What is a restriction of competition and when is it a restriction by object?

Recent decisions of the European Court of Justice

Judith Schreiber

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Abbreviations

AG	Advocate General
Art.	Article
BER	Block Exemption Regulation
EC Treaty	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union

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Introduction

"Our competitors are our friends, our customers are the enemy", this could be the unofficial motto of a company in a cartel.[1] Even though this sentence is of course a simplistic definition, it shows abstractly some major aspects of a restriction of competition in terms of Art.101 TFEU: The competitors are *friends,* which implies that there must be a kind of consensus preventing them to take actions against each other's interest. In other words, since they are *friends*, the competitors are not completely free in their behaviour. At the same time, the friendship consensus protects each of them from potential losses due to inefficiency, because a *friend* would not make use of the weakness of another friend. The customers on the other hand are the *enemies,* meaning that, at the end of the day, they will pay the price (in the truest sense of the word) for the inefficiency caused by non-existing competition.

One of the main targets mentioned in the Treaty Establishing the European Community (EC Treaty) was *‚A system ensuring that competition in the internal markets is not distorted'*[2]. Today, the protection of competition is no longer listed as a separate aim in the Treaty of the Functioning of the European Union (TFEU) Rather, the wording of the Lisbon Treaty seems to qualify the protection of competition as a means to an end in order to ensure the functioning of the internal market:[3]

> *1. The Union shall have exclusive competence in the following areas (...)*
> ***(b) the establishing of the competition rules necessary for the functioning of the internal market;***[4]

However, the legally binding protocol number 27 to the TFEU and the TEU on competition and the internal market[5] reaffirms more or less the old wording of the EC Treaty by stating that the internal market *contains* a system ensuring that competition is not distorted.[6]

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[1] *Organisation for Economic Co-operation and Development, DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE,* REPORT ON THE NATURE AND IMPACT OF HARD CORE CARTELS AND SANCTIONS AGAINST CARTELS UNDER NATIONAL COMPETITION LAWS, 2002, 3 (cited: OECD, Report on Hardcore Cartels)

[2] Art 3(1)(g) of the Treaty establishing the European Community (EC Treaty)

[3] Vertrag von Lissabon – Kartellrecht: Zielt die Europäische Union nicht (mehr) auf den Schutz des Wettbewerbs ab? (2009) Kartellrechtsblog

While the high priority to protect competition in the EU is widely uncontested, neither the old EC Treaty nor the TFEU specify what is meant exactly by competition. The lack of a definition could make it difficult to determine when a restriction of competition is given, because a restriction can only be identified when the concept of competition is sufficiently clear.[7] At the same time, a general applicable definition of competition might not to be practicable, since the market-related conduct of companies and the interactions between different market players are various and quickly changing.[8]

The concept of competition could therefore be specified in the light of the rationale and the values behind its protection. Generally speaking, three main values of competition can be identified:[9] Competition as a generator of economic growth[10] by using society's scarce resources as efficient as possible, competition as a main tool to achieve an integrated internal market by opposing market isolation,[11] and competition as a promoter of the freedom to participate in the market as a competitor or consumer.[12] Those elements are interrelated and, at the same time, they have the potential to conflict in some cases.[13] Whereas the Ordoliberal School considers the promotion of freedom as the prior function of competition and the European Institutions used to attach a great importance to integration, the focus is now put more on the creation of efficiency.[14]

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[4] Art. 3 (1) lit b) of the Treaty on the functioning of the European Union (TFEU)

[5] ABlEG 2008 C 115/209.

[6] Vertrag von Lissabon – Kartellrecht: Zielt die Europäische Union nicht (mehr) auf den Schutz des Wettbewerbs ab? (2009) Kartellrechtsblog.

[7] *Odudu, Okeogene,* The Boundaries of EC Competition Law The Scope of Article, Oxford University Press, New York 2006, 9 (cited: Odudu, The Boundaries of EC Competition Law).

[8] *Mäger, Thorsten,* Mäger, Europäisches Kartellrecht,2, Baden Baden 2011, par.2 (cited: Mäger, Europäisches Kartellrecht).

[9] Odudu, The Boundaries of EC Competition Law, 9.

[10] Art. 3 (3) of the Treaty Establishing the European Union (TEU).

[11] Art. 3 (1) lit b) TFEU.

[12] Odudu, The Boundaries of EC Competition Law, 14.

[13] Odudu, The Boundaries of EC Competition Law, 22.

[14] Odudu, The Boundaries of EC Competition Law, 10.

All of these aspects come into play in the recent ECJ case-law or the decisions of the Commission: *"By these practices the parties coordinated the setting of their quotation prices instead of deciding on them independently. These arrangements have as their object the restriction of competition within the meaning of Article 81(1) of the EC Treaty."*[15] (Emphasize added) The Commission points out in this decision, that pre-pricing communications reduce the capacity of the cartel operators to decide independently, i.e. to act freely.

The function of competition to promote the internal market becomes clear when the Court regards *"agreements which are aimed at partitioning national markets according to national borders or make the interpenetration of national markets more difficult"*[16] as restrictions of competition.

When Neelie Kroes, former Commissioner for Competition, says that *"our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources"*[17], it seems that consumer welfare and efficiency gains have become the ultimate goals of competition law. The ECJ, however, did not follow this understanding in its (recent) case-law, pointing out that competition law *"aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such."*[18]

Keeping in mind these diverging tendencies, the distinction of restrictions by object and effect in Art.101 TFEU is of particular interest: As will be analysed below, in the case of anticompetitive objects, there is no need to further assess actual negative effects for consumers, in order to establish an infringement of Art.101 TFEU. Therefore, the "object approach" is subject to fierce criticism: It is argued to be not in line with the modern "effects-based approach", elevating consumer welfare as the ultimate criterion, which has

[15] *Decision of the European Commission* , COMP/39188, Bananas (2008) par. 263.

[16] *European Court of Justice,* C-403 & 429/08, Football Association Premier League Ltd, (2011), par. 139.

[17] Available at http://ec.europa.eu/competition/speeches.

[18] *ECJ,* C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v. Commission, (2009) ECR-I9291, par.63.

to be fulfilled to conclude whether there is a restriction of competition or not. Thus, the basic distinction between object and effect infringements is at the core of the question, of what is protected under Art.101 TFEU, i.e. what is considered as a restriction of competition.

This basic differentiation will be the subject of the first section. It will firstly deal with the "two-stage assessment" of Art.101 (1) TFEU, entailed by the distinction; thereafter the main reasons for the differentiation shall be explained. On the basis of the recent decisions of the ECJ in *BIDS*[19], *T-Mobile*[20] and *GlaxoSmithKline*[21], this logic within Art.101 (1) TFEU and the rationale behind it, shall be clarified.

The second section will focus on the scope of the 'objects category', by analysing the methods and indications to identify a restriction by object, in order to then assess, according to recent case-law such as *Football Association Premier League* and *Pierre Fabre*[22], if and under which conditions such a finding could be rebutted or exempt. Finally, the question of whether it makes sense to speak in this context about a "more economic" assessment of Art.101 TFEU will be discussed.

"Preventions, restrictions and distortions of competition" are prohibited under Art.101 (1) TFEU. In practice, however, there is generally no distinction between those terms and the restriction of competition is the core element of Art.101 (1) TFEU.[23] Therefore, these terms will be treated in the following text as synonyms.

[19] *ECJ*, C-209/07, Competition Authority v. Beef Industry Development Society and Barry Brothers,(2008) ECR I-8637

[20] *ECJ*, C-8/08, T-Mobile, (2009) ECR I-4529

[21] *ECJ*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v. Commission, (2009) ECR-I9291

[22] *ECJ*, C-439/09, Pierre Fabre Cosmétique SAS, (2011)

[23] Mäger, Europäisches Kartellrecht, 87.

Furthermore, since "*the criteria laid down in the Court's case-law for the purpose of determining whether conduct has as its object or effect the prevention, restriction or distortion of competition are applicable irrespective of whether the case entails an agreement, a decision or a concerted practice*"[24], the question on what is considered as an agreement in terms of Art.101 (1) TFEU will not be discussed in this paper.

[24] *ECJ*, C-8/08, T-Mobile, (2009) ECR I-4529, par. 24.

I The distinction between restrictions by object and restrictions by effect

This section shall firstly clarify how the distinction between object and effect restrictions is assessed within Art.101(1), in order to then determine the backgrounds of the distinction.

A. A two stage-assessment

1. Two alternative elements of Art.101 (1)

*"**All agreements between undertakings**, decisions by associations of undertakings and concerted practices which may affect trade between Member States and **which have as their object or effect the prevention, restriction or distortion of competition** within the internal market"*[25] (Emphasize added) are prohibited under Art.101 (1) TFEU.

The conjunction "or" clearly shows that object and effect restrictions are alternative elements and do not have to be fulfilled cumulatively in order to identify an infringement of Art.101 (1) TFEU.[26] Indeed, in *Ferriere Nord* the ECJ forcefully confirms this fact by clearly rejecting the claim of the Italian Company Ferrie Nord, which relied on the Italian version of the EC Treaty:[27] Unlike the other language versions the Italian text referred to agreements which have as their object *and* effect the restriction of competition.[28] Hence, by rejecting the Italian version, the ECJ underlined that object restrictions on the one hand and effect restrictions on the other hand are two distinct alternative conditions to fulfil Art.101 (1) TFEU.[29]

[25] Art. 101 (1) TFEU

[26] Mäger, Europäisches Kartellrecht, 87.

[27] Odudu, The Boundaries of EC Competition Law, 113.

[28] Opinion of AG Léger, (1997), C-219/95, par. 12.

[29] Odudu, The Boundaries of EC Competition Law, 113.

2. Once identified a restriction by object, no need to assess the actual effects

In *Ferriere Nord* the court referred in its argumentation to older settled case law, especially to *Société Minière:* back in 1966 the ECJ for the first time addressed the basic distinction between restrictions by object and restrictions by effect as alternative conditions. Moreover, the court explained that a two stage assessment of Art.101 (1) TFEU has to be applied:[30] First of all, it should be determined if a restriction by object is given. If the agreement in question (or some clauses of the agreement) *"does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered, (...), it is then necessary to find that those factors are present which show that competition had in fact been prevented or restricted (...).*[31]

Thus, the assessment of Art.101 (1) TFEU consists of two steps: first of identifying, whether an agreement contains a restriction by object, and if not, of finding out, whether anticompetitive effects are given. In the same line, the court clearly points out in *Consten Grundig*[32] that in order to assess a restriction of competition there is no need to analyse the concrete effects of an agreement, once an anticompetitive object is identified.[33]

[30] *Lebrun, Bruno,* Definition of restrictions of competition by object: Anything new since 1966? (2011) available at http://www.cdr-news.com/categories/expert-views/definition-of-restrictions-of-competition-by-object-anything-new-since-1966

[31] *ECJ*, C-56/65, Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.). (1966), par. 8.

