Rivista Italiana di Antitrust
Italian Antitrust Review
N. 3 (2015)
Articles

THE CONUNDRUM OF RESTRICTIONS "BY OBJECT": RATIONALE, SCOPE, IMPACT AND A PROPOSAL

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Keywords: Object, effect, hard-core, restriction, competition

Abstract: *The distinction between restrictions "by object" and "by effect" has re-surfaced in the last few years as a central issue in the EU competition debate in parallel with a number of recent decisions by the Court of Justice. This is still a largely unresolved and, admittedly, quite confusing area, which may appear surprising given its crucial, central role within EU antitrust law. Without any ambition of systematically going through the vast literature on the topic, the aim of this article is, moving from the legal rationale underlying the antitrust assessment of agreements/concerted practices, to propose a framework of analysis for determining when a "restriction by object" is the right category to use. For this purpose, the key role of this distinction in the EU competition system and the major ambiguities contained in the Court of Justice statements around the "object/effect" dichotomy will be outlined, thereby attempting a general schematization of the main positions on the issue. A proposed framework of analysis will then be illustrated, arguing that the key criterion to be followed is the likelihood of anticompetitive effects and, through this, it is possible to differentiate between hard-core/"naked" infringements, (other) object restrictions (requiring a well construed theory of harm to show likelihood of effects) and effects restrictions (ascertained on the based of full empirical analysis). In practice, a four-step test is proposed: i) verify whether the alleged infringement could be classified as "hard-core"; in the negative, ii) proceed by testing whether there is a clear likelihood of anticompetitive effects; then, absent this, iii) make a deeper/empirical effects analysis; finally (in all cases) iv) verify whether Art. 101(3) may play any role. The proposed approach will also be tested on some specific types of infringements.*

1. INTRODUCTION

The distinction between restrictions "by object" and restrictions "by effect" has re-surfaced in the last few years as a central protagonist in the EU competition debate. This renewed interest in one of the central pillars of the EU antitrust architecture has been mostly attributed to a number of recent decisions of the European Court of Justice[3] (*ECJ*). The

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[1] Lawyers.

[2] We would like to thank Cecilia Carli, trainee at our Firm, for research and drafting assistance as well as their colleagues Joanna Goyder and Alison Jones for their comments and insights. All errors belong exclusively to us.

[3] Case C-67/13 *Groupement des Cartes Bancaires v. Commission* [2014], Judgment by the Court of Justice of 11 September 2014, ECLI:EU:C:2014:2204, para. 49; Case C-286/13 *P Dole v Commission* [2015], Judgment by the Court of Justice of 19 March 2015, ECLI:EU:C:2015:184, para. 113; Case C-345/14, *SIA 'Maxima Latvija' v Konkurences padome* [2015], Judgement of the Court of 26 November 2015.

DOI: 10.12870/iar-11744

question as to the correct boundaries between these two categories of infringement and the related implications has admittedly always remained a grey area, with a growing disconnect between the somewhat stable case law on the point and the increasingly aggressive use of the "by object restriction" tool on the part of the competition authorities. Curiously enough, while the debate has over time focused on the literal wording of the current Art. 101(1) TFEU or of the case law that interpreted it (with rather abstracts formulations), a limited space has been given to its true rationale and what actually Art. 101(1) TFEU was effectively designed to capture.

As it was pointed out almost 100 years ago[4], in relation to the antitrust scrutiny of any agreements or concerted practice "…*the true test of legality should be* […] *whether the restraint imposed merely regulates and perhaps promotes competition or whether it may suppress competition*…"[5]. It is a well-known basic principle that, since every agreement or practice concerning trade normally generates a restraint of the conduct of the contracting parties, what is crucial from an antitrust standpoint is whether the agreement/concerted practice under scrutiny is capable of generating restrictions of competition, that is restrictions affecting the competitive process and, in turn, the welfare of consumers. Without the intention (or need) to enter the even broader debate of what is the actual goal of EU competition laws[6], for the purpose of the subject-matter of this article what counts is that the core criteria for any antitrust analysis of the legality of any agreement or a concerted practice cannot be but the likelihood that such agreement or concerted practice may generate serious effects on the competitive process. In other words, there must be a causal nexus between the conduct being reviewed and its market impact.

