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Article 101 TFEU and Market Integration

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ABSTRACT

Market integration is an objective of Article 101 TFEU. As a result, agreements aimed at partitioning national markets are *in principle* restrictive of competition by object. The case law on this point has been consistent since *Consten-Grundig*. Making sense of it, however, remains a challenge. The purpose of this piece is to show, first, how the methodological approach followed by the Court of Justice changes when market integration considerations are at stake. Secondly, it explains why and when restrictions on cross-border trade have been found not to restrict competition by object within the meaning of Article 101(1) TFEU.

An agreement aimed at partitioning national markets is not as such contrary to Article 101(1) TFEU if the analysis of the counterfactual reveals that it does not restrict inter-brand and/or intra-brand competition that would have existed in its absence. It is possible to think of three scenarios in this regard: (i) an agreement may be objectively necessary to achieve the aims sought by the parties; (ii) a clause may be objectively necessary for an agreement and (iii) competition is precluded by the underlying regulatory context (as is the case, in particular, when the exercise of intellectual property rights is at stake).

JEL: K21; L42; L82; L86; O34

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I. INTRODUCTION

EU competition law and the internal market often go hand in hand.[1] The vigorous enforcement of Articles 101 and 102 TFEU contributes to the integration of Member States' economies. Suffice it to think of practices hindering cross-border trade such as market sharing cartels,[2] agreements between domestic firms to prevent entry by foreign rivals,[3] and unilateral practices by incumbents in the network industries.[4] By the same token, removing restrictions to the free movement of goods and services facilitates competition between firms.[5] As Stigler famously observed, '[f]ree trade is a sort of antimonopoly program in itself'.[6]

EU competition law is peculiar in that market integration is an autonomous objective of the discipline.[7] This means that it is protected in a direct way, and not simply as a positive side effect of the protection of the competitive process. Articles 101 and 102 TFEU are interpreted and enforced with the explicit purpose of advancing the integration of Member States' economies. In this sense, EU competition law stands out from other regimes. Conduct that seeks to restrict cross-border trade may be prohibited irrespective of whether it leads to efficiency gains and irrespective of whether it has a negative impact on one or more parameters of competition. Despite explicit invitations to reconsider its case law, the Court of Justice (hereinafter, the 'Court', or the 'ECJ') has consistently signalled its commitment to market integration.

Agreements aimed at restricting trade between Member States are in principle restrictive of competition by object (or 'by their very nature') under Article 101(1) TFEU.[8] The prima facie prohibition applies not only to cartel-like arrangements, which are unlikely to have redeeming virtues and would be prohibited in any competition law system worthy of the name. It also applies to some vertical restraints that can enhance inter-brand competition and benefit consumers in the process.[9] In particular, the Court of Justice (hereinafter, the 'Court', or the 'ECJ') has consistently held since *Consten-Grundig* that agreements that give absolute territorial protection to a distributor[10] and agreements that provide for an export prohibition[11] are in principle restrictive of competition by object.

While it is clear that agreements aimed at partitioning national markets are typically contrary to Article 101(1) TFEU, the boundaries of the rule remain elusive. The difficulty lies in the fact that the prima facie prohibition of these agreements is not an absolute one. It is clear from the case law that, in a given economic and legal context, an agreement aimed at partitioning national markets may be found not to restrict competition, and may sometimes fall outside the scope of Article 101(1) TFEU altogether. In *Coditel II*, the Court held that an exclusive territorial licence granted to a broadcaster was not as such restrictive of competition, even though it gave absolute territorial protection to the licensee.[12] That a licensing agreement of this kind may escape Article 101(1) TFEU was expressly confirmed in

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[1] See in this sense Protocol (No 27) on the internal market and competition, 2008 O.J. (115) 309, pursuant to which 'the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted'.
[2] See for instance Case T-360/09, *E.ON Ruhrgas AG and E.ON AG v Commission*, EU:T:2012:332 and Case T-370/09, *GDF Suez SA v Commission*, EU:T:2012:333.
[3] See for instance Joined Cases 96-102, 104, 105, 108 and 110/82, *NV IAZ International Belgium and others v Commission*, EU:C:1983:310.
[4] See for instance *Deutsche Post AG* — Interception of cross-border mail (Case COMP/C-1/36.915): Commission Decision 2001/892/EC, 2001 O.J. (L 331) 40.
[5] See for instance Case C-221/08, *Commission v Ireland*, EU:C:2010:113 and Case C-333/14, *Scotch Whisky Association and Others v Lord Advocate and Advocate General for Scotland*, EU:C:2015:845.
[6] George J. Stigler, *The Economists and the Problem of Monopoly*, 72 AMERICAN ECONOMIC REVIEW (PAPERS AND PROCEEDINGS), 1 (1982).
[7] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission ('Glaxo Spain')*, EU:C:2009:610, para. 61.
[8] The expressions 'by object' and 'by its [their] very nature' are used interchangeably in the remainder of this article (as the ECJ has done over the years). There is a consistent line of case law on the legal status of parallel trade restrictions, which can be traced back to Joined Cases 56/64 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* ('*Consten-Grundig*'), EU:C:1966:41. See in particular Case 19/77, *Miller International Schallplaten v Commission* [1978], EU:C:1978:19; Joined Cases 100 to 103/80, *SA Musique Diffusion française and others v Commission*, EU:C:1983:158; Joined Cases 25/84 and 26/84, *Ford-Werke AG and Ford of Europe Inc v Commission*, EU:C:1985:340; Case C-277/87, *Sandoz prodotti farmaceutici SpA v Commission*, EU:C:1989:363; Case T-77/92, *Parker Pen Ltd v Commission*, EU:T:1994:85; and Case T-13/03, *Nintendo Co, Ltd and Nintendo of Europe GmbH v Commission ('Nintendo')*, EU:T:2009:131.
[9] See in this sense the Opinion of Advocate General Roemer in Joined Cases 56/64 and 58/64, *Consten-Grundig*, EU:C:1966:19 and Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *Glaxo Spain*, paras. 62-64.
[10] This was the issue at stake in Joined Cases 56/64 and 58/64, *Consten-Grundig*.
[11] See for instance Case 19/77, *Miller International Schallplaten v Commission*.
[12] Case 262/81, *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others ('Coditel II')*, EU:C:1982:334.

Murphy.[13] However, the instances when – and the reasons why – the presumption of unlawfulness is and can be rebutted are not obvious to infer from the case law.

The importance of these questions cannot be overestimated. Market integration has always been a policy priority for the Commission. From the early days, it has devoted a significant fraction of its resources to prevent the creation of barriers to cross-border trade, in particular by means of distribution agreements.[14] More than fifty years after the adoption of Regulation 17, the Commission remains committed to market integration. It has reconsidered its approach to a whole range of practices, but not to agreements aimed at partitioning national markets. These agreements are treated as severely, if not more, as in the past decades.[15] This paper is being prepared at the time of the launch of an ambitious Digital Single Market Strategy (hereinafter, the 'DSMS') that seeks, inter alia, to improve online access to goods and services.[16] In parallel, the Commission has announced the launch of a sector inquiry into e-commerce.[17]

Access to copyright-protected content across borders is one of the priorities of the DSMS. Geo-blocking (that is, the use of technologies to prevent access to online content based on the location of the end-user) is perceived to be a major obstacle in this regard. The removal of 'unjustified geo-blocking' has in fact emerged as one of the most emblematic initiatives of the Commission in this context.[18] The difficulties with access to copyright-protected content online are in part the consequence of the operation of intellectual property regimes, which are national (as opposed to EU-wide) in scope and in part the consequence of exclusive territorial licensing agreements. Right holders – including film studios and sports associations – generally license their content to a different provider in each Member State.

The uncertain boundaries of the prima facie prohibition of agreements aimed at partitioning national markets have become apparent in the context of the DSMS. In July 2015, the Commission announced that it had sent a Statement of Objections to Sky UK, a pay TV operator, and all 'big Six' Hollywood major studios.[19] The Commission has reached the preliminary conclusion that the exclusive territorial licensing agreements between the studios and the content provider are restrictive of competition by object. The case is interesting in that it exposes the tension between *Consten-Grundig* – pursuant to which absolute territorial protection is prima facie prohibited under Article 101(1) TFEU – and *Coditel II*, which suggests that exclusive licensing is not as such restrictive in the context of which the agreements are part.

There have been few scholarly attempts to explore the principles underpinning the mass of case law and administrative practice on agreements aimed at partitioning national markets.[20] Compared with other contentious questions in (EU) competition law, relatively little progress has been made in the understanding of this issue. An overview of the leading texts addressing the subject reveals that the complexities of the case law are acknowledged, but that there is no systematic attempt to explain the

[13] Joined Cases, C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd ('Murphy')*, EU:C:2011:631, para 137.

[14] For a historical perspective of the early days of enforcement and the focus on market integration, see in particular JOANNA GOYDER & ALBERTINA ALBORS-LLORENS, GOYDER'S EU COMPETITION LAW (5th ed. 2009), 52-69.

[15] While the enforcement of Article 101(1) TFEU to vertical restraints has undergone a substantial transformation, the Commission has not changed its views on the treatment of agreements aimed at partitioning national markets. In the current version of the Guidelines on vertical restraints, the Commission is of the view that, '[i]n principle, every distributor must be allowed to use the internet to sell products'. See the Guidelines on vertical restraints, 2010 O.J. (C 130) 1, para 52. As will be explained in greater detail below, the most recent version of the Block Exemption Regulation dealing with technology transfer agreements is relatively stricter in relation to agreements that restrict active and passive selling. See Article 4 of Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, 2014 O.J. (L 93) 17.

[16] COM(2015) 192 final, 'A Digital Single Market Strategy for Europe'.