[32] *ECJ*, C-56 & 58-64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community, par. 87.

[33] Odudu, The Boundaries of EC Competition Law, 113.

a) The two-step test in GlaxoSmithKline

Accordingly, in *GlaxoSmithKline* the Court argues: *"there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object."* Further, the ECJ explained that the Treaty does not only protect the interests of consumers (or other competitors), but also competition itself, i.e. the structure of the market. "*Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price*"[34]

The background was a dual-price policy set by GlaxoSmithKline (GSK), applying different prices to its wholesalers depending on the ultimate resale country. The purpose was to avoid parallel-trading, which flourished due to considerable price differences of pharmaceuticals in Southern Europe (in this case Spain, prices were set at a low level by the state) compared to other Member States.[35] GSK notified the agreement with the wholesalers to the Commission (still under the old notification system before regulation 1/2003), in order to obtain negative clearance or an exemption. This application was denied to GSK, because the Commission considered that the object of the agreement, i.e. the restriction of parallel trade by charging higher prices for products destined to export than for wholesalers reselling in the domestic market, had infringed Art.81 EC Treaty.[36]

[34] *ECJ,* C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v. Commission, (2009) ECR-I9291, par. 63.

[35] *Life Science Newsletter,* Parallel trade in the pharmaceutical sector: the ECJ judgement in the GlaxoSmithKline Case (2009) available at http://www.ashurst.com/publication-item.aspx?id_Content=4844.

[36] *ECJ,* C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v. Commission, (2009) ECR-I9291 par. 11.

Under appeal, the Court of First Instance (CFI) annulled the negative decision of the Commission, holding that "*an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition that applies in so far as the agreement may be presumed to deprive final consumers of those advantages.*" Given the specific characteristics of the pharmaceutical market, the CFI found that in the present case the Spanish intermediaries might keep the price advantage gained through parallel trade and not pass it on to the final consumers.

In the second instance however, the ECJ clearly rejected this argumentation as an error of law: Pursuing the wording of Art. 81(1) EC Treaty, as well as the settled case-law, the Court held that for finding an anticompetitive object there is no need to prove disadvantages for final consumers.[37] (see above)

In *GlaxoSmithKline* the Court corroborated the affirmations formulated in *T-Mobile Netherlands and Others*.

b) The two-step test in T-Mobile

In this case, the representatives of the five mobile telecommunications operators (one of them was the operator "Ben", which is now T-Mobile Netherlands) in the Netherlands held a meeting, in order to discuss the reduction of standard dealer remunerations for post-paid subscriptions.

The referring Dutch court had to decide, inter alia, if the agreement or concerted practice between the big operators constitutes a restriction of competition by object. It came to the conclusion that the exchange of information between the Dutch telecommunication operators did not have an anti-competitive object, based on the fact that consumer prices were not affected by it.

[37] *ECJ*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v. Commission, (2009) ECR-I9291, par. 64.

Again, the ECJ did not follow this opinion, because first of all the remuneration for dealers would certainly play a decisive role in fixing the price which has to be paid by the final consumer. Moreover, the Court reconfirmed that in any case in order to identify an anti-competitive object *"there does not need to be a direct link between that practice and consumer prices"*.[38] Accordingly, in *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (BIDS)* it was stated that an infringement by object cannot be justified in terms of Art.101 (1) TFEU by the demonstration of the actual effects.[39] In other words, even though when it subsequently comes out, that the collusive conduct in question did not actually result in anticompetitive effects, this does not rebut the finding of an anticompetitive object.[40]

c) The bifurcated structure of Art.101 TFEU

Another argument in favour of the ECJ's judgements is the structure of Art.101 TFEU, as explained by AG Trstenjak in her opinion on *GlaxoSmithKline*: Indeed, Art.101 (1) TFEU prohibits restrictions by object in general. However, Art.101 (3) TFEU has the function to exempt those agreements, which cumulatively fulfil certain requirements, namely four conditions: firstly efficiency benefits in terms of distribution improvements or technical or economic progress have to be created as a result of the agreement, secondly consumers have to benefit from these improvements, thirdly the restrictions imposed to the companies involved have to be indispensable in order to achieve the progress and finally competition cannot be eliminated substantially by the agreement.[41] The first two requirements clearly show that Art.101 (1) TFEU is not designed to weigh consumer benefits against restrictions of competition, because this balancing is conducted systematically in Art.101 (3) TFEU.

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[38] *ECJ*, C-8/08, T-Mobile, (2009) ECR I-4529, par. 30.

[39] *ECJ*, C-209/07, Competition Authority v. Beef Industry Development Society and Barry Brothers,(2008) ECR I-8637 par. 17.

[40] Bailey, David, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 562

[41] Opinion of AG Trstenjak, (2009) ECR I-09291, par. 105.

It follows that the ECJ does not consider disadvantageous effects for consumers as a normative requirement to fulfil a restriction of competition in terms of Art.101 (1) TFEU.[42]

To sum up, the two-stage assessment of Art.101 (1) TFEU is based on the wording of Art.101 (1) TFEU (alternative elements object "or" effect), the fact that competition law *aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such"*[43], and the structure of Art.101, which considers advantages for consumers in Art.101 (3) TFEU.

3. Effects analysis from two different angles

Considering the two-stage assessment of Art.101 (1) TFEU as explained above, one may come to the conclusion that the distinction between the analysis of restrictions by object and restrictions by effect is a very sharp one. However, when taking a closer look, this differentiation becomes vaguer and needs further specification.[44]

Odudu explains that the distinction of restrictions by object and restrictions by effect is linked to different methods of showing that competition is restricted.[45] Thereby, restriction of competition is defined as *allocative inefficiency*, i.e. scarcity of output and subsequently insufficient desirable goods and increased prices. This describes a situation in which companies, despite reducing the quantitative output of their production, benefit enough from higher prices to compensate for lost sales.[46]

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[42] *Behrens, Peter*, Abschied vom *more economic approach*? *Peter Bechthold et.al.*, Recht, Ordnung und Wettbewerb – Festschrift für Wernhard Möschel zum 70. Geburtstag, Baden-Baden 2011, 13.

[43] *ECJ*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v. Commission, (2009) ECR-I9291, par. 63.

[44] Mäger, Europäisches Kartellrecht, 87.

[45] Odudu, The Boundaries of EC Competition Law, 103.

[46] Odudu, The Boundaries of EC Competition Law, 10.

a) Restrictions by effect: measurement and prediction method

(1) Measuring negative effects ex post

On the one hand, the actual or potential effects of a collusive conduct can be measured or predicted. The measurement of anticompetitive effects or *allocative inefficiency* is basically conducted by comparing market output and prices before and after implementation of an agreement. The advantage of this method is that once negative effects as increased prices caused by an agreement can be *directly* observed on the market, the conclusion of a restriction of competition becomes pretty clear and incontestable. At the same time, the practicability of the measurement method is quite limited: not only is it often complex and time intensive, but also problematic because it can logically only be conducted *ex post*; i.e. after negative effects have already occurred due to the implementation of an agreement. Even though since the modernization of competition law 2004 the tendency goes more towards an *ex post* control (see section I 2) and section III), the task of competition enforcement has traditionally been focused on an *ex ante* control, thus the *prevention* of *allocative inefficiency*.[47]

(2) Predicting negative effects ex ante

Therefore, restrictions by effect can also be predicted *ex ante*: this time the potential not the actual *allocative efficiency* is assessed by means of economic techniques. For instance, the calculation of the own price elasticity defines the rate at which consumers would stop to buy a product when the price increases. This enables the identification of the point until which an increase in price compensates a firm for its lost sales. By calculating the difference between the cost of production and the price, the Lerner Index helps to identify those companies, which have enough market power to price above costs in the long run. Other strong indications to predict effects on the market can be found when considering the market share and the market concentration of the companies in question or by assessing whether it is difficult for new firms to enter the market.[48]

[47] Odudu, The Boundaries of EC Competition Law, 103.

[48] Odudu, The Boundaries of EC Competition Law, 107-112.

b) Restrictions by object: presumption method

On the other hand, as regards infringements by object, the harmful effects on the market are neither measured nor predicted by economic tools; they are legally presumed *"based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market."*[49] In other words, *"some contractual restrictions are, prima facie, so likely to affect competition that this effect will be presumed"*.[50] (Emphasize added)

Indeed, in *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Beef Industry)* the ECJ made clear that the object approach is based on a legal presumption that competition is restricted.[51] Therewith the ECJ refers to its early case-law in *Société Minière* stating that Art.101 (1) TFEU *"is based on an assessment of the effects of an agreement from two angles of economic evaluation"*[52](Emphasize added). Thus, the concept of restriction of competition is the same, both for restrictions by object and restrictions by effect. This rejects approaches, under which the assessment of an anticompetitive object is based on a different meaning of restriction of competition than when assessing a restriction by effect[53] (so called "distinctness thesis"[54])

The conception of restrictions by object as a legal presumption of anticompetitive effects has also been confirmed by the Commission, e.g. in its Guidelines on the applicability of Art.81 describing restrictions by object as *"agreements (...) presumed to have negative market effects"*[55]. Respectively, on the other hand *"in the case of restrictions of competition by effect there is no presumption of anti-competitive effects."*[56]

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[49] Commission Guidelines on the application of Article 81(3) of the Treaty, (2004), par. 21.

[50] *Goyder D.G.* , EC Competition Law, 4, Oxford 2003, 96.

[51] *Odudu, Okeoghene,* Restrictions of competition by object – What's the beef? Comp Law 2008, 13.

[52] *ECJ*, C-56/65, Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.). (1966), par. 248.

[53] *Odudu, Okeoghene,* Restrictions of competition by object – What's the beef? Comp Law 2008, 13.

[54] *Black, Oliver,* Conceptual Foundations of Antitrust, CU P, 2005, 95-96.

[55] Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements, (2001), par. 18 and 25.

[56] Commission Guidelines on the application of Article 81(3) of the Treaty, (2004), par. 24.

Thus, there are various ways to identify detrimental consequences on the market caused by an agreement. The assessment may be conducted from different angles (measuring, predicting, presuming), but the target is the same: avoiding collusive conduct which causes or is likely to cause harmful effects on the market, defined by Odudu as *allocative inefficiency*.

However, what the rationale behind the analysis of economic effects from two different angles, and why do we need a presumption when we could measure or predict negative effects on the market with economic tools?
Why does Art.101 (1) TFEU distinguish between object and effect restrictions and therefore requires a two-stage assessment?

B. The Rationale behind the distinction between object and effects restrictions

The basic distinction between restrictions by object and restrictions by effect and as a result the two-stage examination of Art.101 TFEU, can be justified through economic reasons, its classification in the legal system, policy judgements and important practical issues in the functioning and enforcement of competition law.[57]

1. Economic reasons

a) Facts and figures from the OECD

It is uncontested that for instance production quotas produce negative effects for consumers and society:[58] Generally speaking, when cartelists agree to limit their production they will always rationally behave like a profit maximising monopolist,[59] i.e. consumers will get less and pay more for the cartelized good and society as a whole will be

[57] *Bailey, David,* Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 562.