The EU Commission (*Commission*) and national competition authorities (*NCAs*) over the years have tended to resort more and more to the category of "object" restrictions provided for by Art. 101 TFEU and its equivalent national provisions, adopting an expansive approach to what a "object restriction" is[7]. This has inevitably resulted into an increasing reliance on what are nothing more than irrebuttable "presumptions" of anticompetitive effects based on the type/nature of the conduct concerned or – in other (often rejected) words – in a wide use of a *per se* prohibition[8]. It is in

[4] Justice Brandeis, member of the Supreme Court of the United States from 1916 to 1939.

[5] ITALIANER, A., "Competitor agreements under EU competition law", speech at the 40th Annual Conference on International Antitrust Law and Policy, Fordham Competition Law Institute New York, 26 September 2013.

[6] Although this debate may be affected by different approaches as to the object/effects divide.

[7] For an overview of the categories of infringements which the Commission has included (in spite of the modernisation changes and move towards a more economic-based interpretation and application of competition law) within this relatively broad category of object restraints, see JONES, A., "Left behind by Modernisation? Restrictions by Object under Article 101(1)", *European Competition Journal* (2010), p.649.

[8] As noted recently by AG Kokott, this is substantially an "anticipation" of the ban by the legal system resembling the rationale underpinning risk offences in penal and administrative law: "…*the prohibition on 'infringements of*

DOI: 10.12870/iar-11744

fact a well-known (basic) EU competition law principle that, once the restrictive "object" has been established, a defence showing that no restrictive effects have been generated would not lead anywhere unless the defence is channeled through Art. 101(3) TFEU, which is the only legal exception that could be used to overcome a finding of illegality under Art. 101(1) TFEU.

The object/effect divide is still a largely unresolved and quite confusing issue, particularly when trying to move away from the theory and apply it in practice in a systematic way. This is surprising given its crucial, central role within EU antitrust law: it may be questioned how it is that a greater consistency and a wider consensus (at least on the fundamental terms of the discussion) has not been reached on a such central, though basic, issue[9]. As noted by the Advocate General Wahl in one of the recent cases that have reinvigorated the debate at issue (*Cartes Bancaires)*[10], the advantages connected with using the "by object" category materialize only if its scope and boundaries are clearly circumscribed; if not, that is if the category is excessively expanded, there could be the risk of over-deterrence, affecting practices that are unlikely to generate restrictive effects, thus inevitably distorting the functioning of the market: that is, exactly the opposite of what antitrust law intends to achieve.

The purpose of this article is to try to shed more clarity on the notion of "object restrictions". This will not be done by going systematically through the vast case law (which, more often than not, is merely repetitive or, worse, confusing, on the point) and limited doctrine on the topic; nor the mentioned recent cases of the ECJ will be subject to a new line-by-line interpretation, as the task has been already done by a number of qualified authors. Rather, the aim of this paper is, moving from the legal rationale underlying the antitrust assessment of agreements and concerted practices, to propose a framework of analysis for determining when a "restriction by object" is the right category to use in assessing agreements/concerted practices. Whilst the overall approach is thus more normative than

competition by object' resulting from Article 81(1) EC is comparable to the risk offences (Gefährdungsdelikte) known in criminal law: in most legal systems, a person who drives a vehicle when significantly under the influence of alcohol or drugs is liable to a criminal or administrative penalty, wholly irrespective of whether, in fact, he endangered another road user or was even responsible for an accident. 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-competitive object; whether in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant" (Opinion of Advocat General Kokott delivered on 19 February 2009, in case C‑8/08, *T-Mobile Netherlands BV and Others*, cit. *supra*, para. 47). For the sake of clarity, object restrictions do not lead to a full presumption of the existence of anticompetitive effects: these cannot be deemed to exist (if not proven), e.g. for the purpose of identifying the seriousness of the conduct and relatedly setting the fine.

[9] Cfr. VALENTE, M., "Drawing a line in the sand? The Court of Justice's Cartes Bancaires judgement", *Competition Law Journal* (July 2015), p. 91. In the article the Author quotes HOLLEY, D. L., stating "*…it was in 1962 that EEC competition lawyers began asking themselves in earnest by what criteria a contractual restriction should be judged under art 85(1) of the EEC Treaty. They are still asking the question*".

[10] Case C-67/13 P *Cartes bancaires v Commission* [2014], Conclusions of AG Wahl, para. 36.

DOI: 10.12870/iar-11744

descriptive, the authors believe that the proposed framework is perfectly compatible with the most recent developments of the case law of the ECJ and that, accordingly, competition authorities could and should adopt it in order to improve the robustness and, most importantly, the correctness of their decision-making process.