[17] C(2015) 3026 final, Commission Decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No 1/2003. Commissioner Vestager stated publicly that one of the objectives of the inquiry is to explore the potential contribution of EU competition policy to the objectives of the broader institutional agenda. See 'Competition: Commissioner Vestager announces proposal for e-commerce sector inquiry', IP/15/4701. In March 2016, the Commission published its initial findings. See SWD(2016) 70 final, 'Geo-blocking practices in e-commerce Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition'.

[18] See in this sense COM(2015) 192 final, 'A Digital Single Market Strategy for Europe': 'The Commission will make legislative proposals in the first half of 2016 to end unjustified geo-blocking. Action could include targeted change to the e-Commerce framework 4 and the framework set out by Article 20 of the Services Directive'.

[19] 'Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland', IP/15/5432.

[20] Some of the most important scholarly contributions to the question that explore, at least to some extent, this question, include STEVEN ANDERMAN & HEDVIG SCHMIDT, EU COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS: THE REGULATION OF INNOVATION (2011); DAVID T. KEELING, INTELLECTUAL PROPERTY RIGHTS IN EU LAW – VOLUME I: FREE MOVEMENT AND COMPETITION LAW (2004); CHRISTOPHER STOTHERS, PARALLEL TRADE IN EUROPE: INTELLECTUAL PROPERTY, COMPETITION AND REGULATORY LAW (2007) and (in relation to Article 102 TFEU) VASILIKI BRISIMI, THE INTERFACE BETWEEN COMPETITION AND THE INTERNAL MARKET: MARKET SEPARATION UNDER ARTICLE 102 TFEU (2014).

reasons why restrictions to cross-border trade have sometimes been found to fall outside the scope of Article 101(1) TFEU and have sometimes been deemed (prima facie) prohibited.[21]

Several factors may explain the current state of the literature. First, this is a distinct EU law question, which does not have the global character of most contemporary debates. Secondly, much of the literature has focused, by and large, on criticising of the status quo, which is typically understood to be inadequate and at odds with economic theory.[22] Thirdly, commentators have generally considered the application of Article 101 TFEU in particular sectors. Thus, contributions have focused on parallel trade in the pharmaceutical industry,[23] and, in the aftermath of *Murphy*, on the legal status of exclusive territorial licensing agreements between right holders and content providers.[24]

This article takes a different perspective on the question. It does not seek to challenge the status of market integration as an autonomous objective of EU competition law. Instead, it intends to explain what is peculiar about it. First of all, it shows that, when market integration considerations are at stake, the Court tends to follow a sui generis approach to the analysis of restraints. The criteria that the Court typically applies to establish whether an agreement is restrictive by object are not always followed when it considers agreements aimed at partitioning national markets. In particular, the sui generis approach fails to consider the economic and legal context of which the agreement is part. This peculiarity explains the outcome of *Consten-Grundig* and subsequent cases.

Secondly, the paper offers an explanation of the logic underlying the case law. An analysis of the case law suggests that an agreement aimed at partitioning national markets is acceptable where the analysis of the counterfactual reveals that it does not restrict inter-brand and/or intra-brand competition that would have existed in its absence. It has long been clear that restraints that are objectively necessary to attain a legitimate aim fall outside the scope of Article 101(1) TFEU.[25] Rulings like *Coditel II* and *Erauw-Jacquery*[26] show, in addition, that restraints on cross-border trade are sometimes acceptable where they relate to the exercise of an intellectual property right. What is less apparent from the case law is that the analysis of the counterfactual is also useful to identify the instances in which such restraints are compatible with Article 101(1) TFEU.

II. THE CRITERIA TO ESTABLISH A RESTRICTION BY OBJECT

The case law on agreements aimed at partitioning national markets departs from the default approach that the Court follows when it considers whether an agreement is restrictive by object. Typically, this question revolves around whether the agreement under consideration is a plausible means to achieve a

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[21] Suffice it to mention the following examples to show that there has been no systematic attempt to make sense of the case law. To begin with, RICHARD WHISH & DAVID BAILEY, COMPETITION LAW (8th ed. 2015) discuss the relevant rulings in 119-133 and 816-822 (in relation specifically to intellectual property). However, they do not attempt to identify the rationale behind the case law. The same can be said of ALISON JONES & BRENDA SUFRIN, EU COMPETITION LAW (5th ed. 2014), who discuss at length the case law, in particular in 858-865 (intellectual property). Some of the leading treatises explain at length that the prohibition 'by object' of agreements aimed at partitioning national markets is not an absolute one, but fail to provide the underlying rationale. For a particularly extensive treatment of the question, see BELLAMY AND CHILD: EUROPEAN UNION LAW OF COMPETITION (Vivien Rose & David Bailey eds., 7th ed. 2013) – 2.085-2.123 for a general discussion and 9.093-9.915 for an analysis of cases relating to the exploitation of intellectual property rights and Faull & Nikpay: The EU Law of Competition (Jonathan Faull, Ali Nikpay & Deirdre Taylor eds., 3rd ed. 2014) – 3.187-3.200 for a general discussion and Chapter 10 for an analysis of the issues relating specifically for intellectual property. Among monographs, see in particular KEVIN COATES, COMPETITION LAW AND REGULATION OF TECHNOLOGY MARKETS (2011), who notes –5.322-5.329 – that the prima facie prohibition of agreements restricting parallel trade does not apply to instances in which intellectual property rights are exploited in an intangible form. The same observations extend to works addressing the question from an intellectual property perspective, see in particular LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW (4th ed. 2014), 326-27.
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[22] There is certainly no shortage of articles criticising the case law and administrative practice. Just to mention some examples, see Nicolas Petit, *Parallel trade: econo-clast thoughts on a dogma of EU competition law*, in TRADE AND COMPETITION LAW IN THE EU AND BEYOND (Inge Govaere et al. eds., 2011); Andrea Coscelli, Geoff Edwards & Alan Overd, *Parallel trade in pharmaceuticals: more harm than good?*, 29 EUROPEAN COMPETITION LAW REVIEW, 490-492 (2008); and Patrick Rey & James S. Venit, *Parallel trade and pharmaceuticals: a policy in search of itself*, 29 EUROPEAN LAW REVIEW, 153-177 (2004).

[23] The abundant literature on the topic includes Christopher Stothers, *Who needs intellectual property?: Competition law and restrictions on parallel trade within the European Economic Area*, 27 EUROPEAN INTELLECTUAL PROPERTY REVIEW, 458-466 (2005); Georgios Tsouloufas, *Limiting pharmaceutical parallel trade in the European Union: regulatory and economic justifications*, 25 EUROPEAN LAW REVIEW, 385-404 (2011); Lazaros G. Grigoriadis, The application of EU competition law in the pharmaceutical sector the case of parallel trade, 25 EUROPEAN BUSINESS LAW REVIEW 141-201 (2014).

[24] See in particular Peter Alexiadis and David Wood. 2012, *Free Market 1: Copyright 0 - UK Premier League Loses Away from Home*, 18 UTILITIES LAW REVIEW 243-9 (2012); Bill Batchelor and Luca Montani, *Exhaustion, essential subject matter and other CJEU judicial tools to update copyright for an online economy*, 10 JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE, 591-600 (2015); Bill Batchelor and Tom Jenkins, *FA Premier League: the broader implications for copyright licensing*, 33 EUROPEAN COMPETITION LAW REVIEW, 157-64 (2012).

[25] See in this sense Case 56/65, *Société Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38 and Guidelines on vertical restraints, paras. 60-64.

[26] Case 27/87, *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, EU:C:1988:183.

pro-competitive aim. As a rule, an agreement that can be plausibly explained on efficiency grounds is not deemed to restrict competition by object. For instance, vertical restraints are known to be a source of efficiency gains. Thus, the majority of distribution agreements are not considered to be contrary to Article 101(1) TFEU by their very nature, and some fall outside the scope of the provision altogether in certain instances.

If this default approach applied to agreements aimed at partitioning national markets, many of them would not be considered to be restrictive by object. For instance, absolute territorial protection is plausibly pro-competitive, in the sense that it can lead to increased inter-brand competition and can effectively address free-riding concerns. In spite of this fact, agreements providing for absolute territorial protection are prima facie prohibited under Article 101(1) TFEU. This divergence in outcome is the consequence of the application of a different set of criteria – a sui generis approach – to establish whether they are restrictive by object. The purpose of this section is to uncover the methodological shift in the case law of the Court.

A. Restrictions by object under the default approach

1. *Making sense of the rationale behind the agreement*

The criteria that the Court follows when it examines whether an agreement is restrictive by object are easily inferred from the case law. Typically, this question is established by reference to the underlying rationale of the agreement, which is determined in light of objective factors. These factors include the content of the agreement and the economic and legal context of which it is part.[27] The starting point under the default approach is the analysis of the objective purpose behind the contentious restraints. Where the Court finds, in light of the relevant economic and legal context, that a given restraint is a plausible means to attain a pro-competitive objective, it concludes that it is not restrictive of competition by object.

This default approach has been followed in numerous cases. These include landmark rulings on vertical restraints such as *Societe Technique Miniere*, *Metro I*,[28] *Delimitis*[29] and *Pronuptia*.[30] In all of these cases, the Court started its analysis by identifying the pro-competitive reasons why two parties may provide for the restraints under consideration. The fact that there is a plausible efficiency-enhancing explanation for them led the Court to conclude that the agreement did not restrict competition by object. If anything, the default approach has become more explicit in relatively recent rulings, namely *Pierre Fabre*[31] and *Cartes Bancaires*.[32] The two judgments expressly revolved around whether the contentious restraints related to a 'legitimate objective'.

In *Pierre Fabre*, the Court concluded that an obligation imposed on distributors to sell from a physical space and in presence of a pharmacist was not objectively justified, in the sense that it did not relate to a legitimate aim.[33] As a result, the restraint was found to be restrictive by object. In *Cartes Bancaires*, the Court held that a set of restraints aimed at combatting free-riding related to a 'legitimate objective' and could not be considered to be contrary to Article 101(1) TFEU by its very nature.[34] As a co-operative venture that is likely to lead to efficiency gains, these restraints would only be prohibited where they are shown to have restrictive effects on competition.