[58] *Bailey, David,* Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 563.

[59] *Mankiw, Nicholas,* Grundzüge der Volkswirtschaftslehre, 2004, 389.

worse off since resources are not used in an optimal *allocative* efficient way.[60] This is linked to the fact that, though difficult to measure, "*economists agree that there is a loss resulting from consumers' collective decision to purchase less of the product at the cartel price. A lower quantity of a product (or service) is produced and consumers are forced to substitute a less desirable product for that quantity that they can no longer afford to buy. There is another, usually larger loss to consumers resulting from their having to pay the higher cartel price for that quantity that they do purchase.*"[61] In a cartel situation, prices are approximately 16% higher than under competitive conditions.[62] As a result, this generally leads to a "wealth transfer" from consumers to the cartel operators, which, indeed is not only an economic, but also a social issue.

In addition to the *inefficient allocation* of resources, a cartel "*shelters its members from full exposure to market forces*" Thus, the cartel operators feel less pressure to control costs and to innovate. These negative consequences, qualified as *"productive"* and *"dynamic"* inefficiency, constitute a real loss for society, although it is even more difficult to measure than the negative impact resulting from *allocative* inefficiency.

In the US, a Cartel Report on prosecutions of international cartels found out that just ten of the biggest cartels had *"affected over USD 10 billion in U.S. commerce,"* and *"cost individuals and businesses many hundreds of millions of U.S. dollars annually in the U.S. alone."*(Emphasize added) Considering that these numbers only represent a few cartels in one country (though the largest economy of the world) and only those cartels which have been discovered, the costs of cartels must be huge at European level as well. Further, "*the Report relied upon estimates that on average, cartels produce overcharges amounting to 10% of the affected commerce and cause overall harm amounting to 20% of affected commerce.*"

[60] *Bailey, David,* Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 563.

[61] OECD, Report on Hardcore Cartels, 6-7.

[62] Available at: http://www.bwb.gv.at/KartelleUndMarkmachtmissbrauch/Seiten/default.aspx#Kartell

b) The very harmful nature in economic terms

"The serious nature"[63] of a restriction by object is based on the high probability that the collusive conduct would cause such serious negative economic consequences for consumers and society.

For instance, in a preliminary ruling, the ECJ had to decide in *Irish Beef* if the scheme addressing the problem of structural over-capacity in the Irish Beef Processing sector constituted an infringement by object.[64] Indeed, the beef processing market was suffering from insufficient business to sustain profitability for all Irish companies in this branch. The structural over-capacity was the result of various factors: Within the framework of the CAP reform, farmers got a so-called 'deseasonalisation premium' (DSP), if they send their cattle to the processors throughout the year instead of delivering most of it in the peak season in fall. (Historical background: cattle were fed on pasture, once the pasture was exhausted farmers delivered it to processors, usually between September and November). At the same time, companies received from the Irish Department of Agriculture subsidies up to 75% of the construction costs of processing plants. Consequently, after the implementation of DSP the weakest processors did not exit the market because they had an incentive to stay. An overcapacity of around 30% subsequently occurred.

Thus, in order to address the structural over-capacity, an association of 10 undertakings (BIDS), representing together 93% of the Irish Beef processing industry, created a scheme under which some members would stay on the market and some would quit. BIDS would take out a loan to compensate the 'goers' under several conditions, as for example that they 'goers' would not re-enter the market for at least two years.[65]

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[63] Commission Guidelines on the application of Article 81(3) of the Treaty, (2004), par. 21.

[64] *Lebrun, Bruno,* Definition of restrictions of competition by object: Anything new since 1966? (2011) available at http://www.cdr-news.com/categories/expert-views/definition-of-restrictions-of-competition-by-object-anything-new-since-1966

[65] *Odudu, Okeoghene,* Restrictions of competition by object – What's the beef? Comp Law 2008, 12.

The court considered the BIDS agreement as restrictive by its object, due to the fact that *„the distinction between infringements by object and infringements by effect arises from the fact that certain forms of collusion between undertakings can be regarded by their very nature, as being injurious to the proper functioning of normal competition".*[66] (Emphasize added)

Hence, the ECJ, justified the differentiation between object and effect infringements within Art.101 (1) TFEU *by the very* harmful *nature* in economic terms.[67] Accordingly, the Court ruled that a system decreasing the processing capacity by 25% by the withdrawal of some competitors constitutes an agreement injurious to the proper functioning of normal competition by its very nature.[68]

In the same vein the Commission considered in *Bananas* that weekly telephone calls between banana suppliers would facilitate an agreement on the setting of quotation prices, as well as to foresee each other's future pricing and therefore constitute an infringement by object.[69]

c) US per se infringements based on economic evidence and theory

Besides, a similar concept to restrictions by object exists in US antitrust law, the so-called category of *per se* infringements (see in detail below II. A. (b) (3)), also justified by economic reasons:

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[66] *ECJ*, C-209/07, Competition Authority v. Beef Industry Development Society and Barry Brothers,(2008) ECR I-8637, par.17.

[67] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 562.

[68] *Lebrun, Bruno,* Definition of restrictions of competition by object: Anything new since 1966? (2011) available at http://www.cdr-news.com/categories/expert-views/definition-of-restrictions-of-competition-by-object-anything-new-since-1966

[69] *Decision of the European Commission* , COMP/39188, Bananas (2008), par. 263 -265.

"The available evidence suggests that the application of the per se rule against cartels is beneficial to the economy, and so does the available economic theory. Cartels reduce output and produce nothing in return."[70]

In the US, the implementation of *per se* rules has to be preceded by the acquirement of experience in a certain period of time about the real impact of a certain collusive conduct. In principle, this applies for the EU as well. For instance, the same system is used to define whether the commission should adopt a block exemption*: "only after sufficient experience has been gained in the light of individual decisions"*.[71] Accordingly, the reference to experience in paragraph 21 of the applicability of Art.101 (3) TFEU might indicate that the experience of economic impacts of certain types of collusion is used to identify anti-competitive objects. However, not only precedent experience helps to establish the distinction between object and effect infringements, but also insights from industrial organizations, especially empirical research, which demonstrates the high probability of a restriction of competition. Moreover, indications of deterring economical consequences might also be gained through the experience of other comparable jurisdictions.[72]

2. Policy judgement, especially market integration

The category of object infringements represents a stronger tool for the legislator to implement certain policy priorities, because unlike in the case of effect infringements, a restriction by object can be prohibited because of its very harmful nature. Besides the goal of protecting the proper functioning of competition and thus consumers and society from *allocative inefficiency,* the purpose of an integrated internal market can play an important role when it comes to object infringements. The Court considered for example vertical agreements imbuing absolute territorial protection as anticompetitive objects, without analysing the actual effects. Accordingly, the ECJ qualified restrictions of parallel trade as

[70] *Easterbrook, Frank,* The limits of antitrust, 63 TLR 1984, 18.

[71] Council Regulation 19/65 as amended by Council Reg. 1219/99 O.J. 1999, L 148/1.

[72] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 363.

restrictive by object in the light of market integration and in that sense confirmed the traditional stance towards parallel trade in *GlaxoSmithKline*[73] because such agreements *"frustrate the Treaty's objective of achieving the integration of national markets"*[74]

3. The classification from a legal dogmatic point of view

As mentioned above (Section I/ 1)), while constituting an analysis from two different angles, both the 'object' and the 'effect' approach in Art.101 (1) pursue the same basic purpose: protecting the proper functioning of competition and subsequently efficiency for consumers, competitors and society. However, the legal interest which is protected by a legal norm should not automatically be confused with the prohibited behaviour.[75] The sometimes difficult distinction between object and effect infringements reflects the complex relationship between the definition of a forbidden conduct on the one hand and the rationale behind the existence of the legal norm on the other hand.

This issue is of course not only specific to the field of competition law, rather an analogy to so called risk-offences in criminal law (or administrative law) can be drawn, as did AG Trstenjak and Kokott in their respective opinions in *BIDS* and *T-Mobile*. For example, road traffic offences of speeding or driving under influence of drugs or alcohol apply regardless of whether in an individual case it had lead to deterrent effects, i.e. a traffic collision.[76] Kokott argued accordingly: *"In the same vein, undertakings infringe European competition law and may be subject to a fine if they engage in concerted practices with an anti-competitve object; either in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant"*[77]

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[73] *Dostert, Anne,* Parallel Trade in pharmaceutical products within the internal market: the recent Glaxo judgement of the ECJ, CJEL, 2009, 27.

[74] *ECJ,* C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v. Commission, (2009) ECR-I9291, par. 61.

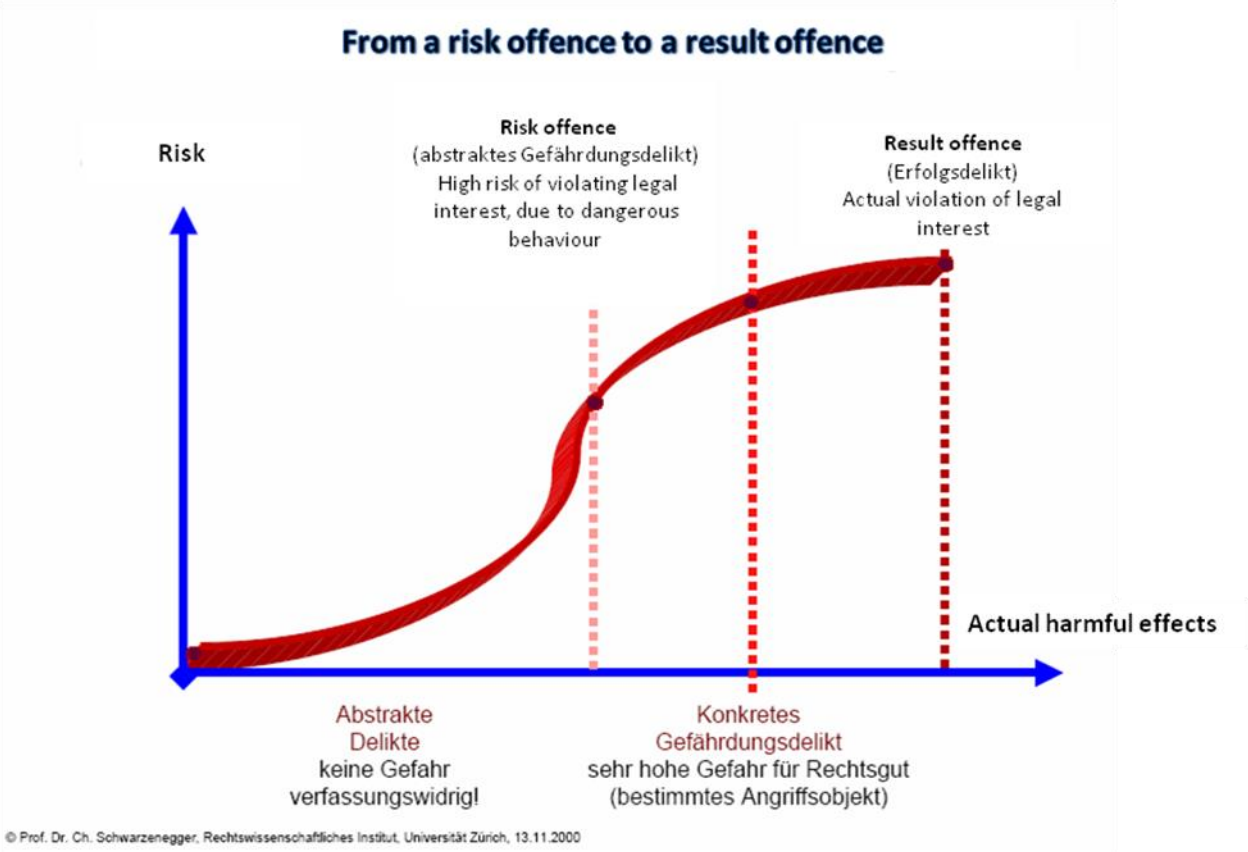
[75] *Castillo de la Torre, Fernando,* Evidence, Proof and Judicial Review in Cartel Cases, World Competition 32 no. 4 2009, 508.