This article is structured as follows: it will first outline why the question under debate is key in the EU competition system (Section 2); it will then highlight some ambiguities contained in the ECJ case law around the "object/effect" distinction (Section 3), and attempt a general (and abstract) schematization of the existing main positions on the issue (Section 4). It will finally illustrate the proposed framework of analysis (Section 5), also applying it in the context of some exemplificative, specific typologies of infringements (Section 6).

The focus, in terms of jurisdictional coverage, will clearly be EU law, but references to Italian law, as well as few comparisons with the US antitrust tradition, will also be included where opportune.

2. THE CONSEQUENCES AND PRACTICAL IMPORTANCE OF THE "OBJECT/EFFECT" QUALIFICATION

The above introductory notes set the stage for outlining the key legal implications connected with the distinction between "by object" and "by effect" restrictions. Far from being a merely academic debate, the concrete consequences stemming from this distinction are significant. Whilst any lack of clarity around the scope of a legal concept creates some ambiguity at the margin, the distinction at issue, given its central features, is rather capable of generating genuine legal uncertainty on the economic behaviour that are or could be permissible. Thus, it seems evident that any effort to come up with a systematic interpretation of this distinction needs to be coordinated with the necessity to provide legal certainty to the market players and, in particular, with the goal of avoiding chilling pro-competitive behaviour.

The issue assessed in this article has in fact a material direct impact on the substantive assessment that the relevant competition authority has to make (beside the implications on the parties' defence rights). Indeed, the distinction between "by object" and "by effect" infringements could be considered a sort of *fil rouge* which imbues the very substance of the proceedings concerning a violation of Art. 101 TFEU, and encompasses its main elements, such as the burden of proof, the application of Art. 101(3) TFEU legal exception, the application of the block exemptions and of the *de minimis rule*, the possibility for companies subject to investigation to see commitment solutions accepted, as well as the evaluation of seriousness/gravity of the infringement and related consequences.

i) Relevance of the object/effect restriction for the burden of proof

As it is well known, Art. 2 of Reg. 1/2003 provides the general procedural rule according to which "... *the burden of proving an infringement* [...] *shall rest on the party or the authority alleging the*

DOI: 10.12870/iar-11744

infringement…", whilst, in turn, it would be for the accused undertaking to show that the legal exception contained in Art. 101(3) TFEU applies.

In principle, moving a restriction outside of the "object box"[11] has thus a direct impact on the burden of proof. We say "in principle", as the degree of such impact will ultimately depend on what is truly a "by object" restriction meant to be, and what this entails in terms of analysis/evidence required from the authority. In any event, it is clear that reducing the scope of the "object box" will in practice imply, at the very least:

a) for any competition authority, more complexity for the establishment of an infringement of Art. 101(1) TFEU, which should however be traded off with more accuracy in its findings; and

b) for the accused undertaking, the possibility to defend itself showing that conduct is unlikely to generate any anticompetitive impact, as well as more simplicity in invoking the application of Art. 101(3) TFEU[12,13].

As it will be seen, some decisions and judgments have arguably relaxed the standard required to prove the existence of a restriction by object, thus potentially expanding the content of such "box", contributing to a potential imbalance of the entire system. The ascertainment of an object restriction in fact gives rise – as indicated above – to an irrebuttable "presumption" of the existence of appreciable anti-competitive effects, in the sense that the likelihood of their materialization does not need to be proved for the purpose of establishing a breach of Art. 101 TFEU. Last but not least, relevant implications could arise also from a "due process" standpoint, it particular in relation to the right of defense of the enterprises under investigation.

A proper distinction between "object" and "effect" restrictions is thus crucial to avoid an overreliance on presumptions by the relevant regulator as well as to rebalance the burden of proof between the enforcer and the parties.

ii) Relevance of the object/effect distinction for the application of 101(3) TFEU

Art. 101(3) TFEU contains an efficiency exception allowing undertakings to shield restrictions from the application of Art. 101(1) TFEU under certain conditions. Under Reg. 1/2003, the related (high) burden of proof is on the undertaking invoking it, which has to

[11] This depiction has been famously made by Professor Whish (now in WHISH, R. and BAILEY, D., *Competition Law*, 7th ed., Oxford, 2012, p. 120) and subsequently accepted by most commentators as a short-cut to the debate at issue. See also KING S., *"The object box: law, policy or myth?*", *European Competition Journal* (2011).

[12] It is clear that, under EU competition law, it has always been theoretically possible to invoke the application of Art. 101(3) TFEU also in relation to restrictions "by object". It is however a common view, including of the Commission (see Staff Working Document on the De Minimis notice) that, once an authority has concluded, even on a preliminary basis, that the restriction being investigated is "by object", the odds of a successful application of Art. 101(3) TFEU become very slim.