2. *The relevance of effects*

Where an agreement is found to restrict competition by object, it is not possible for the parties to escape the prima facie prohibition by showing that it did not have (or is unlikely to have) an impact on prices or other parameters.[35] Once an agreement is found to restrict competition by object within the meaning of Article 101(1) TFEU, it is not necessary for the authority or the claimant to establish its effects. The Court held in *Consten-Grundig* and *Societe Technique Miniere* that object and effect are alternative, as opposed to cumulative, conditions.[36]

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[27] For recent examples outside the judgments discussed at length in the piece, see for instance Case C-32/11, *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal*, EU:C:2013:160, para. 36; Case T-370/09, *GDF Suez SA v Commission*, EU:T:2012:333, para. 64.

[28] Case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v Commission ('Metro I')*, EU:C:1977:167, paras. 20-22.

[29] Case C-234/89, *Stergios Delimitis v Henninger Bräu AG*, EU:C:1991:91, paras. 11-12.

[30] Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41, paras. 15-18.

[31] Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* EU:C:2011:649.

[32] Case C-67/13 P, *Groupement des cartes bancaires (CB) v Commission*, EU:C:2014:2204.

[33] Case C-439/09, *Pierre Fabre*, paras. 40-46.

[34] Case C-67/13 P, *Groupement des cartes bancaires*, paras. 74-75.

[35] Case C-286/13 P, *Dole Food Company Inc. and Dole Fresh Fruit Europe v Commission ('Bananas')*, EU:C:2015:184, paras. 111-135.

[36] Case 56/65, *Société Technique Minière*, 249.

Conversely, the mere fact that an agreement is 'capable' of having, or 'likely' to have, anticompetitive effects is insufficient to establish a restriction by object. For instance, the Court has consistently held that selective distribution agreements based on purely qualitative criteria generally fall outside the scope of Article 101(1) TFEU. This is so in spite of the fact that such systems have a significant impact on the ability and incentive of its members to compete on price. The ECJ has acknowledged since *Metro I* that selective distribution softens price competition.[37] Because this effect on price can be safely presumed to be outweighed by other pro-competitive benefits, it is not deemed restrictive by object.[38]

The same can be said of exclusive dealing obligations. This vertical restraint significantly constrains the freedom of action of the distributor. It is also 'capable' of having a restrictive impact on competition in the sense that it limits rivals' access to outlets. In spite of these effects, the Court ruled in *Delimitis* that exclusive dealing is not restrictive by object. As a result, a careful analysis of its actual or likely negative effects on competition is necessary.[39] The same can be said of comparable restraints. In *Maxima Latvija*, the Court acknowledged that an agreement between an 'anchor tenant' and the owner of a shopping mall can have anticompetitive effects if the former is given the right to approve the letting of premises to (competing) third parties. However, this fact alone was deemed insufficient to establish a restriction by object.[40]

If an agreement lacks a plausible pro-competitive rationale, it can only be expected to have, if at all, anticompetitive effects. There is no certainty that a price-fixing cartel will actually lead to allocative inefficiency. It is well-known that even a sophisticated cartel arrangement can fail. It is clear, on the other hand, that if a price-fixing cartel is implemented, it will, in all likelihood, have a *net* negative impact on competition.[41] Thus, if an agreement is restrictive of competition by object, it is safe to presume that it is at least 'capable' of having anticompetitive effects.[42]

An agreement is not 'capable' of having anticompetitive effects if an analysis of the counterfactual reveals that it does not restrict (actual or potential) competition that would have existed in its absence. The fact that an agreement is not 'capable' of having restrictive effects also means, by the same token, that it does not have an anticompetitive object. An agreement that does not restrict (inter-brand or intra-brand) competition that would otherwise have existed cannot plausibly serve an anticompetitive purpose. If it is not 'capable' of having restrictive effects, the rationale for the agreement is, in all likelihood, a pro-competitive one.

Take the example of a research and development agreement between two firms that bring together their complementary technologies and know-how. Such an agreement is not 'capable' of having restrictive effects in the sense that the firms, alone, would not have been able to engage in the project. Co-operation between the parties, in other words, does not restrict competition that would have existed in its absence. In such circumstances, it seems difficult to argue that the objective purpose of the agreement is anticompetitive. This is the position taken by the Commission in the Guidelines on horizontal co-operation agreements.[43] As the Guidelines suggest, it is safe to presume that, in such circumstances, the agreement pursues a pro-competitive aim.[44]

3. *Subjective considerations*

The subjective intent of the parties is not a necessary or sufficient condition to establish a restriction by object. Similarly, once it is established that an agreement pursues an anticompetitive object, it is irrelevant that it also pursues other aims.[45] However, subjective considerations may assist an authority

[37] Case 26/76, *Metro I*, para 21; Case 75/84, *Metro SB-Großmärkte GmbH & Co. KG v Commission ('Metro II')*, EU:C:1986:399, para. 45; and Case C-439/09, *Pierre Fabre*, para. 40.

[38] In para. 45 of *Metro II*, the Court interpreted its own ruling in *Metro I* as holding that the limitation of price competition entailed by the selective distribution system in the case 'was counterbalanced by competition as regards the quality of the services supplied to customers, which was not normally possible in the absence of an adequate profit margin covering the higher costs entailed by such services'.

[39] See in this sense Alexander Italianer, Director-General of DG Competition, Speech at the CRA Annual Brussels Conference – Economic Developments in Competition Policy: The Object of Effects (Dec. 10, 2014). The Director General General for Competition noted in his speech that *Delimitis* had a major impact on the competition law community due to the fact that '[a] seemingly serious restriction of competition like the obligation not to buy from Henninger's [the supplier in the case] competitors, required the consideration of effects'.

[40] Case C-345/14, *SIA 'Maxima Latvija' v Konkurences padome*, EU:C:2015:784, para 22.

[41] See in this sense Luc Peeperkorn, *Defining 'by object' restrictions*, CONCURRENCES, 40-50 (2015).

[42] Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343, para. 31

[43] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011 O.J. (C 11) 1, para 130.

[44] Ibid., para 141.

[45] Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd ('BIDS')*, EU:C:2008:643, para. 21.

or a court when determining whether an agreement is restrictive by object.[46] Such considerations may be taken into account in the analysis. In particular, evidence of the intent of the parties to an agreement may be an indicator of the (pro- or anticompetitive) rationale behind the practice.

B. MARKET INTEGRATION AND RESTRICTIONS BY OBJECT

1. *The prima facie prohibition of agreements aimed at partitioning national markets*

When market integration considerations are relevant for the outcome of a case, the Court departs from the default approach. The tension between the default and the sui generis approaches is apparent in *Consten-Grundig*, which was delivered only a few months after *Societe Technique Miniere*. In the latter, the Court held that an agreement that is objectively necessary for a manufacturer to enter a new market does not restrict competition, whether by object or effect.[47] *Societe Technique Miniere* captured the essence of the free-rider problem, which explains why a distributor may require territorial exclusivity from a supplier.[48] Moreover, the Court made it clear that, where an agreement does not restrict competition that would otherwise have existed, it is not contrary to Article 101(1) TFEU. In *Consten-Grundig*, on the other hand, the Court held, without qualifying its position, that an agreement that gives absolute territorial protection to a distributor is restrictive of competition by object.

The statement found in *Societe Technique Miniere* suggests that exclusive distribution agreements pursue a legitimate aim and are not as such contrary to Article 101(1) TFEU. It would follow from this conclusion that an agreement that gives absolute territorial protection to a distributor is not restrictive by object. This is at least what the approach sketched by the Court in *Metro I* or *Cartes Bancaires* would imply. It is true that absolute territorial protection eliminates intra-brand competition. At the same time, it is an effective means to address free-rider issues and as such can lead to efficiency gains.

In his opinion in *Consten-Grundig*,[49] Advocate General Roemer favoured the default approach. In particular, he questioned whether it was possible to conclude that an agreement providing for absolute territorial protection restricts competition by object without considering the economic and legal context of which it is part. By reference to *Societe Technique Miniere*, he noted that, in some cases, eliminating intra-brand competition could be objectively necessary to enter a new market. If the counterfactual analysis indeed reveals that this is the case, the restraint would promote (inter-brand) competition in the area concerned by the agreement, not the opposite. At the very least, the question would require an analysis of the conditions of competition in the relevant market and of the position of the parties therein.

The judgment in *Consten-Grundig* departed from the default approach in several important respects. First, the Court did not ascertain the nature of the agreement and whether the contentious restraints could serve a pro-competitive rationale. Instead, it made the analysis revolve around the *means* through which the parties sought to achieve their objectives. Thus, instead of examining the objective purpose of exclusive distribution, as it did in *Societe Technique Miniere* and myriad subsequent cases, it focused on the fact that the parties had insulated the distributor from all cross-border trade. Secondly, the Court only took into consideration the ostensible impact of absolute territorial protection on intra-brand competition. It did not give any weight to the fact that the contested restraint could serve a legitimate aim leading to pro-competitive benefits. The key factor underlying the default approach was therefore absent from the analysis.