[76] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 563.

[77] Opinion of AG Kokott, (2009) ECR I-4529, par. 47.

The German term for risk offence *"abstraktes Gefährdungsdelikt"* shows clearly that a legal interest is abstractly protected, not the concrete negative effect in a particular case. In other words, according to the prevailing *theory of general danger*, risk offences prohibit a *typically dangerous behaviour*, based on statistics and experience and respectively a *high probability to cause an infringement* of the protected legal interest. Subsequently, the focus is placed on the category of a conduct, considered as dangerous or harmful in general, rather than on the conduct itself. Similarly, in the *presumption theory* the existence of risk offences is justified by the fact that the danger is presumed in this kind of offences.[78]

In terms of legal systematic, an analogy of infringements by object to *risk offences* on the one hand and infringements by effect to *result offences* ("Erfolgsdelikte"), requiring actual harmful effects, on the other hand, seems to be admissible.



[78] *Lange, Carsten,* Das abstrakte Gefährdungsdelikt- Straftat oder Ordnungswidrigkeit? (2005) available at http://www.uni-leipzig.de/~straf/materialien/wise0405/sem-02abstrgefdelikt.pdf

[79]

Hence, the different theories to legitimize risk offences may be used as well to justify the distinction between object and effects restrictions from a legal dogmatic perspective: While the *theory of general danger*, prohibiting certain categories of dangerous behaviour, may be applied to a wide extent (however, see below II A. there is no exhaustive enumeration of dangerous categories of behaviour), the *presumption theory* expresses a very similar logic to the analysis from two different angles, discussed above.

Moreover, one could further note at this point, that criticism regarding the violation of the presumption of innocence may be seen in the light of the category of risk offences: the presumption of the negative impact shifts the burden of proof to the investigated company, which is generally seen as opposed to the principle *ei incumbit probation qui dicit non qui negat*,[80] which means that *the burden of proof lies with who declares, not who denies.* The shift of the burden of proof is justified by the dangerous nature of the conduct, i.e. the high probability to cause damage.

4. Administrable and efficient enforcement of Art.101 (1) TFEU

First of all, as explained above (A) 2)), it is settled case-law that once an anti-competitive is identified; there is no further need to prove anticompetitive effects. The notion of object restriction constitutes a pragmatic approach for the enforcement of competition law when facing serious agreements, likely to produce harmful effects:[81] (see also III) Generally speaking, it alleviates competition authorities from the sometimes complex burden of proving such effects, especially when assessing a sophisticated cartel going beyond mere price fixing systems. Indeed, the purpose of the investigation is in any case to demonstrate that a collusive conduct infringes Art.101 (1). However, whereas an infringement by effect has to be measured or predicted (see above...), the presumption method for object

[79] Prof. Dr. Schwarzenegger Rechstwissenschaftliches Institut Universität Zürich

[80] *Castillo de la Torre, Fernando,* Evidence, Proof and Judicial Review in Cartel Cases, World Competition 32 no. 4 2009, 514.

[81] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 567.

infringements shifts the burden of proof to the companies under investigation.[82] (see more III)

This approach seems reasonable, basically because of two aspects: A costs and benefits calculation[83] and the deterrence effect[84]. The former is mentioned by AG Kokott in her opinion in *T-Mobile* arguing that "*resources of the competition authorities and the justice system*" are conserved by excluding the assessment of the actual effects.[85] Indeed, the prevailing view in economy confirms that cases, in which serious agreements, such as horizontal price fixing schemes, produce more benefits than harm, are sufficiently rare to not waste public costs in a complex market investigation. Besides, in the assessment of a restriction by object, some criteria such as market definition are simplified compared to the analysis of an effect infringement.[86] In general, it seems to be a common approach from the regulators perspective to also define an offence according to potential problems, which may arise in the subsequent investigation and demonstration of certain facts.[87]

[82] *Lebrun, Bruno,* Definition of restrictions of competition by object: Anything new since 1966? (2011) available at http://www.cdr-news.com/categories/expert-views/definition-of-restrictions-of-competition-by-object-anything-new-since-1966

[83] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 567.

[84] Odudu, The Boundaries of EC Competition Law, 107 and 115.

[85] Opinion of AG Kokott, (2009) ECR I-4529, par.43.

[86] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 566.

[87] *Castillo de la Torre, Fernando,* Evidence, Proof and Judicial Review in Cartel Cases, World Competition 32 no. 4 2009, 508.

The object element further enables companies to better anticipate if their conduct is likely to be considered as an infringement of Art.101 (1) TFEU and to behave accordingly. Even though there is no 100 percent guarantee that a certain collusive behaviour will be prohibited, parties can generally rely on the high probability that some agreements, as for example export bans, will be classified as object restrictions. Hence, the distinction between infringements by object and infringements by effect promotes legal certainty and deterrence,[88] which corresponds to the traditional ex ante approach (see above I A) 3)) and is undoubtedly one of the most powerful aspects in the functioning of competition rules.[89]

To put it in a nutshell, the basic differentiation between object and effect restrictions arises on the one hand from economic findings gained basically through statistics, experience and other information from the industry. On the other hand, it is reasonable from a legal dogmatic perspective to prohibit particularly dangerous behaviour as such on the basis of a presumption of harmful effects for the society. Furthermore, the object element provides a better understanding for companies of what is likely to be classified as an object infringement of Art.101 (1). Last but not least, it promotes deterrence, which is one of the main success factors for an efficient competition policy.

[88] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 567.

[89] Odudu, The Boundaries of EC Competition Law, 107

II. Identifying and assessing a restriction of competition by object

While there is a rather broad consensus (Commission, ECJ case-law, most writings), that a restriction by object differs from a restriction by effect by entailing a legal presumption of negative effects in contrast to the assessment of the actual effects, the controversial part is often the question whether an anticompetitive object is given or not.[90] The basic principles for the test to determine an object infringement are laid down in the early case-law of the ECJ in *Société Minière*:

"*The fact that these are not cumulative but alternative requirements, indicated by the conjunction "or", leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. This interference with competition referred to in Article [101 (1)] must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered*".[91] (Emphasize added)

In the subsequent case-law, some of these aspects were clarified; other points were developed.[92] This section shall provide an overview on how restrictions by object are identified and assessed, especially in recent ECJ judgements. The first part will focus on the agreement itself, analysing how its purpose or nature can give rise to the presumption of illegality, while the second part will deal with the legal and economic context and the questions, to which extent parties may rebut a presumption of illegality within Art.101 (1)

[90] Opinion of AG Trstenjak, (2009) ECR I-09291, par. 24.

[91] *ECJ*, C-56/65, Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.). (1966)

[92] *Lebrun, Bruno,* Definition of restrictions of competition by object: Anything new since 1966? (2011) available at http://www.cdr-news.com/categories/expert-views/definition-of-restrictions-of-competition-by-object-anything-new-since-1966

TFEU or otherwise, if it is possible that an anticompetitive object may be exempt under Art.101 (3) TFEU.

A. How an agreement may give rise to a legal presumption of illegality

As analyzed above, in the case of object restrictions, the infringement of Art.101 (1) TFEU is presumed by means of a legal presumption of deterrent consequences for the proper functioning of competition. Keeping that in mind, the fundamental question of how an agreement may give rise to a legal presumption of illegality shall be treated.

In its Guidelines on the application of Art.101 (3) TFEU, the Commission explains that "*the assessment of whether or not an agreement has as its object the restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it.*"[93] Likewise, the ECJ made clear in *BIDS* that two independent factors may constitute a basis for the legal presumption,[94] so that *"account must be taken"* not only *"to the effects which are the necessary consequence of the provisions"* but also to *"the effects which the parties intend to achieve through those provisions."*[95] The same approach is adopted by the Court in its recent judgements, such as *Football Association League, Pierre Fabre* and *GlaxoSmithKline*.[96] Consequently, the presumption of illegality may be induction (proceeding from the content) or intention (proceeding from the purpose) based.[97]

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[93] Commission Guidelines on the application of Article 81(3) of the Treaty, (2004), par. 22.

[94] *Odudu, Okeoghene,* Restrictions of competition by object – What's the beef? Comp Law 2008, 13-16.

[95] *ECJ*, C-209/07, Competition Authority v. Beef Industry Development Society and Barry Brothers, (2008) ECR I-8637 par. 65.

[96] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 576.

[97] Odudu, The boundaries of EC competition Law, 114.

1. Identifying the serious content of an agreement

The content of the agreement in question is the starting point in order to detect an anticompetitive object, which may be deducted from written evidence or from what the undertakings have said or done in this regard. The purpose is to demonstrate, why an agreement should be prohibited on the sole ground of a legal presumption of negative effects.[98] Therefore, the ECJ elaborated in its case-law several pertinent formulas to establish a basis for a presumption of illegality.

a) Formulas from the ECJ jurisprudence

(1) Consten and Grundig: restrictive by their very nature

Shortly after its *Société Minière* (see above) ruling, the ECJ was confronted in *Consten Grundig*[99] with a case involving a prohibition of parallel trade. The court made it clear that such clauses may be restrictive of competition *"by their nature"*. In subsequent case-law this formula has been supplemented as in *Miller International*[100], considering anticompetitive objects as restrictive by their *"very nature"*.

(2) European Night Service: obvious restrictions of competition

In *European Night Service* the CFI probably refers to restrictions by object when it speaks of "*obvious restrictions of competition such as price-fixing, market-sharing and the control of outlets*"[101]. It seems reasonable that agreements obviously producing harm to competition are very likely to be classified as restrictive by object. However, this does not conversely lead to the conclusion that all restrictions by object are at the same time obvious

[98] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 576.