[13] HARPER, P., "Groupement des cartes bancaires judgement – rolling back on the expansion of by object infringements", *Competition law Review* (2014).

DOI: 10.12870/iar-11744

substantiate its claims with empirical evidence[14]. Once the restrictive object of the restriction has been proven, and assuming that no defences of ancillary[15]/"regulatory ancillarity"[16] are available, the argument that efficiencies generated by the agreement will offset its restrictive effects is the only possible defence left for undertakings. However, once the restriction is qualified on the basis of its object alone, as said the likelihood of satisfying the conditions for Art. 101(3) decreases dramatically.

Despite the technical availability of Art. 101(3) TFEU for all restrictions of competition by object, the truth is that, in practice, agreements containing such restrictions are rarely exempted. It is a fact that the very existence of an object restriction leads to the strong perception that satisfying the conditions for Art. 101(3) is highly unlikely[17]. The *Expedia*[18] ruling has made it even clearer emphasizing that, as "by object" restrictions are by their very nature "*…injurious to the proper functioning of competition* […] *independently of any concrete effect that it may have…*", the trade-off analysis required under Art. 101(3) TFEU between the negative and positive effects of a restriction on competition becomes *ictu oculi* very difficult.

[14] It has to prove: i) the relevant efficiency, capable of exceeding the negative effect of the restriction, ii) demonstrating that such efficiency could not be generated without the relevant restriction, that iii) the related benefits will accrue in large part to the consumers and iv) that competition would not be eliminated from the market.

[15] See the often forgotten para. 29 of the EU Commission's Notice, *Guidelines on the application of Article 81(3) of the Treaty* (2004/C 101/08): "*In Community competition law the concept of ancillary restraints covers any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it. If an agreement in its main parts, for instance a distribution agreement or a joint venture, does not have as its object or effect the restriction of competition, then restrictions, which are directly related to and necessary for the implementation of that transaction, also fall outside Article 81(1). These related restrictions are called ancillary restraints. A restriction is directly related to the main transaction if it is subordinate to the implementation of that transaction and is inseparably linked to it. The test of necessity implies that the restriction must be objectively necessary for the implementation of the main transaction and be proportionate to it. It follows that the ancillary restraints test is similar to the test set out in paragraph 18(2) above. However, the ancillary restraints test applies in all cases where the main transaction is not restrictive of competition*".

[16] WHISH, R. and BAILEY, D., *Competition Law*, cit. *supra*, p. 130 and ss. Professor Whish analyses the Wouters case in which the ECJ deemed appropriate to establish that "reasonable" regulatory rules fall outside Art. 101(1) insofar they are necessary to achieve a legitimate public interest.

[17] See Communication from the Commission, *Guidelines on the application of Article 81(3) of the Treaty* (2004/C 101/08), para. 46: "*However, severe restrictions of competition are unlikely to fulfil the conditions of Article 81(3). Such restrictions are usually black-listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices*".

[18] See case C-226/11, *Expedia Inc. v Autorité de la concurrence and Others* [2012], Judgment by the Court of Justice of 13 December 2012, ECLI:EU:C:2012:795. In particular at para. 27-36 of the judgment the ECJ affirms that "*…the Court has emphasised 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. It must therefore be held that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.*". In practice, an appreciable effect is presumed for by object restrictions. See on this point BUSHELL, G. and HALEY, M., "Expedia: the de minimis notice and "by object" restrictions", *Journal of European Companies Law & practice* 4.3 (2013), p. 224-226.

DOI: 10.12870/iar-11744

Thus, it has been argued that in the absence of clear guidance as to the circumstances in which the legal exception could apply to restrictions "by object", the expansion of the "object box" means that companies might be more inclined to abandon very early potentially welfare-enhancing business initiatives once the advisors have explained the risks of them being characterized as "restriction by object". This has even led some commentators to speak about the "*slow death of Article 101(3)*"[19].

iii) Relevance of the object/effect distinction in relation to the de minimis rule and the block exemptions

The object/effect dichotomy is relevant also for the proper application of the various EU Commission's notices and guidelines, to the extent they derive some consequences from this distinction.