The rule in *Consten-Grundig* has been confirmed over the years. It has applied to a broad range of measures that were understood to limit or discourage parallel trade.[50] A notable feature of subsequent case law is the prominence given to intent considerations in the analysis. In *Miller International*, concerning an express export prohibition, the Court took the view that the 'agreed purpose' of the restraint was to 'isolate a part of the market'.[51] More generally, the Court has consistently referred to

[46] Case C-209/07, *BIDS*, ibid. and Case C-551/03 P, *General Motors BV v Commission*, EU:C:2006:229, paras. 77-78.
[47] Case 56/65, *Société Technique Minière*, 250.
[48] ANNE-LISE SIBONY, LE JUGE ET LE RAISONNEMENT ÉCONOMIQUE EN DROIT DE LA CONCURRENCE (2008), 248.
[49] Joined Cases 56/64 and 58/64, *Consten-Grundig*, Opinion of AG Roemer. For a discussion of the main points raised in the opinion, see VALENTINE KORAH & DENIS O'SULLIVAN, DISTRIBUTION AGREEMENTS UNDER THE EC COMPETITION RULES (2002), 59-62 and ALISON JONES & SUFRIN, EU COMPETITION LAW – TEXT, CASES AND MATERIALS (2014), 206-210.
[50] Measures that have been deemed functionally equivalent to those at stake in *Consten-Grundig* include the following: the use of a dual pricing mechanism, which may be implemented either by charging higher prices for goods intended for export (at stake in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *Glaxo Spain*) or by charging lower prices for goods facing parallel imports; the outright refusal to deliver goods intended for export (at stake in Joined Cases 25/84 and 26/84, *Ford*); the refusal to provide guarantees or other after-sales services for goods acquired via parallel imports; an online sales ban (at stake in Case C-439/09, *Pierre Fabre*) or a limitation on online sales.
[51] Case 19/77, *Miller International Schallplatten GmbH v Commission*, para. 7. See also Joined Cases 32/78, 36/78 to 82/78, *BMW Belgium SA and others v Commission*, EU:C:1979:191, para. 28.

agreements 'aimed' at preventing or restricting parallel trade between Member States.[52] However, the subjective intent of the parties is not established in light of objective factors. In particular, the economic and legal context of the agreement is not considered in this line of case law.

2. *Parallel trade and the exploitation of intellectual property rights*

Agreements aimed at partitioning national markets are prima facie prohibited even when the contractual goods incorporate an intellectual property right. In principle, the fact that the agreement relates to the distribution of, inter alia, patented drugs or recordings of copyright-protected music does not influence the legal qualification under Article 101(1) TFEU. This is clear since *Consten-Grundig*. The assignment of a trade mark was in fact the device used by Grundig to confer absolute territorial protection on the French distributor. The Court held that the application of EU law does not question the existence of intellectual property rights, but may challenge the way in which they are exercised.[53]

Nungesser, concerning a licensing agreement for the production and distribution of plant varieties, confirmed the strict stance vis-à-vis agreements aimed at partitioning national markets. The Court distinguished in the case between 'open' and 'closed' territorial licences.[54] Pursuant to the ruling, the holder of an intellectual property right is entitled to give an exclusive territorial licence to produce and distribute plant varieties. However, if the terms of the licence affect the ability of third parties to engage in parallel trade, the agreement would be restrictive by object. As in *Consten-Grundig*, the licensor had assigned the intellectual property right to the German distributor.

It is clear, on the other hand, that the prohibition of agreements aimed at partitioning national markets is not an absolute one. In a given economic and legal context, a licensing agreement providing for territorial exclusivity – even for absolute territorial protection or an export prohibition – may fall outside the scope of Article 101(1) TFEU. *Coditel II* and *Erauw-Jacquery* are two clear examples in this regard. In the first, a producer gave absolute territorial protection to a film distributor. By virtue of the agreement, the film distributor was entitled to prevent licensees based in other Member States from broadcasting the work covered by the agreement in its exclusive territory.[55] *Erauw-Jacquery*, in turn, concerned the licensing of plant varieties. As part of the agreement, the licensee was prohibited from exporting basic seed.[56]

If the ECJ had examined these two agreements in light of the criteria set out in *Consten-Grundig*, it would have concluded that they were contrary, by their very nature, to Article 101(1) TFEU. The ostensible purpose of the exclusive licence in *Coditel II* was to eliminate all forms of intra-brand competition. In fact, the dispute in the case arose when a Belgian cable operator distributed a German channel offering the film covered by the licence and the licensee invoked its exclusive rights over the work in question. *Erauw-Jacquery* looks like an equally straightforward case if one takes as a starting point the categorical statement about export prohibitions found in *Miller International*.

In the two cases, the Court considered the nature of the agreement, as well as the context of which it was part, to establish whether the contentious restraints served a legitimate purpose. In doing so, it resorted to the default approach sketched in *Societe Technique Miniere*. The analysis revealed that the said restraintsrelated to the very essence of the relevant intellectual property right. The essential function of the right of communication to the public, at stake in *Coditel II*, is to allow its owner to 'require fees for *any* showing of [a] film' (emphasis added).[57] This right, in other words, does not merely cover the first showing of a film, whether on television or in a cinema theatre. The authorisation of the copyright owner is required every single time the work is communicated to the public. The Court found, against this background, that an agreement that gives the licensee the exclusive right to offer the film in Belgium for a given period (and thus to prohibit others from doing so) is not contrary, in and of

[52] See for instance Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *Glaxo Spain*, para. 59 and Joined Cases C-403/08 and C-429/08, *Murphy*, para. 247.

[53] It is in this ruling that the Court introduced the distinction between the existence of an intellectual property right, which is not as such questioned under EU law, and its exercise which may come under scrutiny if it violates, inter alia, Articles 101 and 102 TFEU. The Court held that '[t]he injunction […] to refrain from using rights under national trade-mark law in order to set an obstacle in the way of parallel imports does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Article [101(1) TFEU]'. See also Case 78/70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, EU:C:1971:59, para 11.

[54] Case 258/78, *LC Nungesser KG and Kurt Eisele v Commission*, EU:C:1982:211, paras. 53-58.

[55] By virtue of the agreement, the Belgian licensee enjoyed the exclusive right to communicate the film to the public in the form of cinema performances and broadcasts for a period of seven years.

[56] In *Erauw-Jacquery*, the licensee undertook, inter alia, to propagate basic seed in the territory covered by the agreement and committed to refrain from exporting such basic seed.

[57] Case 262/81, *Coditel II*, para. 12.

itself, to Article 101(1) TFEU. Such an agreement merely allows the right of communication to the public to perform its essential function. *Coditel II* was expressly confirmed by the ECJ in *Murphy*.[58]

The Court followed a similar line of reasoning, and reached the same conclusion, in *Erauw-Jacquery*. The case concerned the exploitation of plant breeders' rights. The value of these rights, and thus the ability of the breeder to reap the fruit of its efforts, is contingent on plant varieties remaining distinct, uniform and stable.[59] The Court considered that the export restrictions at stake in the case were necessary to protect the investments made by the licensor in the development of new varieties.[60] Advocate General Mischo was more eloquent in his opinion. He argued that, absent the clauses relating to the propagation of basic seed (which is distinct, uniform and stable), the intellectual property rights would be de facto lost.[61] In the same vein, he compared basic seed to a process protected by a patent.[62]

3. *Market integration and objective necessity*

According to *Societe Technique Miniere*, it is necessary to consider the relevant economic and legal context when examining whether an agreement is restrictive by object. As already explained, if the analysis of the counterfactual reveals that a restraint does not restrict competition that would otherwise have existed, it does not have an anticompetitive object. *Consten-Grundig*, on the other hand, laid down an unqualified prohibition of agreements aimed at partitioning national markets. Under the latter, the economic and legal context of the agreement would not be of relevance. Moreover, *Consten-Grundig* ruled out, absent exceptional circumstances, the availability of Article 101(3) TFEU. The Court sided in this sense with the Commission, which concluded that absolute territorial protection goes beyond what would be necessary to achieve the efficiency gains claimed by the parties.[63]

In spite of the seeming contradiction between the two rulings, it is clear from subsequent case law that it is open to the parties to show that an agreement is objectively necessary and thus that it falls outside the scope of Article 101(1) TFEU. In *Murphy*, the Court held that the 'economic and legal context' of which an agreement is part may lead to the conclusion that it is 'not liable to impair competition'.[64] While the competition authority or the claimant bear the burden of proving that the agreement is restrictive of competition within the meaning of Article 101(1) TFEU,[65] it is possible for the parties to provide evidence relating to the relevant economic and legal context.[66]

The Guidelines on vertical restraints shed light on how the objective necessity test might operate in practice. In line with the relevant case law and administrative practice, agreements providing for absolute territorial protection fall outside the scope of Regulation 330/2010. Moreover, they are deemed unlikely to fulfil the conditions set out in Article 101(3) TFEU.[67] On the other hand, the Commission accepts that the launch of a new product in a new territory may require substantial investments. As a result, the distributor may not be willing to enter the agreement unless it is protected from intra-brand competition. In such circumstances, the Commission considers that protection against active and passive sales from other distributors may be acceptable during an initial launch period of two years, during which the agreement under consideration would not be caught by Article 101(1) TFEU.[68]

III. MARKET INTEGRATION AND THE ANALYSIS OF THE COUNTERFACTUAL

An analysis of the case law shows that the Court departs from the default approach only where it concludes that an agreement aimed at partitioning national markets is restrictive by object. Whenever the Court finds that the agreement is not as such contrary to Article 101(1) TFEU, it resorts to the default approach. This is apparent from *Coditel II* and *Erauw-Jacquery*. The agreements examined in the two cases were ostensibly aimed at partitioning national markets, but the Court considered the economic and legal context and the pro-competitive purpose they served. Against this background, it

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[58] Joined Cases C-403/08 and C-429/08, *Murphy*, para. 137: '[a]s regards licence agreements in respect of intellectual property rights, it is apparent from the Court's case-law that the mere fact that the right holder has granted to a sole licensee the exclusive right to broadcast protected subject-matter from a Member State, and consequently to prohibit its transmission by others, during a specified period is not sufficient to justify the finding that such an agreement has an anti-competitive object […]'.

[59] See in this sense Articles 5 to 9 of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991.

[60] Case 27/87, *Erauw-Jacquery*, para. 10.

[61] Case 27/87, *Erauw-Jacquery*, Opinion of AG Mischo, para. 11.

[62] Ibid.

[63] See in this sense *Grundig-Consten* (Case IV-A/00004-03344) Commission Decision 64/566/CEE, 1964 O.J. (161) 2545.

[64] Joined Cases C-403/08 and C-429/08, *Murphy*, para. 140.