[99] *ECJ*, C-56 & 58-64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community (1996).

[100] *ECJ*, C-19/77 Miller International v. Commission

[101] *CFI*, T-374/94, T-375/94, T-384/94 and T-388/94, European Night Service, par. 136.

restrictions: As noted by AG Trstenjak in her opinions in *BIDS*[102] and *GlaxoSmithKline*[103], an anticompetitive object can be identified without having to prove an obvious restriction of competition.[104]

(3) BIDS: restriction as a necessary consequence

While the ECJ justified the legal presumption in its early case-law by an agreement or a clause which is *"sufficiently deleterious"(original:"degré suffisant de nocivité")* to restrict competition, the Court detected the anticompetitive object of an agreement in *BIDS "where the necessary consequence of the agreement was the restriction of competition"*[105]. In other words, the consequence of a restriction of competition must be inevitable. Accordingly, both the AG and the ECJ concluded that a 25 % decrease of the production capacity, due to a part of the processors exiting the market are factors that would have *as a necessary consequence* a restriction of competition.[106](facts of the case see above …)

(4) T-Mobile: capable to restrict

In this case, the Court qualified the unique exchange of information between the Dutch Mobile telecommunication operators in order to reduce standard dealer remunerations for postpaid subscriptions, as a restriction of competition by object: (facts of the case see above…) "*in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or*

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[102] *ECJ*, C-209/07, Competition Authority v. Beef Industry Development Society and Barry Brothers,(2008) ECR I-8637, par. 47.

[103] *ECJ*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v. Commission, (2009) ECR-I9291, par. 108.

[104] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 573.

[105] *ECJ*, C-209/07, Competition Authority v. Beef Industry Development Society and Barry Brothers,(2008) ECR I-8637, par. 17.

[106] *Odudu, Okeoghene*, Restrictions of competition by object – What's the beef? Comp Law 2008, 11-16.

distortion of competition within the common market."[107] The ECJ's wording in *T-Mobile* could be seen as a slight, but maybe significant nuance to the *BIDS* formula, moving from *the necessary consequence* to *simply be capable.*

(5) GlaxoSmithKline: specific capability and tendency to restrict

In *GlaxoSmithKline* the ECJ encompasses several traditional elements in order to determine the anticompetitive content of an agreement (e.g. *very nature, sufficiently deleterious*). Further, especially the Opinion of AG Trstenjak provides a sophisticated summary: accordingly, an agreement should be qualified as restrictive by object if it *"has the specific capability and the tendency to have a negative impact on competition. In this connection, regard must be in particular be paid to existing experience according to which, in all probability, certain types of agreement have a negative impact in the market and jeopardise the objectives pursued by the Community's competition legislation."*[108]

While the formulas have been further clarified and developed in the subsequent case-law, it is remarkable that almost all ECJ judgments dealing with object restrictions refer to the test defined back in 1966 in *Société Minière,* still applicable today.

In order to find strong indications for an agreement anticompetitive *"by its very nature"* or a clause having the *"necessary consequence"* to restrict competition, a helpful starting point might be the reference to the examples listed in the Treaty or to the "hardcore restrictions" in the Block Exemption Regulation.

[107] *ECJ*, C-8/08, T-Mobile, (2009) ECR I-4529.

[108] Opinion of AG Trstenjak, (2009) ECR I-09291, 90,91.

b) Legislative sources

(1) Examples listed in Art.101 (1) TFEU

The Treaty provides a useful list of restrictions in Art.101 (1) TFEU, whereby the letters (a) to (c) respectively refer to direct and indirect forms of price fixing, while (d) and (e) tackle the subject of discrimination and tie-in practices respectively.[109]

Though the list might provide a helpful start in the assessment of anticompetitive objects, two basic points have to be considered when relying on the examples of the Treaty: First of all, the list is not an exhaustive enumeration of anticompetitive objects. This is underlined by the Court in *BIDS*, where it was pointed out that infringements by object are not limited to the examples in Art.101 (1) TFEU.[110]Moreover, this point is confirmed by previous judgements and decisions, condemning other practices not listed in Art.101 (1) TFEU as anti-competitive objects, such as collusive tendering or certain exchange of information. The latter practice is for instance specified by the Commission's Guidelines on Horizontal Cooperation Agreements, which classifies agreements, with the purpose to exchange of future pricing plans, as restrictive by object[111] because they are very likely to distort the functioning of competition and very improbable to trigger efficiencies.

On the other hand, even though there is strong probability that the examples of Art. 101 TFEU will be considered as object infringements, this might not automatically be the case especially for letters (d) and (e), since in this cases a restriction of competition might be sometimes difficult to prove without any analysis of the actual and potential economic effects and the assessment of substantial market power.[112]

[109] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 571.

[110] Opinion of AG Trstenjak, (2008) ECR I-8637, par. 47.

[111] Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, (2010), par. 74.

[112] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 572.

(2) "Hardcore restrictions" in the Block Exemptions Regulations

"Non-exhaustive guidance on what constitutes restrictions by object can be found in Commission block exemption regulations, guidelines and notices. Restrictions that are black-listed in block exemptions or identified as hardcore restrictions in guidelines and notices are generally considered by the Commission to constitute restrictions by object." The Commission provides here in its Guidelines on the Application of Art.101 (3) TFEU a strong indication that one could rely on the fact, that "hardcore restrictions" will fall in all likelihood under the classification of an object restriction. Furthermore, the Commission specifies which horizontal agreements, such as price fixing and market sharing and which vertical agreements, such as the setting of fixed or minimum prices are presumed as being illegal by object.[113]

However, since hardcore restrictions are "*presumed*" and not defined as *"to fall within Art.101 (1)*" TFEU the Commission acknowledges exceptional cases where a hardcore restriction may not fulfill Art.101 (1) TFEU.[114]

Indeed, the ECJ made it clear in *BIDS* that the "*restrictions by object should not be narrowed down"* to any pre-determined lists of "hardcore restrictions".[115] This approach is confirmed by the explanations of AG Mazak in *Pierre Fabre* emphasizing in its Opinion that hard-core restrictions and restriction by object are two different legal concepts.[116] The Commission supported this view as well.[117]

The origin of the case was an agreement banning de facto all sales on internet between Pierre Fabre Dermo Cosmétique SAS, a manufacturer of cosmetics and healthcare products, and the its selective distribution network, consisting of several pharmacies. According to the agreement, the distributors were committed to ensure their physical presence at the outlet, which the NCA found equivalent to a general ban of internet sales

[113] Commission Guidelines on the application of Article 81(3) of the Treaty, (2004), par. 23.

[114] Commission Guidelines on Vertical Restraints (2010), par. 47.

[115] *Svetlicinii, Alexandr,* „Objective justifications" of "restrictions by object" in Pierre Fabre: A more Economic Approach to Art. 101 TFEU? ELR 2011, 351.

[116] Opinion of AG Mazak, C-439/09, (2011), par. 15.

[117] Opinion of AG Mazak, C-439/09, (2011), par. 24.

to end-users. Thus, the NCA stated that the prohibition of all active and passive sales constitutes an infringement of Art.101 (1) by object and cannot be subject to the BER 1999 because such a practice falls under the list of "hardcore restrictions" in Art.4 (c) of the 1999 BER. The decision was challenged by Pierre Fabre before the *cour d'appel de Paris,* which made a reference for a preliminary ruling to the ECJ, basically asking if the general ban of internet sales infringes Art.101 (1) TFEU, and since, as a "hardcore restriction", it could not be exempted under the BER, if the agreement could be subject for an individual exemption under Art.101 (3) TFEU.[118]

In order to clarify terminological confusions, AG Mazak referred to precedent case-law in *Pedro IV Servicios*: *"where an agreement does not satisfy all the conditions provided for by an exempting regulation, it will be caught by the prohibition laid down in (Article 101 (1) TFEU) only if its object or effect is perceptibly to restrict competition within the common market and it is capable of affecting trade between Member States"*[119] and concluded that an agreement containing a "hardcore restriction" does not necessarily infringe Art.101 (1) TFEU by object.[120]

Though the two concepts of "hardcore restrictions" on the one hand and restrictions by object on the other hand will overlap most of the time, one cannot automatically conclude in any case that an agreement infringes Art.101 (1) TFEU by object because it is considered as a "hardcore restriction".

(3) US formula: restrictive per se

In the US, violations of the Sherman Act are divided into two categories: violations *per se* and violations of the *rule of reason*. Agreements, which are considered as *per se* infringements, are characterized unlawful because of their *"pernicious effect on competition or lack[s] . . . any redeeming virtue"*[121]. In contrast to the assessment of *rule of reason*

[118] *Svetlicinii, Alexandr,* „Objective justifications" of „restrictions by object" in Pierre Fabre: A more Economic Approach to Art. 101 TFEU? ELR 2011, 348.

[119] *ECJ*, C-260/07, Pedro IV Servicios SL % Total Espana SA, (2009) par. 68.

[120] Opinion of AG Mazak, C-439/09, (2011), par. 29.

[121] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)).

infringements, which is basically conducted by a weighing of the advantages and drawbacks for consumers and society, *per se* violations are prohibited without any further assessment or inquiry of the actual effects.

This might sound similar to the distinction between object and effect infringements. However, when taking a closer look, the concepts are not equivalent: This is especially due to the structure of Art.101 prohibiting restrictions of competition under paragraph (1) and providing exemptions under paragraph (3) if the agreement inter alia *"contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit"*. Therefore, the Court underlined in many occasions that the US formula is not applicable. For instance in *Montecatini*, the ECJ stated that the regular meetings of polypropylene operators to fix target prices should be considered as infringements by object, although the conduct was not *per se* contrary to Art.101.[122] Consequently, AG Trstenjak rejected in her GlaxoSmithKline Opinion the attempt of GSK to apply the *per se/rule of reason* formula.[123]Hence, it becomes clear that analogies to the US *per se/rule of reason* rule should be treated with caution when assessing a restriction by object.

2. Identifying the serious intent of an agreement

Whereas the intention of the parties to restrict competition is not required in order to identify an anticompetitive object based on the content of an agreement as explained above, it might constitute a separate base to classify an agreement as restrictive by object under Art.101 (1).

In this framework, *BIDS* tried to argue that their arrangements did not pursue the objective of restricting competition. Rather *"the true objective of the BIDS arrangement was to enable all the players in the industry, from the farmyard to the factory gate, to compete more effectively and be more competitive."*[124] Further, they pointed out the "*openness and*

[122] *ECJ*, C-235/92 P, Montecatini, (1999) par. 138.

[123] Opinion of AG Trstenjak, (2009) ECR I-09291, par. 47.

[124] *Irish High Court* Competition Authority v Beef Industry Development Society Ltd (2006) par. 72.

What is a restriction of competition and when is it a restriction by object?