As it is known, the very recent *De minimis* Notice[20] provides for market share "safe harbour" thresholds for the parties to an agreement/concerted practice below which a restriction is not considered "appreciable", and therefore does not fall under Art. 101(1) TFEU[21]. The "safe harbours" provided in the new *De minimis* Notice however do not apply to restrictions by object[22], as these are assumed to be always generating an "appreciable" restriction of competition. For this very reason, given its far reaching practical implications, the new *De minimis* Notice has been accompanied by a Commission Staff Working Document (*SWD*)[23] offering some guidance on the notion of restrictions of competition "by object". Whilst this document provides some theoretical insights on what a restriction "by object" is, the SWD could also be seen as the

[19] See LAMADRID, A., "The Slow Death of Article 101(3)", *Chillin' Competition blog*, available at http://chillingcompetition.com/2011/10/28/the-slow-death-of-article-1013/, and ADKINS, B. and BEIGHTON, S., "An Object of Interest*", Competition Law Insight* (2014).

[20] Communication from the Commission – *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the treaty on the Functioning* OJ C 291/2014 of 30 August 2014.

[21] *Ibidem*, para. 11.

[22] Para. 2, de Minimis Notice indicates that "…[t]*he Court of Justice has also clarified that an agreement which may affect trade between Member States and which has as its object the prevention, restriction or distortion of competition within the internal market constitutes, by its nature and independently of any concrete effects that it may have, an appreciable restriction of competition . This Notice therefore does not cover agreements which have as their object the prevention, restriction or distortion of competition within the internal market…*". The subsequent para. 13 further clarified that "…*this Notice does not cover agreements which have as their object the prevention, restriction or distortion of competition within the internal market. The Commission will thus not apply the safe harbour created by the market share thresholds set out in* [the notice]. *For instance, as regards agreements between competitors, the Commission will not apply the principles set out in this Notice to, in particular, agreements containing restrictions which, directly or indirectly, have as their object: a) the fixing of prices when selling products to third parties; b) the limitation of output or sales; or c) the allocation of markets or customers. Likewise, the Commission will not apply the safe harbour created by those market share thresholds to agreements containing any of the restrictions that are listed as hardcore restrictions in any current or future Commission block exemption regulation, which are considered by the Commission to generally constitute restrictions by object….*".

[23] Commission Staff Working Document, *Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, Accompanying the Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*, C(2014) 4136 final.

DOI: 10.12870/iar-11744

culmination of a trend aimed at extending the use of the restriction "by object" category[24], which is expressly stated to include exchanges of information on future prices, the ban on selling via Internet distribution systems, reverse payment settlements and co-promotion agreements in the pharmaceutical sector[25]. Whilst the SWD has just an informative nature, it clearly shows how the Commission envisages an on-going expansion of the "object box".

The object/effect dichotomy should instead have no practical impact on the application of block exemption regulations (*BERs*). Most notably, Articles 4 and 5 of the Vertical BER (*VBER*)[26] identify restrictions that remove the benefit of the block exemption, respectively for the whole agreement and for the single clause containing them. In particular, among the "black-listed" (under Art. 4) restrictions, the VBER lists the so-called "hard-core" provisions (in particular resale price maintenance and passive sales limitation), which are (at least) a sub-group of restrictions by object. The same is true for the Technology Transfer Block Exemption and the Specialisation Agreements Block Exemption[27]. Differently from the *De Minimis* Notice, no explicit reference is made in there to the "object" category setting it apart from the "effect" category as such and, accordingly, the object/effect *discrimen* should in principle not play any particular role here.

iv) Relevance of the object/effect distinction for the availability of commitments

The recourse to commitment decisions has been on a steady growth path: they are considered as a rapid solution in certain appropriate cases based on considerations of procedural economy, as they permit a timely intervention especially in the case of rapidly-evolving markets as well as an effective use of resources for the prosecuting agency. It therefore seems that this "tool" is most useful when the alleged infringements not only are not as serious (thus not "deserving" a fine), but also when the degree of complexity is particularly high and time-consuming to sort out: in other words, commitments are primarily suited for "by effect" infringements and not for "by object" restrictions.

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[24] This appears to be particularly true in regard of the original (2014) version of the SWD (eventually replaced in 2015 with an updated version), which provided for a even larger list of object infringement (and was for this reason heavily criticised).

[25] See on this point PAZZI M. G., "The review of the De Minimis Notice", *Italian Antitrust Review*, 3 (2014).

[26] See Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices and Commission Notice, *Guidelines on Vertical Restraints*, C(2010) 2365.

[27] See Commission Regulation No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, Art. 4; and Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, Art. 4. See also Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements Text with EEA relevance, Art. 5 ("*Hardcore restrictions*").