[65] See Article 2 of 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, 2003 O.J. (L 1) 1.

[66] Ibid., para. 143.

[67] Guidelines on vertical restraints, paras. 50-54.

[68] Ibid., para. 61.

looks like the sui generis approach sketched in *Consten-Grundig* is little more than an analytical shortcut intended to signal the strict stance of the Court towards agreements aimed at partitioning national markets.

The fundamental question raised by the case law is why agreements aimed at partitioning national markets are not always deemed to restrict competition by object. The challenge, in other words, is to understand why the Court concluded in *Nungesser* that an agreement giving absolute territorial protection to a distributor is restrictive of competition by object and, four months later, in *Coditel II*, it ruled that a licence having the same effect is not as such contrary to Article 101(1) TFEU. Only in one of the two cases were the factors pertaining to the economic and legal context of the agreement deemed sufficient to justify absolute territorial protection.

The question of whether parallel trade restraints are a by object violation of Article 101(1) TFEU depends on an analysis of the counterfactual. Where an agreement is objectively necessary to enter a new market, it does not restrict competition that would have existed in its absence. As a result, it is not contrary, in and of itself, to Article 101(1) TFEU. Rulings like *Coditel II* and *Erauw-Jacquery* can also be explained in light of the counterfactual. Where the absence of cross-border competition is not the consequence of the practice, but of the operation of the intellectual property regime, the agreement is not deemed restrictive by object.

A. THE ANALYSIS OF THE COUNTERFACTUAL: THREE SCENARIOS

It is possible to distinguish three broad scenarios in which the analysis of the counterfactual is relevant in the context of Article 101(1) TFEU. In some cases, inter-firm co-operation is objectively necessary to achieve the aims sought by the parties.[69] Several examples of this first scenario have been discussed above. Co-operation between pharmaceutical companies may be objectively necessary to develop a new drug.[70] Similarly, a network sharing agreement may be objectively necessary for two mobile phone operators to provide their services in a particular country.[71] Whether or not an agreement is indispensable to achieve the objectives sought by the parties has to be established on a case-by-case basis. Depending on the context of the case, the agreement may fall outside or within the scope of Article 101(1) TFEU.

Secondly, the analysis of the counterfactual may reveal that a restraint in an agreement is ancillary to the main transaction.[72] A restraint is said to be objectively necessary where the agreement would not have been concluded in its absence. The case law on vertical restraints provides several examples of this second scenario. For instance, the Court held in *Pronuptia* that restraints relating to the protection of the know-how of a franchisor and to the preservation of the uniformity of the franchise are not caught by Article 101(1) TFEU.[73] The idea underlying the ruling is that a firm would not resort to franchising if it were not able to protect its know-how and reputation. The same can be said of some restraints found in selective distribution systems, such as an obligation not to sell to non-members of the network.[74]

The third scenario is one in which competition is precluded by the underlying regulatory framework. In other words, what prevents – inter-brand or intra-brand – rivalry is the legal regime to which the parties to the agreement are subject. In such circumstances, the agreement cannot restrict competition that would have existed in its absence. Competition may be impossible where the government awards exclusive rights to a firm. As a result, a market sharing agreement concluded between two parties protected by exclusive rights in their respective territories cannot restrict competition that would have existed in its absence. In such circumstances, competition between the parties is precluded by the regulatory framework, not by the agreement. The General Court examined a similar scenario in *E.On Ruhrgas v Commission* and *Gaz de France v Commission*. It concluded that the Commission had not established an infringement to the requisite legal standard insofar as there were no

[69] Guidelines on the application of Article 81(3) of the Treaty, 2004 O.J. (2004) (C 101) 97 (hereinafter, the 'Guidelines on Article 101(3) TFEU'), para 17: 'if due to the financial risks involved and the technical capabilities of the parties it is unlikely on the basis of objective factors that each party would be able to carry out on its own the activities covered by the agreement the parties are deemed to be non-competitors in respect of that activity. It is for the parties to bring forward evidence to that effect'.
[70] Guidelines on horizontal co-operation agreements, para 130.
[71] Case T-328/03, *O2 (Germany) GmbH & Co. OHG v Commission*, EU:T:2006:116.
[72] Guidelines on Article 101(3) TFEU, para 17: 'certain restraints may in certain cases not be caught by Article [101(1) TFEU] when the restraint is objectively necessary for the existence of an agreement of that type or that nature. Such exclusion of the application of Article [101(1) TFEU] can only be made on the basis of objective factors external to the parties themselves and not the subjective views and characteristics of the parties'.
[73] Case 161/84, *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, paras 15-17.
[74] Case 26/76, *Metro I*, para 27.

'real, concrete possibilities' for the parties to the market-sharing agreement to compete with one another.[75]

The first and the third scenarios are useful to make sense of the case law on agreements aimed at partitioning national markets. The sort of case-by-case analysis that the first scenario demands does not make it easy to provide ex ante guidance about the instances in which an agreement is objectively necessary. It is indeed difficult to define proxies for the novelty of the product, or for the sort of investments that might require absolute territorial protection. The outcome of each case will thus be determined by the features that are peculiar to it. It is not surprising that there are no clear indications in the case law of how the counterfactual analysis may be conducted in this context.

The regulatory framework in which firms compete, on the other hand, can be readily identified in advance. By the same token, the consequences of the framework for firms' ability and incentive to compete can also be anticipated. It is therefore possible to lay down a legal test defining the instances in which an agreement does not restrict competition that would have existed in its absence. The outcome of *Coditel II* and *Erauw-Jacquery* was not determined by the facts that were peculiar to the cases, but by the nature and operation of the intellectual property system. As a result, it is possible to tell how future cases raising the same issues are likely to be decided, and to explain why other cases – like *Nungesser* or *Glaxo Spain* – were decided differently.

B. A LEGAL TEST BASED ON THE COUNTERFACTUAL

1. *The scope of intellectual property rights*

Intellectual property regimes define the range of acts that the right holder is entitled to authorise or prohibit. It is useful to think of the scope of the right granted by the intellectual property regime as having a substantive and a geographic dimension. As far as the substantive dimension is concerned, there is a difference between rights that are subject to exhaustion and those that are not. When a good is incorporated in a tangible good,[76] such as a DVD, the right holder is in a position to authorise or prohibit the (i) (re)production of the item and (ii) its first sale. The exhaustion doctrine would apply to any subsequent sales, which would fall outside the substantive scope of the intellectual property right. In the realm of copyright, the so-called InfoSoc Directive,[77] provides for a right of distribution,[78] which is deemed exhausted with the first sale or other transfer of ownership made by the right holder or with its consent.[79] The substantive scope of the right of distribution is depicted in Figure 1.

[INSERT FIGURE 1]

Intellectual property rights are attached to a particular territory. The right to reproduce an item and to put it on the market exists by virtue of the legislation of the country (or region[80]) that recognises it. The practical consequence is that the exhaustion of the right of distribution in one territory does not necessarily entail its exhaustion in other territories. The question depends on the geographic scope[81] of the exhaustion doctrine, that is, on the country in which the marketing of the first sale of the product must take place for the doctrine to apply. In some countries, the geographic scope of the right is strictly

[75] Case T-360/09, *E.ON Ruhrgas AG and E.ON AG v Commission*, para 104 and Case T-370/09, *GDF Suez SA v Commission*, para 97/

[76] Reference is made to tangible goods to streamline the argument and to focus on instances in which the exhaustion principle clearly applies. It should be noted, however, that it cannot be completely excluded that the doctrine also applies when distribution takes place in an intangible form. See in this sense, in relation to software, Case C-128/11, *UsedSoft GmbH v Oracle International Corp*, EU:C:2012:407. The exhaustion of rights subject to the InfoSoc Directive has been addressed by the Court in Case C-419/13, *Art & Allposters International BV v Stichting Pictoright*, EU:C:2015:27, which can be (and has been) interpreted as suggesting that the exhaustion doctrine only applies to tangible objects. For a discussion, see Eleonora Rosati, *Online copyright exhaustion in a post-Allposters world*, 10 JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE, 673-681 (2015).

[77] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167) 10 (hereinafter, the 'InfoSoc Directive').

[78] Article 4(1) provides for a right to 'authorise or prohibit any form of distribution to the public by sale or otherwise'.

[79] Pursuant to Article 4(2) of the Directive, '[t]he distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent'.

[80] Some intellectual property titles have an EU-wide scope. See in particular Council Regulation (EC) No 6/2002 of 12 December 2001, as amended by Council Regulation No 1891/2006 of 18 December 2006, on Community designs, 2002 O.J. (L 3) 1; Council Regulation (EC) No 207/2009 of 26 February 2009, as amended by Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015, on the Community trade mark, 2009 O.J. (L 78) 1; and Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, 2012 O.J. (L 361) 1.

[81] For a similar approach, see JANE C. GINSBURG AND EDOUARD TREPPOZ, INTERNATIONAL COPYRIGHT LAW – U.S. AND E.U. PERSPECTIVES (2015), 402-416, who refer to the 'territorial scope' of exhaustion.

national, in the sense that the right of distribution is only deemed exhausted where the product is put on the market in the country that provides for intellectual property protection.

It has long been established that the exhaustion doctrine applies at the EU (or EEA) level.[82] From a geographic standpoint, the doctrine is thus regional, as opposed to national, in scope. Once an item is put on the market by the right holder or with its consent in the EU (or EEA), it can circulate freely within the region.[83] There is no international exhaustion as a matter of EU law.[84] The right holder is thus entitled to authorise or prohibit the sale of items that have been put on the market by itself or with its consent outside the EU (and EEA). Controlling for the import of products intended for sale elsewhere in the world is part of the range of acts that the right holder is entitled to authorise or prohibit. For instance, Article 4(2) of the InfoSoc Directive limits the territorial scope of the exhaustion doctrine to the first sale of the goods within the Union. The geographic scope of the right of distribution in the EU is depicted in Figure 2.