Recent decisions of the European Court of Justice

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Supervisor: Theofanis Christoforou

Brussels, 06.09.2012

transparency" of the arrangements "*from the very beginning"*, in order to prove the absence of an intention.[125]

However, AG Trstenjak did not admit those arguments because the decrease of 25 % of the production capacity *"appears to be aimed at an appreciable restriction of competition"*[126]. Accordingly, the ECJ qualified the scheme as *"intended to encourage the withdrawal of competitors."*[127] Even though BIDS would have been successful to prove that the content of the arrangements was not necessarily restrictive, they would still infringe Art.101 (1) by object, based on the intent of the agreement.[128]

The presumption of an infringement of Art.101 (1) based on the intent can be justified by the fact that such agreements are more likely to lead to an actual restriction, than agreements without an anti-competitive purpose. This is basically due to the fact that people aiming for a certain outcome are usually working to make it actually happen.[129]

To sum up, on the one hand it is settled case-law that the content of an agreement can be qualified as anticompetitive without an intention of the parties in that regard.[130] On the other hand, it has been established[131] that the parties' intention can itself constitute a sufficient base to presume a restriction by object.[132]

In order to identify an anticompetitive content, strong indications could be found in primary (examples listed in the Treaty) and secondary law ("hardcore restrictions" in the

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[125] *Irish High Court* Competition Authority v Beef Industry Development Society Ltd (2006) par. 85.

[126] Opinion of AG Trstenjak, (2008) ECR I-8637 par. 77.

[127] *ECJ*, C-209/07, Competition Authority v. Beef Industry Development Society and Barry Brothers,(2008) ECR I-8637 Par. 31.

[128] *Odudu, Okeoghene,* Restrictions of competition by object – What's the beef? Comp Law 2008, 16-17.

[129] Odudu, The Boundaries of EC Competition Law, 121.

[130] *ECJ*, C-209/07, Competition Authority v. Beef Industry Development Society and Barry Brothers, (2008) ECR I-8637 par. 21.

[131] *ECJ*, C-56 & 58-64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community (1996**),** par. 342-343.

[132] Odudu, The boundaries of EC Competition Law, 122.

BER), whereby the case-law of the ECJ provides helpful formulas for the assessment whether a restriction by object is given or not.

In this regard, however, it must be pointed out that there is neither a predetermined category of object restrictions (see above), nor can an anticompetitive object only be assessed by *"using an abstract formula"*[133], isolated from the specific framework of an individual case.

In the same vein, the Court pointed out in *GlaxoSmithKline* that when analyzing an agreement *"regard must be had inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part".*[134] *(Emphasize added)*

B. Consideration of the legal and economic context and analysis on how a restriction by object may be rebutted or exempted

This subsection shall firstly determine what has to be understood by the legal and economic context and then examine, according to the case-law, to which extent a restriction by object could be rebutted within Art.101 (1) TFEU or exempted under Art101 (3) TFEU.

1. The consideration of the legal and economic context should not amount to an effects analysis

It is part of the settled case-law regarding infringements by object, that an agreement must be analyzed in the factual legal and economic framework in which it is put in place.[135] Accordingly, the Guidelines on the Application of Art.101 (3) state that *"an examination of the facts underlying the agreement and the specific circumstances in which it operates may be*

[133] *ECJ*, C-439/09, Pierre Fabre Cosmétique SAS, (2011), par. 26.

[134] *ECJ*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v. Commission, (2009) ECR-I9291 par. 58.

[135] *ECJ*, C-8/08, T-Mobile, (2009) ECR I-4529, par. 27.

required before it can be concluded whether a particular restriction constitutes a restriction of competition by object."[136]

However, the inquiry into the legal and economic context cannot be understood as an analysis of the potential or actual harmful effects for consumers. (see above I...). The Court therefore rejects arguments, which are related to the effects of an agreement. Rather, such an analysis should be conducted in order to ascertain whether the legal or economic context leaves no margin to companies for restricting competition, because, due to the legal or economic circumstances on the investigated market, there is no more competition which could be restricted. One could imagine a highly regulated market, where the legal context makes it impossible for companies to infringe Art.101 (1) (neither by object, nor by effect), because competition has been *de iure* eliminated in this market.[137] The same is true for the economic framework as it is demonstrated in *Montecatini v. Commission*[138]*:* The Court did not accept the argument that the rise of the oil price set by the OPEC would justify the *Polypropylen*e cartel, because the companies involved had failed to prove that the increase of the oil price had made any competition between the producers of polypropylene impossible.[139]

Thus, AG Trstenjak points out in *BIDS* that the element of the legal and economic context in the assessment of object restrictions should not *"be seen as a gateway for any factor which suggests that an agreement is compatible with the market."*[140]

2. Rebuttal of a prima facie finding of an anticompetitive object

The examination of the legal and economic context may not only be used to disclose an anticompetitive object, which is not immediately obvious from its (written) terms[141], but

[136] Commission Guidelines on the application of Article 81(3) of the Treaty, (2004), par. 22.

[137] *Castillo de la Torre, Fernando,* Evidence, Proof and Judicial Review in Cartel Cases, World Competition 32 no. 4 2009, 508.

[138] *ECJ,* C-235/92, Montecatini (1999)

[139] *Bailey, David,* Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 582.

[140] Opinion of AG Trstenjak, (2008) ECR I-8637, par. 50.

also to rebut a prima facie finding of an object restriction within Art.101 (1).[142] This is confirmed by AG Trstenjak in her Opinion in *BIDS*, explaining that account must be taken on the legal and economic context insofar as it *"could cast doubt on the existence of a restriction of competition"*[143]

In its older case-law, the judgment in *Erauw-Jaquery Sprl v. La Hesbignonne Société Coopérative* is of particular interest. Erauw-Jaquery, a Belgian plant breeder, set up a clause restricting its licensee, La Hesbignonne, to sales limited to certain farmers. The clause was clearly put in place to prohibit exports. Despite this fact, the Court ruled that it did not infringe Art.101 (1) because of the intellectual property rights, which entitled the breeder to choose who can make use of its seeds.[144]

According to what has been explained above, the Court seems to acknowledge that the legal context, i.e. the intellectual property rights of the breeder, creates circumstances in which competition rules do not apply as usual. Since an intellectual property right always creates a kind of monopoly (for a certain time), competition is *de iure* limited or eliminated in this context.

Also dealing with intellectual property rights, the ECJ had to decide in *Football Association Premier League (FAPL*) whether it is compatible with EU Law to prohibit television viewers in one country from using decoder cards bought and imported from broadcasters in another country. The background was an exclusive territorial licensing system, put in place by FAPL when granting the broadcasting rights for English Premier League football matches. The ECJ ruled that the system of exclusive territorial licensing does in principal as such not infringe EU law.[145] However, the court considered the prohibition of using

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[141] *Bailey, David,* Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 583.

[142] *Odudu, Okeoghene,* Restrictions of competition by object – What's the beef? Comp Law 2008, 14.

[143] Opinion of AG Trstenjak, (2008) ECR I-8637, par. 50.

[144] *Bailey, David,* Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 584.

[145] *Werner, Philipp,* Kein absoluter Gebiettsschutz für Exklusivlizenzen im Satellitenfernsehen 2011 available at Handelsblatt.com

decoder cards from another Member State as a restriction going beyond what is necessary to safeguard intellectual property rights. Thus, it classified the agreement as restrictive by object, which should further be seen in the light of the purpose of market integration (see above I. B. 2.).

Regarding the legal and economic context, the ECJ remarks: *"Also, FAPL and others and MPS have not put forward any circumstance falling within the economic and legal context of such clauses that would justify the finding that, despite the considerations set out in the preceding paragraph, those clauses are not liable to impair competition and therefore do not have an anticompetitive object."*

What might be especially interesting in that case is the terminology adopted by the ECJ, speaking not only of circumstances that "*could cast doubt*" (see above BIDS), but rather of *"any circumstance falling within the economic and legal context of such clauses that would justify"*: The latter wording could be seen as a more extensive interpretation of the role of the legal and economic context by the Court. However, such a view would not be in line with the settled case law (see above... and see also below objective justifications). Furthermore, the fact that the Court did not find out in its recent case law an exclusion of an infringement of Art.101 (1) because of the legal and economic context, neither in *FAPL*, nor in *GlaxoSmithKline* in the second instance, speaks for a rather narrow interpretation.

3. Objective justifications to restrict competition?

In *General Motors*[146] the Court tackled the contentious subject of whether an anticompetitive agreement by object should be regarded as an infringement of Art.101 (1) TFEU if it pursues at the same time a legitimate objective: *"It is the very fact that an agreement obviously has an anti-competitive purpose that renders irrelevant and uninfluential the fact that it also pursues other purposes."*[147] The Court (or respectively the CFI) took the same approach in other judgments as in *NV IAZ International Belgium v. Commission* or

[147] Opinion of AG Tizziano, C-551/03 P, (2006) ECR I-3173 par. 68.

Brasserie nationale v. Commission.[148] In the latter case the CFI rejected arguments relying on the case *Wouters*, which considered that some regulatory rules pursue a legitimate aim and therefore exclude an infringement of Art.101 (1).[149]

The recent ECJ judgment in *Pierre Fabre* is of particular interest in this regard because the Court used for the first time (in the context of Art.101) the terminus *objective justification* when it concluded that *"such agreements are to be considered, in the absence of objective justifications as restrictions by object"*[150] This could be understood in two ways: either as a possible rebuttal of a prima facie evidence or as a legal base to save anticompetitive objects by objective justifications. There is a slight but important difference between those two interpretations:[151] The former means that the application of a presumption is objectively not justified because of the context, whereas the latter means that though the presumption of illegality is justified, there are nevertheless objective justifications to escape prohibition of Art.101 (1). This understanding would lead to a preliminary assessment of Art.101 (3) and, as a result, shift the burden of proof back to the competition authority.[152]

However, such an interpretation would probably be opposed to earlier case-law (see above). Furthermore, Art.101 is characterized by a bifurcated structure: Art.101 (1) is designed to assess the existence of an anticompetitive object (or effect), while Art.101 (3)*"provides a mechanism to consider whether a restriction of competition should nevertheless be tolerated."*Therefore, this structure would be distorted if Art.101 (3) arguments could be raised under an Art.101 (1) issue.[153]

Also, the final outcome speaks for a rather narrow interpretation: The Court did not find an acceptable objective justification, although *Pierre Fabre* argued that this concept should go

[148] *CFI*, T-49-51/02, Brasserie nationale v. Commission. (2005) par. 85.

[149] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 580.

[150] *ECJ*, C-439/09, Pierre Fabre Cosmétique SAS, (2011) par. 39.

[151] *Bailey, David*, Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 581.

[152] *Svetlicinii, Alexandr*, „Objective justifications" of "restrictions by object" in Pierre Fabre: A more Economic Approach to Art. 101 TFEU? ELR 2011, 351.