[INSERT FIGURE 2]

Other rights are not subject to exhaustion. This is the case, in particular, of the right of communication to the public. The right holder is entitled to authorise or prohibit *any* communication to the public of the work protected by copyright. Thus, even if a film is broadcast with its consent, the author would still have the right to authorise or prohibit every subsequent broadcast of the same film. A fundamental implication of the absence of exhaustion is that the right holder is entitled to control the cross-border provision of services within the EU. A firm that has received a license to communicate a work to the public in one Member State is not entitled to broadcast the same work in other Member States that are not covered by the licence. The Court clarified in *Coditel I* that the exercise of the right of communication to the public in such a context is not contrary to Article 56 TFEU, even though it prevents the cross-border provision of services.[85] This principle is also expressly enshrined in secondary legislation, including Article 3(3) of the InfoSoc Directive.[86]

The logic behind the application of the exhaustion doctrine in some cases but not in others is straightforward. When an intellectual property right is incorporated in tangible property, the right holder is in a position to receive appropriate remuneration by controlling the production and first sale of every item incorporating an intellectual property right. If the right is exploited in an intangible manner, there is no such thing as a 'first sale'. A showing of a film on television cannot be resold in the same way that a DVD can. As a result, the intellectual property system can only operate meaningfully if the right holder is in a position to authorise or prohibit every communication to the public. By ruling out the application of the exhaustion doctrine in *Coditel I*, the Court of Justice adapted its case law to the nature and operation of intellectual property regimes. It pointed out that requiring fees for *any* showing of a film is part of the 'essential function' of copyright,[87] and interpreted Article 56 TFEU in a manner that is compatible with it.

2. *Elements of the legal test*

The nature and the scope of the intellectual property right determine whether an agreement limiting parallel trade is restrictive by object. The legal test that is implicit in the case law comprises two cumulative conditions. The first condition relates to the substantive scope of the intellectual property right. If the agreement allows one of the parties to authorise or prohibit acts that are not covered by the relevant right, it may restrict competition by object. For instance, an agreement that allows a distributor to control the resale of tangible goods within its exclusive territory falls outside the substantive scope of the right of distribution. By the same token, it may restrict (intra-brand) competition that would otherwise have existed. In the absence of the agreement, resales would have been possible.

If it appears that the agreement is broader than the substantive scope of the intellectual property right, it is necessary to consider its geographic dimension. When the distribution of tangible goods is at stake, the question is whether the right is exhausted in the context of the case. Where, for instance, the right of distribution is exhausted – because the goods in question have been put on the market by the author or with its consent – the agreement is prima facie contrary to Article 101(1) TFEU.

[82] See in particular Case 78/70, *Deutsche Grammophon*; Case 16/74, *Centrafarm BV and Adriaan de Peijper v Winthrop BV*, EU:C:1974:115; and Case 15/74, *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc*, EU:C:1974:114.
[83] See in particular Case 187/80, *Merck & Co. Inc. v Stephar BV and Petrus Stephanus Exler*, EU:C:1981:180.
[84] Case C-355/96, *Silhouette International Schmied GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH*, EU:C:1998:374.
[85] Case 62/79, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*, EU:C:1980:84.
[86] Article 3(3) clarifies that the right of communication to the public provided for in the first paragraph 'shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article'.
[87] Ibid., para 14.

The two conditions would be fulfilled in such a case. Because the distributor is not in a position to invoke the copyright to prevent the cross-border trade of goods within the EU, the agreement restricts competition that would otherwise have existed. In the absence of exhaustion, on the other hand, competition would be precluded by the underlying regulatory regime, not by the agreement. As a result, the agreement would not be restrictive by object.

Where the agreement concerns a right that is not subject to exhaustion, it is only restrictive by object if there is a mismatch between the territory covered by the licence and the geographic scope of the underlying right. By the same token, if the right and the agreement have the same scope, the latter is not as such contrary to Article 101(1) TFEU. Think of a licence covering the exercise of the right of communication to the public in the UK. If the agreement allows the licensee to authorise or prohibit any communication to the public taking place within the UK, it remains within the substantive and geographic scope of the right. As a result, it is not restrictive by object. This is what the Court held in *Coditel II*, and is the necessary consequence of *Coditel I*. If the right holder is entitled to invoke the right of communication to the public to control the cross-border provision of services, an agreement giving the licensee the same right does not restrict competition that would have existed in its absence.

Conversely, the agreement would be restrictive of competition by object if the licensee were given the right to control any communication to the public outside the UK. In such a case, there would be a mismatch between the agreement and the right. The right would cover any communication to the public in the UK, but the agreement would allow the licensee to control acts taking place in other Member States. The licence would thus fall outside the geographic scope of the right and would therefore restrict competition that would have existed in its absence. As will be explained in greater detail below, a mismatch of this kind explains the outcome of *Murphy*.

[INSERT TABLE 1]

C. THE LEGAL TEST IN PRACTICE

1. Glaxo Spain

It is easy to make sense of the outcome in *Glaxo Spain* in light of the test sketched above. Glaxo imposed a dual pricing system on its Spanish wholesalers with the ostensible purpose of discouraging them from re-selling the contractual products in other Member States. The agreement clearly fell outside the substantive and geographic scope of the intellectual property right, which was exhausted at the EU level. Indeed, Glaxo imposed conditions on the resale of the products. In such circumstances, the Court could only come to the conclusion that the agreement was restrictive by object. Absent evidence of the objective necessity of the agreement, Glaxo would only have been able to escape the prohibition by showing that the conditions laid down in Article 101(3) TFEU were fulfilled.[88]

[INSERT TABLE 2]

2. Javico *and* Micro Leader

In *Javico*,[89] the Court examined an agreement providing for an explicit export prohibition. The ban was imposed on the distributor of the products in Russia and Ukraine. As in *Glaxo Spain*, the substantive scope of the agreement was broader than that of the underlying intellectual property right. It concerned the resale of products bearing a trade mark. Unlike *Glaxo Spain*, however, it was not entirely clear that the right was exhausted. The ban had indeed been imposed on a distributor based outside the EU. If one assumes that the right was not exhausted, it is natural to conclude that the agreement was not restrictive of competition by object.[90] Such an agreement could be caught by Article 101(1) TFEU if it were established that it has an appreciable effect on competition in the economic and legal context of which it is part.[91]

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[88] In *Glaxo Spain*, the Court emphasised that Article 101(3) TFEU is in principle available for all agreements, including those that restrict competition by object, and dismissed the appeal brought by the Commission against the annulment of Articles 2, 3 and 4 of its decision. At the time of the completion of this piece, the Commission has not adopted a decision in the case. It has, moreover, rejected a complaint asking it to provide a definitive view on the question. See *Glaxo Wellcome* (Case AT.36957): Commission Decision of 27 May 2014. This decision has been challenged before the GC. See Case T-574/14, *EAEPC v Commission*, pending.

[89] Case C-306/96, *Javico International and Javico AG v Yves Saint Laurent Parfums SA*, EU:C:1998:173 (see also Case C-535/13, *Honda Giken Kogyo Kabushiki Kaisha v Maria Patmanidi AE*, EU:C:2014:2123). Interestingly, the ruling in *Javico* came only a few months before the ruling in *Silhouette*, where the Court held that the exhaustion principle does not apply at the international level. The Court did not refer to the issue of exhaustion in the ruling.

[90] Ibid., paras 21-22.

[91] Ibid., paras 23-25.

In *Micro Leader*,[92] the General Court examined the lawfulness of a practice taking place in a similar factual context. It is perhaps the ruling where the logic of the case law is more apparent. The Commission rejected a complaint concerning Microsoft's attempts to prevent the import into France of software sold in Canada. The Court held that, even assuming that the resale of Microsoft's products in France was the result of coordination with its Canadian distributors, the export restrictions would not be caught by Article 101(1) TFEU. In the absence of international exhaustion, such an agreement would remain within the scope of the copyright granted by virtue of EU law.[93] Even though the practice was not held to be anticompetitive in and of itself, the General Court did not rule out that it could breach Article 102 TFEU.[94]

[INSERT TABLE 3]

3. Nungesser *and* Erauw-Jacquery

As pointed out above, the Court distinguished between 'open' and 'closed' territorial licences in *Nungesser*.[95] The first would not be restrictive by object, whereas the second would be prima facie prohibited. The divide between 'open' and 'closed' licences is consistent with the logic underlying prior and subsequent case law. An 'open' exclusive licence is indeed one that remains within the substantive scope of the plant breeders' right, which comprises the production of the seeds and their first sale. A 'closed' licence, on the other hand, is one which, according to the Court, affects the position of third parties. Thus, it concerns an instance in which the agreement allows the licensee to control the marketing of the product beyond the first sale. Insofar as the exhaustion doctrine applies within the EU, a 'closed' exclusive licence is in principle restrictive of competition by object and is unlikely to fulfil the conditions set out in Article 101(3) TFEU.

Against this background, it is easy to understand why the Court held in *Erauw-Jacquery* that the export restriction at stake in the case was not restrictive of competition by object. Given the nature of plant breeders' rights, the protected technology cannot exist in an intangible form. It is inseparable from the seeds that form a distinct, uniform and stable variety. In such circumstances, it seems inappropriate to liken basic seeds to a good incorporating an intellectual property right. As the Advocate General pointed out in his opinion, basic seed is the technology itself. Accordingly, an agreement whereby the licensee is required not to export basic seed remains within the substantive scope of the intellectual property right.

[INSERT TABLE 4]

4. Murphy *and the Cable and Satellite Directive*

In *Murphy*, the Court examined the lawfulness of an agreement prohibiting a satellite broadcaster from exporting decoding devices outside of the territory covered by the licence. The judgment made it very clear that the compatibility of the licence with Article 101(1) TFEU was not at stake in the case. Only the 'additional obligations' concerning the export of decoding devices were considered by the Court.[96] These 'additional obligations' were found to be restrictive by object.[97] The Court explicitly pointed out that the parties had not put forward any factor relating to the economic and legal context of the agreement that could justify a different conclusion.[98] In addition, the said 'additional obligations' were not found to fulfil the conditions of Article 101(3) TFEU.[99]

What is remarkable about *Murphy* is that the Court expressly upheld *Coditel II* and, at the same time, found the agreement to be restrictive of competition by object. This position suggests that the Court views the two rulings as mutually compatible. The test sketched above suggests that, indeed, the two judgments share the same logic. The 'additional obligations' examined by the Court in *Murphy* fell outside the substantive scope of the right of communication to the public via satellite.[100] This is the first

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[92] Case T-198/98, *Micro Leader Business v Commission*, EU:T:1999:341.
[93] Ibid., para 34.
[94] Ibid., paras 54-56.
[95] This divide between 'open' and 'closed' licences has been criticised in the literature. See Rene Joliet, *Trademark Licensing Agreements under the EEC Law of Competition*, 5 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 755-817 (1983) and Valentine Korah, EEC Licensing of Intellectual Property, 4 FORDHAM INTELLECTUAL PROPERTY, MEDIA AND ENTERTAINMENT LAW JOURNAL 55-80 (1993).
[96] Joined Cases, C-403/08 and C-429/08, *Murphy*, para 141.
[97] Ibid., paras 140 and 142.
[98] Ibid., para 143.
[99] Ibid., para 145.
[100] The right of communication to the public via satellite is recognised by virtue of Article 2 of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 1993 O.J. (L 248) 15.

key difference with *Coditel II*. The right of communication to the public comprises the right to authorise or prohibit any communication to the public, but not the right to authorise or prohibit the import of decoding devices. This is what would make the obligations 'additional'. The right to control the import of decoding devices resulted from an ancillary UK-based regime intended to protect broadcasters that was, in any event, found to be incompatible with Article 56 TFEU.[101]

The agreement in *Murphy* also fell outside the geographic scope of the right of communication to the public. This outcome results from the sui generis regime to which satellite broadcasts are subject. In accordance with the Cable and Satellite Directive, a communication to the public via satellite is deemed to take place solely in the Member States where it originates, which is known as the 'country of uplink'.[102] The fact that the satellite broadcast may reach territories other than the one for which the operator holds a licence does not make a difference in this regard. In this sense, the Cable and Satellite Directive allows satellite broadcasters to compete with one another. A Greek satellite broadcaster may lawfully reach viewers in the UK – and compete for these viewers with the British licensee – even though it has only been authorised by the right holder to communicate the work to the public in its home territory.

In the regulatory context of the *Murphy* case, the 'additional obligations' considered by the Court were capable of restricting competition that would have existed in their absence. It is therefore natural that they were found to be a 'by object' infringement. The ability of the Greek satellite broadcaster to provide its services to end-users in other Member States (including the UK) was not precluded by virtue of the copyright regime,[103] but by virtue of the restraints. By the same token, the 'additional obligations' allowed licensees in other Member States to prohibit transmissions that had been authorised by the right holder and which, from a legal standpoint, only took place in Greece. In this sense, the obligations went beyond the geographic scope of protection resulting from the copyright regime. The Court distinguished *Murphy* from *Coditel I* on the same grounds. It concluded that national legislation prohibiting the import of decoding devices could not be justified by the protection of intellectual property rights.[104]

[INSERT TABLE 5]

The scenario that the Court did not formally examine in *Murphy* is one in which the agreement remains within the substantive scope of the licence but goes beyond its geographic scope. As already explained, the Cable and Satellite Directive allows for competition between satellite broadcasters. Under the Directive, the right of communication to the public is only deemed to take place in the 'country of uplink'. Against this background, the question is whether an agreement prohibiting a satellite operator from communicating the work to the public outside the 'country of uplink' is in principle restrictive of competition by object. Unlike the scenario examined in *Murphy*, this agreement would not relate to an 'additional obligation', but to the range of acts that are covered by the right of communication to the public. The analytical framework described above suggests that such an agreement would also be prima facie prohibited under Article 101(1) TFEU. Where the 'country of uplink' principle applies, such an agreement is in principle capable of restricting competition that would have existed in its absence. It could only escape the prima facie prohibition if the parties are in a position to put forward other factors pertaining to the economic and legal context of which the agreement is part.

[INSERT TABLE 6]

5. The Cross-Border Pay TV *case and the InfoSoc Directive*

It has been mentioned in the introduction that the Commission sent a Statement of Objections to Sky UK and the major studios in July 2015. The issues raised by the case are similar to those examined by

[101] See Section 298 of the Copyright, Design and Patents Act 1988, which conferred a set of rights and remedies on pay TV providers who charge for broadcast, encrypt transmissions or provide conditional access services. This legislation was also examined in Murphy, and was found to be contrary to Article 56 TFEU insofar as it prevented the import of decoding devices. Section 298 is intended to give rights similar to copyright owners, but are not part of copyright as such. For a discussion, see LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW (4th ed. 2014), 364-366.

[102] In accordance with Article 1(2)(b) of the Satellite and Cable Directive, '[t]he act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth'.

[103] Insofar as national legislation prohibiting the import of decoding devices was found to be contrary to Article 56 TFEU, it cannot be considered to be an element of the relevant regulatory context.

[104] Joined Cases, C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd ('Murphy')*, paras 118-120.

the Court in *Murphy*. The Commission has come to the preliminary conclusion that some clauses found in the licensing agreements between the studios and the pay TV operator are restrictive by object. The case concerns not only satellite broadcasting but also online transmissions. More precisely, the Commission considers that geo-blocking provisions, whereby Sky UK is required to block access to its online content from outside the UK and Ireland, are contrary to Article 101(1) TFEU.[105]

The interest of the case lies in the fact that the regulatory framework that applies to online transmissions differs from the one that applies to satellite broadcasts. The transmission of content via the Internet is not subject to the *lex specialis* of the Cable and Satellite Directive. A communication to the public online is subject to Article 3 of the InfoSoc Directive. As a result, the act of communication is deemed to take place in every country in which it is received – and not only in the Member States where it originates. In other words, the 'country of reception', as opposed to the 'country of uplink', applies to online broadcasts.[106] A content provider would thus require authorisation from the right holder in every Member State that it intends to reach with its services.

It is difficult to argue, in light of the test sketched above, that geo-blocking provisions are contrary to Article 101(1) TFEU. As in *Coditel II*, what prevents Sky UK from offering its online services outside the UK and Ireland is the regulatory context, not the licensing agreements. In the absence of the obligations relating to geo-blocking, Sky UK would not be entitled to offer its online content in territories allocated to other licensees without the authorisation from the right holder. Thus, the obligations do not restrict competition that would have existed in their absence. The Commission appears to acknowledge that the regulatory context prevents Sky UK (and other content providers) from providing online services across borders. It does not claim that, without the restraints, the content provider would be in a position to offer its online services to end-users based in other Member States.

What the Commission argues is that, absent the restraints, Sky UK would be able to decide, on 'commercial grounds' and taking into account, in particular, the 'regulatory context' whether to offer its services in other Member States.[107] It would seem that the Commission takes the view that a limitation in the freedom of action of Sky UK is sufficient to establish a breach of Article 101(1) TFEU. This argument was also attempted by the Commission in its submission in *Coditel II*[108] and its decision in *Nungesser*.[109] The Court rejected this interpretation of Article 101(1) TFEU in the two cases. As the analysis above shows, constraining the freedom of action of the parties to the agreement is neither a necessary nor a sufficient condition to establish a restriction of competition to the requisite legal standard.

As explained above, the relevant question is whether the agreement remains within the substantive and geographic scope of the relevant intellectual property right. If the geo-blocking provisions are assessed against this benchmark, it appears that the case raises the same issues that the Court already addressed in *Coditel II*. It seems difficult to dispute that a licensing agreement prohibiting a broadcaster from transmitting copyright-protected content outside the territory covered by the licence remains within the substantive scope of the right of communication to the public. Because the 'country of reception' principle applies to online transmissions, the geo-blocking provisions also remain within the geographic scope of the copyright, in the sense that they do not prevent the lawful transmission of content in other territories. At the time of the completion of this piece, the case had not been decided by the Commission. It remains to be seen whether the interpretation of Article 101(1) TFEU at which the Statement of Objections hints will finally be endorsed in the decision.

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[105] 'Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland', IP/15/5432: 'US film studios typically license audio-visual content, such as films, to a single pay-TV broadcaster in each Member State (or combined for a few Member States with a common language). The Commission's investigation, which was opened in January 2014, identified clauses in licensing agreements between the six film studios and Sky UK which require Sky UK to block access to films through its online pay-TV services (so-called 'geo-blocking') or through its satellite pay-TV services to consumers outside its licensed territory (UK and Ireland)'.

[106] That the 'country of reception' principle applies to online transmission has been accepted by the Commission in its past practice. See in particular Commission Decision 2003/300/EC (Case No COMP/C2/38.014 – *IFPI 'Simulcasting'*) OJ (2003) L 107/58, para 21. It is generally understood that the application of the 'country of reception' is the consequence of the fact that the InfoSoc Directive did not make an explicit choice about the question, which is therefore left to national regimes. For an analysis, see STUDY ON THE APPLICATION OF DIRECTIVE 2001/29/EC ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY (THE 'INFOSOC DIRECTIVE') (Jean Paul Triaille ed. 2013). See also Ted Shapiro, *Directive 2001/29/EC on Copyright in the Information Society*, in COPYRIGHT IN THE INFORMATION SOCIETY: A GUIDE TO NATIONAL IMPLEMENTATION OF THE EUROPEAN DIRECTIVE (Brigitte Lindner, and Ted Shapiro eds., 2011).