[153] *Odudu, Okeoghene*, Restrictions of competition by object – What's the beef? Comp Law 2008, 17.

beyond public health and safety concerns.[154] In that regard, AG Mazak made clear that *"the legitimate objective sought must be of a public law nature and therefore aimed at protecting a public good"*.[155] Understood in this way, the concept of objective justifications is in line with the precedent case-law: As one could imagine, if the products concerned in Pierre Fabre would have been pharmaceuticals and not only health products (shampoo, body lotion etc), there could have been public health concerns which could objectively justify a ban of internet sale.

Moreover, since the case concerned a vertical agreement, the judgment in *Pierre Fabre* should also be seen in the light of the Commission's Approach in this connection:[156] In its Guidelines on Vertical Restraints, the Commission admits that there are situations in which an agreement deemed to be anticompetitive could however not fall under Art.101 (1) TFEU, citing the example of a public ban to sell dangerous substances.[157]

Knowing that the concept of objective justifications within Art.101 (1) TFEU will probably be interpreted in a rather strict way, the question arises if and under which conditions an agreement containing an anticompetitive object may be exempted under Art.101 (3) TFEU.

4. Exempting object restrictions under Art.101 (3) TFEU?

In Matra Hachette SA v Commission, the CFI made clear that the exemption under Art.101 (3) TFEU should be theoretically available for every type of anti-competitive conduct, under condition that it fulfils all the criteria required by the Treaty.[158]

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[154] *Svetlicinii, Alexandr,* „Objective justifications" of "restrictions by object" in Pierre Fabre: A more Economic Approach to Art. 101 TFEU? ELR 2011, 349.

[155] Opinion of AG Mazak, C-439/09, par. 35.

[156] *Bailey, David,* Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 581.

[157] Commission Guidelines on Vertical Restraints (2010), par. 60.

[158] *Kolstad, Olav,* Object contra effect in Swedish and European competition law, 2009, 57.

"The Court observes that such reasoning presumes that there are adverse effects on competition which, by their nature cannot qualify for an exemption under Article [81(3)]. In other words, as the Commission rightly points out, such reasoning presumes acceptance of the view that there are infringements which are inherently incapable of qualifying for an exemption but Community competition law, the applicability of which is subject to the existence of a practice which is anticompetitive in intent or has an anti-competitive effect on a given market, certainly does not embody that principle. On the contrary, the Court considers that, in principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article [81(3)] of the Treaty are satisfied and the practice in question has been properly notified to the Commission."[159] (Emphasize added)

More recent explanations in that regard are provided by the Commission in the context of the *BIDS* case, in the framework of an interesting contribution to the OECD Global Forum dealing with restructuring arrangements in the framework of so-called "crisis cartels":

"Article 101(3) provides for an exception from the prohibition of Article 101(1). According to the case-law of the EU Courts any agreement which restricts competition, whether by its object or its effects, may in principle satisfy Article 101(3) TFEU. However, the more severe the restriction of competition the less likely it is that an exemption will be available."[160](Emphasize added)

The Commission thus accepts, that there might be cases, especially in the context of a restructuring, in which an exemption under Art.101 (3) TFEU could be available for restrictions by object as well.

[159] *CFI,* T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595, par. 85.

[160] CRISIS CARTELS Contribution from the European Union -- Session III –5 (2011)

However, as the Commission points out, the cases in which an anticompetitive object may be exempt under Art.101 (3) TFEU are very rare, since they are most of the time qualified as "hardcore restrictions" and "w*here a hardcore restriction is included in an agreement,* […] *it is presumed that the agreement is unlikely to fulfill the conditions of Article 101(3)*".[161] Given the severity (or serious nature) which is generally inherent to a restriction by object, those types of agreements will therefore rarely create efficiencies and at the same time benefit consumers.

5. Escaping Art.101 because of insignificant effect on competition or trade?

Pursuing the case-law, there might be cases where an agreement restrictive of competition does, despite of its anticompetitive object, not infringe Art.101 (1), due to its *"insignificant effect"* on competition or trade between Member States.[162] According to the *de-minimis doctrine*, both restrictions by effect and restrictions by object must therefore have an *"appreciable"* effect on competition.[163]

This, however, cannot entail a broad effects analysis, since such an understanding would be contrary to the two-stage assessment of Art.101 TFEU, i.e. the principle that once a restrictive objective identified, there is no need to assess further effects (see above). Rather, it only applies to exceptional cases, which are *de facto* economically insignificant. Thus, the Court generally rejected this kind of arguments in the subsequent case-law dealing with anticompetitive objects. Furthermore, the Commission's Notice on agreements of minor importance excludes "hardcore restrictions", which, again, makes it very unlikely that a restriction by object escapes prohibition in Art.101 under this concept.[164]

[161] Commission Guidelines on Vertical Restraints (2010), par. 47.

[162] *ECJ,* C-306/96. Javico International v Yves Saint Laurent Parfums [1998] ECR I-1983, par. 16.

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[163] *Kolstad, Olav,* Object contra effect in Swedish and European competition law, 2009, 53.

[164] *Bailey, David,* Restrictions of Competition under Article 101 TFEU, CML Rev, 2012, 591.

C. "A More Economic" assessment of Art.101 (1) TFEU?

1. The Modernization of EU competition law

Since the modernization of EU competition law, based on the Commission's White Paper on the rules implementing Art.85 and 86 EC Treaty (now Art.101 and 102 TFEU) and formalized with the adoption of the Regulation 1/2003 in 2004, the question about the meaning of the distinction between restrictions by object and restrictions by effect has resurfaced over the last years.[165] The enforcement of EU competition law has been decentralised and the notification system replaced by the legal exemption system[166]. As a result, the responsibility to comply with competition rules was shifted to the companies.

The Commission, for its part, declared to adopt a *"more economic approach based on the effects on the market"*[167] in the assessment of possible infringements of competition rules, in other words to put the focus on the real effects of an agreement or conduct, rather than on its form. (effects-based approach).[168]

Following on from that, this concept has often been interpreted as an analysis of whether consumer welfare is negatively affected or not, based on subsequent statements of major representatives of the Commission:[169]

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[165] *Lebrun, Bruno,* Definition of restrictions of competition by object: Anything new since 1966? (2011) available at http://www.cdr-news.com/categories/expert-views/definition-of-restrictions-of-competition-by-object-anything-new-since-1966

[166] Art. 101 (3) TFEU

[167] *Monti*, Perspectives of European Competition Law – A Survey, in: FIW, Zukunft der Wettbewerbsordnung und des Kartellrechts, Referate des XXXIII. FIW-Symposiums, FIW Schriftenreihe Heft 182 (2001) 9-13, 10

[168] *Budzinski, Oliver,* Wettbewerbsfreiheit und More Economic Approach The Open Access Publication Server of the ZBW – Leibniz Information Centre for Economic, 5, available at http://www.uni-marburg.de/fb02/makro/forschung/gelbereihe/artikel/2007-13_budzinski.pdf

[169] *Behrens, Peter*, Abschied vom *more economic approach*? Recht, Ordnung und Wettbewerb – Festschrift für Wernhard Möschel zum 70. Geburtstag, Baden-Baden 2011, 4.

For instance, the speech of Neelie Kroes, former Commissioner for Competition, in London 2005 could be understood in this context: *"Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. An effects-based approach, grounded in solid economics, ensures that citizens enjoy the benefits of a competitive, dynamic market economy."*[170](Emphasize added)

2. The so-called "object paradox"

As a consequence of the "More Economic Approach", a lot of criticism has been raised in regard to recent ECJ judgments, especially when dealing with restrictions by object. All recent cases treated above, namely *BIDS, T-Mobile, GlaxoSmithKline, Football Association Premier League* and *Pierre Fabre* still adhere to the logic stated in *Société Minière*, i.e. the two-step analysis of Art.101 (1) TFEU. Although, some authors may see this logic especially in *Pierre Fabre* (see above objective justifications), the ECJ did nevertheless stick to the bifurcated structure of Art.101 TFEU, rejecting to assess actual effects on consumer welfare in objects cases under Art.101 (1) TFEU. Therefore, the approach of the Court is seen by some authors as a "*disconnection*" to *"the substantive modernization driven by the Commission,"* [171] as opposed to the US judiciary, which was willing to narrow down its *per se* category.[172]

[170] Available at http://ec.europa.eu/competition/speeches

[171] *Gerard, Damien,* The effects-based approach under Article 101 TFEU and its paradoxes: modernisation at war with itself? (2012) 16. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117780.

[172] *Svetlicinii, Alexandr,* „Objective justifications" of "restrictions by object" in Pierre Fabre: A more Economic Approach to Art. 101 TFEU? ELR (2011), 351.

Critics of the "object paradox" further point out that both the ECJ and the Commission tend to treat Art.101 TFEU cases systematically as object restrictions, in order to shift the burden of proof to the companies. For instance, since January 2000, 17 of 18 infringements decisions of the Commission were categorized as object infringements.[173] This point has been in particular criticised, given that both the Commission and the NCAs got large investigative tools, applying at the same time heavy fines.[174]

3. Protecting competition *because* it creates efficiency, not *when* it creates efficiency

In fact, the "*disconnection*" mentioned above, results from the fact that the Court clearly does not consider consumer welfare as the ultimate goal of competition law, which becomes especially clear in *T-Mobile* and *GlaxoSmithKline*. To cite AG Kokott: *"Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such."* [175]

As explained, critics understand the More Economic Approach announced by the Commission as a base for a new element, which has to be assessed in Art.101 (1) TFEU: the question whether consumer welfare is endangered by an agreement or not. However, one could put this interpretation in question, since not only the case-law of the ECJ is opposed to it, but also because there seems to be no clear line on that issue in the statements of the Commission either:[176]

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[173] *Gerard, Damien,* The effects-based approach under Article 101 TFEU and its paradoxes: modernisation at war with itself? (2012) 16. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117780.

[174] *Lebrun, Bruno,* Definition of restrictions of competition by object: Anything new since 1966? (2011) available at http://www.cdr-news.com/categories/expert-views/definition-of-restrictions-of-competition-by-object-anything-new-since-1966, 9.

[175] Opinion of AG Kokott, (2009) ECR I-4529 par. 39 - 40

[176] *Behrens, Peter,* Abschied vom *more economic approach*? Recht, Ordnung und Wettbewerb – Festschrift für Wernhard Möschel zum 70. Geburtstag, Baden-Baden 2011, 7.

"The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers."[177]

In this paragraph, the competition process is put into a causal relation with consumer welfare and the efficient allocation of resources.[178] Accordingly, it could be concluded that Art.101 (1) TFEU should protect competition *because* it creates (allocative) efficiency *and not (only) when* it creates efficiency (or consumer welfare) in an individual case.[179]

From a perspective of administrative manageability, if one would follow the "More Economic Approach" in the assessment of Art.101 (1) TFEU as suggested by critics above, this would probably lead to an inefficient use of public resources (see also above I. B. 4.): Considering that 99 out of 100 agreements of a certain category are restrictive of competition, it is not efficient, and therefore not in the interest of EU citizens, to undertake a broad effects-analysis for every case in order to find out the one exceptional case, which is actually not restrictive.[180] For such *necessarily restrictive* agreements the burden of proof is therefore shifted to the companies engaged in the practice.[181]

Moreover, such an approach would clearly mitigate the deterrence effect of the objects category, which is one of the main reasons for the distinction between object and effect

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[177] Commission Guidelines on the application of Article 81(3) of the Treaty, (2004), par. 13.