[107] 'Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland', IP/15/5432. The Commission argues that in the absence of the 'restrictions, Sky UK would be free to decide on commercial grounds whether to sell its pay-TV services to such consumers requesting access to its services, taking into account the regulatory framework including, as regards online pay-TV services, the relevant national copyright laws'.

[108] The Commission argued in its written submission that the contested clauses were 'typical restrictions on freedom of economic action which generally fall within the scope of Article 85 (1) of the Treaty'. See European Court Reports [1982], p. 3389.

[109] *Breeders' rights – maize seed* (Case IV/28.824): Commission Decision 78/823/EEC, 1978 O.J. (L 286) 23.

[INSERT TABLE 7]

IV. CONCLUSIONS

Market integration has a unique status as an objective of EU competition law. It is natural, and arguably desirable, that the scope of Articles 101 and 102 TFEU is defined in a way that is compatible with the establishment of an internal market. It is not credible to expect that the commitment of the Court and the Commission to market integration will change any time soon. Against this background, the purpose of this article is, first, to identify the instances in which agreements aimed at partitioning national markets are prohibited and, secondly, to devise an operational legal test against which the lawfulness of these agreements can be assessed.

The case law is complex in the sense that the prohibition of agreements aimed at partitioning national markets is not an absolute one. In some circumstances, they do not restrict competition by object. An analysis of the case law shows that the key question in this regard is whether the agreements restrict competition that would have existed in their absence. It is possible to identify two main scenarios in which restrictions on cross-border trade are not in themselves contrary to Article 101(1) TFEU. First, inter-firm co-operation may be objectively necessary to achieve the objectives sought by the parties. Secondly, it may be the case competition is precluded by virtue of the regulatory framework in which the agreement is concluded.

It has long been understood that parallel trade restrictions are acceptable where they are indispensable to enter a new market or for a patent holder to introduce a new technology. An issue that has not been emphasised in the literature is that the other scenario is of fundamental importance to make sense of the case law. *Coditel II* and *Erauw-Jacquery* can be understood in this light. Agreements that remain within the substantive and geographic scope of an intellectual property right do not restrict competition that would have existed in their absence. In such cases, competition is precluded by the underlying legal regime, not by virtue of the agreement.

For almost three decades, 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. 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. Only following the *Murphy* ruling of 2011 did the Commission start to examine the status of cross-border restraints in factual scenarios that were closer in nature to those at stake in *Coditel II*.[110] Ongoing developments will contribute to the clarification of the aspects of the case law that remain controversial, or unclear.

[110] Exclusive territorial licences similar to the one at stake in *Coditel II* have been examined by the Commission, in particular in relation to the exploitation of the rights to sports events. However, the concern in such cases was not so much the partitioning of national markets as the foreclosure of some television operators within each of these markets. See in particular *Film purchases by German television stations* (Case IV/31.734): Commission Decision 89/536/EEC, 1989 O.J. (L 284) 36 and *Joint selling of the commercial rights of the UEFA Champions League* (Case COMP/C.2-37.398): Commission Decision 2003/778/EC, 2003 O.J. (L 291) 25.

[FIGURE 1]

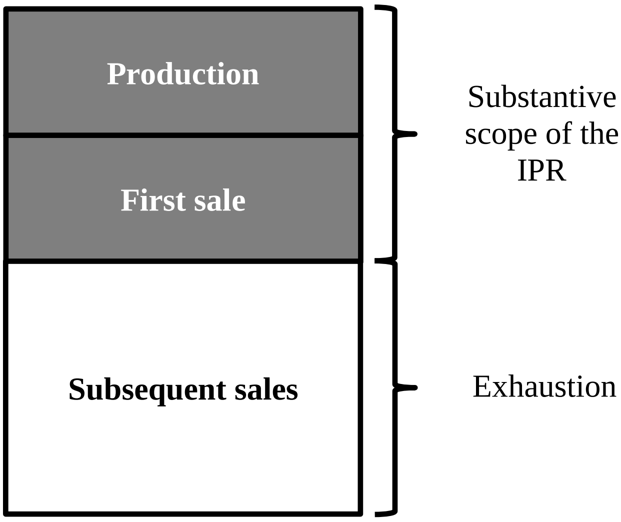

Fig. 1: The substantive dimension of an IPR

[FIGURE 2]

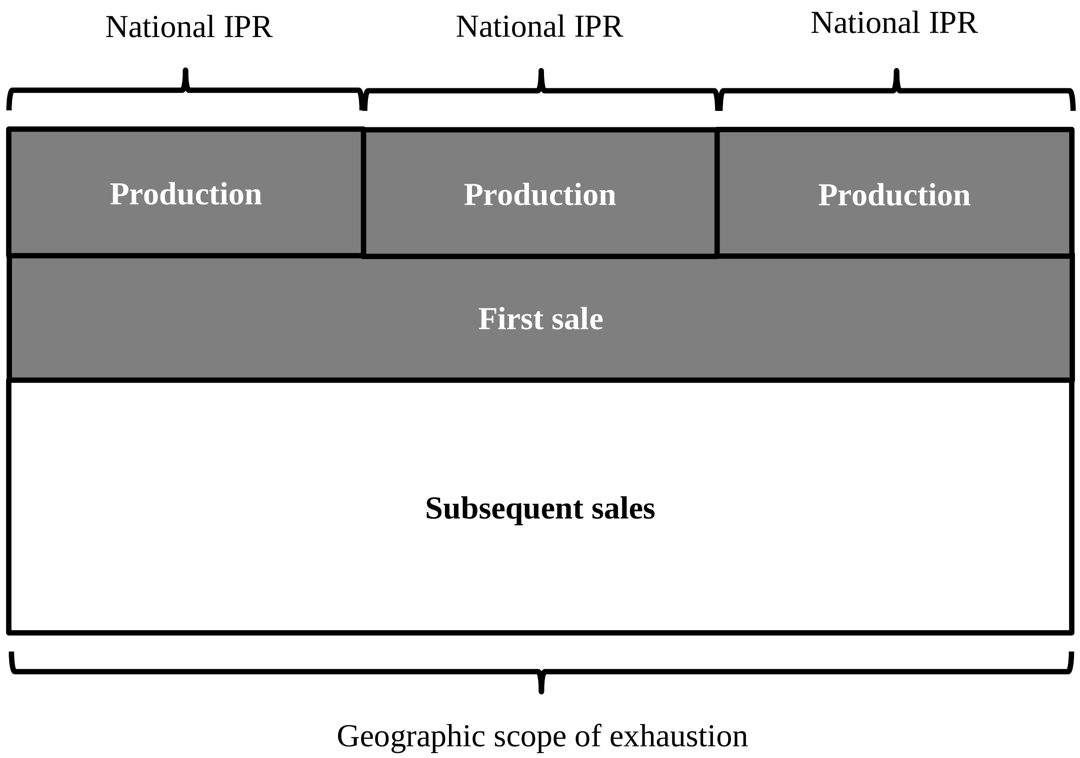

Fig. 2: The geographic dimension of an IPR: EU-wide exhaustion

[TABLE 1]

	Substantive dimension of the IPR	**Geographic dimension of the IPR**	**Outcome**
The IPR is subject to exhaustion	*The agreement is outside the substantive scope of the IPR*	*Right is exhausted in the context of the case*	*The agreement is in principle restrictive by object*
	The agreement is outside the substantive scope of the IPR	*Right is not exhausted in the context of the case*	*The agreement is **not** restrictive by object*
	The agreement remains within the substantive scope of the IPR	*Right is not exhausted in the context of the case*	*The agreement is **not** restrictive by object*
The IPR is not subject to exhaustion	*The agreement is outside the substantive scope of the IPR*	*The licensee can control acts outside the licensed territory*	*The agreement is in principle restrictive by object*
	The agreement remains within the substantive scope of the IPR	*The licensee can control acts outside the licensed territory*	*The agreement is in principle restrictive by object*
	The agreement remains within the substantive scope of the IPR	*The licensee only controls acts within the licensed territory*	*The agreement is **not** restrictive by object*

[TABLE 2]

Glaxo Spain	**Substantive dimension of the IPR**	**Geographic dimension of the IPR**	**Outcome**
The IPR is subject to exhaustion	*The agreement is outside the substantive scope of the IPR*	*Right is exhausted in the context of the case*	*The agreement is in principle restrictive by object*

[TABLE 3]

Javico* and *Micro Leader	**Substantive dimension of the IPR**	**Geographic dimension of the IPR**	**Outcome**
The IPR is subject to exhaustion	*The agreement is outside the substantive scope of the IPR*	*Right is not exhausted in the context of the case*	*The agreement is* ***not*** *restrictive by object*

[TABLE 4]

Nungesser	**Substantive dimension of the IPR**	**Geographic dimension of the IPR**	**Outcome**
Open exclusive licence	*The agreement remains within the substantive scope of the IPR*	*Right is not exhausted in the context of the case*	*The agreement is* ***not*** *restrictive by object*
Closed exclusive licence	*The agreement is outside the substantive scope of the IPR*	*Right is exhausted in the context of the case*	*The agreement is in principle restrictive by object*

[TABLE 5]

Murphy	**Substantive dimension of the IPR**	**Geographic dimension of the IPR**	**Outcome**
The IPR is not subject to exhaustion	*The agreement is outside the substantive scope of the IPR*	*The licensee can control acts outside the licensed territory*	*The agreement is in principle restrictive by object*

[TABLE 6]

***Murphy* (bis)**	**Substantive dimension of the IPR**	**Geographic dimension of the IPR**	**Outcome**
The IPR is not subject to exhaustion	*The agreement remains within the substantive scope of the IPR*	*The licensee can control acts outside the licensed territory*	*The agreement is in principle restrictive by object*

[TABLE 7]

Cross-Border Pay TV	**Substantive dimension of the IPR**	**Geographic dimension of the IPR**	**Outcome**
The IPR is not subject to exhaustion	*The agreement remains the substantive scope of the IPR*	*The licensee only controls acts within the licensed territory*	*The agreement is **not** restrictive by object*