[178] *Behrens, Peter,* Abschied vom *more economic approach*? Recht, Ordnung und Wettbewerb – Festschrift für Wernhard Möschel zum 70. Geburtstag, Baden-Baden 2011, 4.

[179] *Eilmansberger, Thomas,* Verbraucherwohlfahrt, Effizienzen und ökonomische Analyse – Neue Paradigmen im europäischen Kartellrecht? ZweR 2009 437ff

[180] *Kolstad, Olav,* Object contra effect in Swedish and European competition law, 2009, 56.

[181] *Odudu, Okeoghene,* Restrictions of competition by object – What's the beef? Comp Law 2008, 15.

infringements (see above I. B. 4.). In this regard, one could take the example of a driver under influence of alcohol, brought forward by AG Kokott (see above I. B. 3):

No one (except from the driver indeed) would suggest that in the case of a traffic control, a clearly drunken driver should escape prohibition by arguing that no one has been hurt by his conduct. The only argument available could be that the alcohol measuring device of the police did not function properly, i.e. that the dangerous conduct itself is not given. Arguments on the effects will be however irrelevant for this type of offence. The deterrence effect is clearly linked to the classification as a risk offence: Before getting into the car the drunken driver thinks in the first place about potential police controls and not about what danger he might represent for him and his environment. Considering the huge and diverse economic damage (see I. B. 1) produced by cartels, mitigating the deterrence effect of Art.101 (1) TFEU, would probably be very harmful for consumers and society as a whole.

Summary and Conclusions

In order to find out what a restriction of competition is, it is crucial to notice that the distinction between restrictions by object and restrictions by effect entails a two-stage assessment of Art.101 TFEU, meaning that once an anticompetitive object is identified there is no need to prove actual negative effects.

This is mainly due to three factors:

1) Without the two-step test the wording of the Treaty would make not much sense. Otherwise the legislator would have to replace the conjunction "or" by the conjunction "and", creating cumulative instead of alternative elements.

2) According to settled case-law the aim of competition law is not only to protect consumers from *allocative* inefficiency in an individual case, but also to prevent from distortions of competition as such, which generally means the structure of the market and the process of competition. This is also based on the fact that the negative effects resulting from a restriction of competition are diverse and complex and, as for instance the reduction of the pressure to innovate, often very difficult to measure.

3) The bifurcated structure of Art.101 TFEU which considers efficiency gains and positive effects for consumers under Art.101 (3) TFEU: Under this provision, an agreement, *despite considered as restrictive* under Art.101 (1) TFEU, may be exempted if the advantages outweigh the negative impact. A *rule of reason* approach within Art.101 (1) TFEU would lead this structure *ad absurdum*.

The case-law of the ECJ is clear in that regard. Especially in *GlaxoSmithKline* and *T-Mobile*, the Court rejected attempts from the CFI or respectively the Dutch Court to apply a *rule of reason* or *more economic approach* in Art.101 (1) TFEU.

Whereas the anti-competitive effects of an agreement are either measured *ex post*, or predicted *ex ante* by means of economic tools, a restriction of competition is legally presumed.

This presumption of illegality shifts the burden of proof to the investigated company. In order to clarify the concept of a restriction by object, the rationale behind the distinction between object and effects infringements has to be analysed:

1) The object category is based on the fact that some agreements are restrictive by their *very* harmful *nature* in economic terms, i.e. a *prima facie* evidence of the negative economic impact of the agreement is established. This logic becomes especially clear in BIDS, where the Court justified the distinction between object and effect restrictions on the fact, "*that certain forms of collusion between undertakings can be regarded by their very nature, as being injurious to the proper functioning of normal competition".*[182] The economic theory explains that when cartelists agree to limit their production they will always rationally behave like a profit maximising monopolist, i.e. consumers will get less and pay more. For instance, prices are around 16 % higher in a cartel situation, than under competitive conditions. However, not only *allocative inefficiency* results from cartels as aharm to consumers and society, but also *productive* and *dynamic inefficiency*.

2) Restrictions by object are furthermore a useful tool to implement policy priorities as market integration, which can be for instance illustrated by the ECJ's judgment in *Football Association Premier League: "agreements which are aimed at partitioning national markets according to national borders or make the interpenetration of national markets more difficult must be regarded"*[183]

3) The rationale behind the object category becomes clear from a legal dogmatic point of view by comparing restrictions by object to risk offences: Regardless of whether in an individual case speeding on the road had lead to a traffic collusion or not, the dangerous conduct of speeding is itself prohibited. Of course consumers should be protected from *allocative inefficiency*, but the legal interest should not

[182] *ECJ*, C-209/07, Competition Authority v. Beef Industry Development Society and Barry Brothers,(2008) ECR I-8637, par. 17.

[183] *EC J*, C-403 & 429/08, Football Association Premier League Ltd, (2011), par. 139.

automatically be confused with the prohibited behaviour. This reflects the sometimes difficult distinction between object and effect restrictions.

4) The objects approach is an administrable approach since *"resources of the competition authorities and the justice system"* are conserved by excluding the assessment of the actual effects.[184] For the companies it is easier to anticipate if an agreement will infringe Art.101 (1) TFEU under the object approach, which promotes deterrence, one of the main success factors of an efficient competition policy.

In the case of object infringements, when presuming the anticompetitive effects of an agreement regard must be paid "*inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part*".[185]

1) The identification of an anticompetitive content can be achieved by using the formulas provided by the case-law of the ECJ and by relying on the examples in the Treaty and the so-called "hardcore restrictions" listed in the BER. Though these concepts might most of the times overlap, this is not automatically the case and there is no exhaustive list of object restrictions, neither in primary nor in secondary law sources.

2) The formulas applied by the ECJ to find out a restriction by object are, generally speaking, all based on the test laid down in *Société Minière*. The subsequent case-law develops and nuances the terms applied by the Court back in 1966, as for instance in *BIDS* speaking of infringements by object *"where the necessary consequence of the agreement was the restriction of competition,"*[186] or in *T-Mobile,*

[184] Opinion of AG Kokott, (2009) ECR I-4529, par. 43.

[185] *ECJ*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v. Commission, (2009) ECR-I9291, par. 58.

[186] *ECJ*, C-209/07, Competition Authority v. Beef Industry Development Society and Barry Brothers,(2008) ECR I-8637, par. 17.

where the ECJ considers agreements capable of restricting competition in an individual case as anticompetitive objects.

3) Both the content and the intent can build the base for presuming anticompetitive effects. In *BIDS*, the ECJ qualified the scheme as *"intended to encourage the withdrawal of competitors*" and therefore restrictive by object.[187]

The question if and how the legal and economic can constitute a base for a rebuttal of the legal presumption.

1) The legal and economic cannot only contribute to find out the anticompetitive content or intent of an agreement, but also to rebut this fact. This is acknowledged by the Court in *BIDS* and *Football Association Premier League*: The agreement is deemed to restrict competition if the parties cannot put forward "*any circumstance falling within the economic and legal context of such clauses that would justify the finding"*[188]

2) However, the settled case-law of the ECJ confirms that the legal and economic context should only build a base for a rebuttal within Art.101 (1) TFEU, insofar as it eliminates competition in a certain area, which leaves, in fact, no more space for companies to restrict competition.

3) In *Pierre Fabre* the ECJ, generally speaking, accepts *objective justifications* for restrictions by object. This is closely linked to the question whether a legitimized purpose can justify a restriction by object, which is in principal denied by the Court. Nonetheless, some authors may see in this terminology a shift back of the burden of proof to the Commission, which would have conduct a truncated Art.101 (3) TFEU assessment within Art.101 (1) TFEU. This, however, is contested by other authors (and the ECJ itself which underlined in Pierre Fabre that it sticks to the bifurcated structure of Art. 101 TFEU), who interpret the wording of the Court in the light of the Commission's approach in its Guidelines on Vertical Restraints

[187] Ibid, par. 31.

[188] *EC J*, C-403 & 429/08, Football Association Premier League Ltd, (2011), par. 143.

accepting objective justifications in cases where a public law good (such as health) is jeopardized. This view not only in line with preceding case-law, but also with the final outcome in *Pierre Fabre:* The Court did not find any objective justification (the prestigious image was not accepted as a legitimate aim) for the ban on internet sales. (Indeed, the danger for consumers to buy shampoo via the internet must be quite difficult to prove).

An exemption of a restriction by object under Art.101 (3) TFEU is theoretically possible, as for instance described by the Commission in the framework of the restructuring in *BIDS.* However, the cases are very limited, since restrictions by object are by *their very nature* unlikely to produce efficiency gains and, at the same time, to enhance consumer welfare.

The recent case-law of the ECJ on restrictions by object on the one hand is considered by critics as a disconnection to the More Economic Approach or Effects-based Approach. The Court is criticised, when dealing with object restrictions, to not take into account the actual economic effects of the agreement and to apply a large scope of the object category.

This could be questioned firstly by considering the reasons for the two-step test (huge economic damage therefore consideration of object infringements as a risk offences, important deterrence effect). Secondly not only would such an approach represent a breach with the precedent case-law, but also it is not clear when reading the Guidelines of the Commission if the More Economic Approach really aimed to implement a further element, namely the actual effects on consumer welfare, to be assessed within Art.101 (1) TFEU. Rather, the logic seems to persist, that Art.101 (1) TFEU should protect competition *because* it creates (allocative) efficiency *and not (only) when* it creates efficiency (or consumer welfare) in individual casse.[189]

A more economic assessment of Art.101 TFEU may be understood in a different way: Behrens for instance suggests to supplement the traditional economic theories, as the *homo oeconomicus,* by new approaches. For example, pursuing the concept of *bounded rationality*, one should consider in the evaluation of the market conduct of a company

[189] *Eilmansberger, Thomas*, Verbraucherwohlfahrt, Effizienzen und ökonomische Analyse – Neue Paradigmen im europäischen Kartellrecht? ZweR 2009, 437ff

aspects like transactions costs, incomplete information and the uncertainty of the reaction of the competitors.[190] What is certain, is that there is a need for further clarification from both the Commission and the ECJ (what exactly could be understood by objective justifications?) in order to safeguard legal clarity as to what qualifies a restriction of competition by object.

[190] *Behrens, Peter,* Abschied vom *more economic approach*? *Peter Bechthold et.al.*, Recht, Ordnung und Wettbewerb – Festschrift für Wernhard Möschel zum 70. Geburtstag, Baden-Baden 2011, 8.