Accordingly, even if EU Regulation no. 1/2003 does not provide any explicit exclusion of commitments for a certain category of restrictions, the Commission has clarified, in light of Recital 22 of the same Regulation no. 1/2003, that commitments can be accepted if "…*the case is not one where a fine would be appropriate* (*this therefore excludes commitment decisions in hard-core cartel cases*)"[28]. Reference is again made to the narrower hard-core restrictions category, and not to the wider "object box".

The Italian relevant law (Art. 14-*ter* of Law no. 287/1990) equally does not exclude the possibility of recurring to commitments in case of object restrictions. In its practice, the Italian Antitrust Authority (*IAA*) has then shown that, save in relation to hard-core cartels[29], commitments decisions are possible for all type of infringements, thus for instance allowing commitments solution even for RPM conducts[30].

It thus goes without saying that a clear definition and a coherent practical application of what a hard-core restriction is, and by implication how wide the "object box" is, has a clear impact on the possibility for the defendant to propose or not such commitments.

v) Relevance of the object/effect restriction for the gravity of the infringement

The distinction between "object" and "effect" is also directly relevant for the proper assessment of the gravity of the infringement and, as the case may be, for the magnitude of the related fine.

Under the Commission Notice on fines[31], in relation to the basic amount of the sanction it is in fact provided that, amongst the relevant elements to be considered to such end lies the "…*nature of the infringement*…", which clearly also refers to the "by object"/"by effect" divide. Any expansion of the "restriction by object category" would thus inevitably be reflected in the increase in the level of the fines to be imposed. A substantially similar consequence would derive also from the application the relatively recent IAA's guidelines on fines[32].

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28 EU Commission MEMO/04/217 of 17 September 2004 http://europa.eu/rapid/pressrelease_MEMO-04-217_en.htm

29 FATTORI, P. and TODINO, M., *La disciplina della concorrenza in Italia*, Bologna, 2004, p. 434 and case law thereby mentioned within footnotes.

30 See for example case I718 *Enervit - Contratti di distribuzione* [2014], Decision by the Italian Antitrust Authority of 9 July 2014, and I766 *Inverter solari ed eolici – imposizione prezzi minimi* [2014], Decision by the Italian Antitrust Authority of 2 July 2014, in which the IAA accepted commitments from the company to amend its distribution contracts throughout Europe, in particular eliminating exclusivity provisions and without exerting influence over retail prices.

31 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation no. 1/2003(2006/C 210/02).

32 *Linee Guida sulla modalità di applicazione dei criteri di quantificazione delle sanzioni amministrative pecuniarie irrogate dall'Autorità in applicazione dell'articolo 15, comma 1, della legge n. 287/90*, Resolution by the Italian Antitrust Authority of 22 October 2014, no. 25152.

DOI: 10.12870/iar-11744

Clarifying the distinction between hard-core, by object and effect restriction could thus help avoid distortions also in relation to the setting of fines.

3. Confusion and inconsistencies in the case law on the object/effect divide

Having outlined the main antitrust areas that would directly benefit from a clarification of the scope of the "object box", we now turn to address the issue of why such concept, despite its crucial role, remains to this day ambiguous in its contours. We believe that this uncertainty is entrenched in the concrete approach followed by the Commission (and NCAs) both in antitrust proceedings and also in its soft law guidance. In light of the clear fact-finding and investigative advantages that qualifying a given practice as an "object restriction" has, competition authorities have a natural tendency to broaden the scope of the "object box", stretching it to its limits. The General Court and, most importantly, the ECJ, should step up their scrutiny of the object/effect dichotomy in a way that both reflects the true legal rationale behind its original introduction in the Treaty of Rome and takes into account the substantial implications that an unduly expansion of the "object box" could create.

Without any ambition of being exhaustive, it is important to briefly go over the various wording that over the years have been used to try to identify the scope of the category of "by object" restrictions.

The formula traditionally adopted by the EU Courts is that restrictions of competition by object are those that "…*by their very nature have the potential to restrict competition…*"[33] (emphasis added): thus, the mere potentiality of competitive harm would seem to suffice. A substantially identical wording has been followed by the Commission. For example, in its Guidelines on Art. 101(3) TFEU, as well as in its Horizontal Guidelines, the Commission states that "…*restrictions of competition by object are those that by their very nature have the potential of restricting competition.*…"[34]. Thus, in order to include a restriction within the "object" box, one could argue that it would be necessary to show that restrictive effects are at least likely (i.e. "potential"), whilst the mere possibility should not do the trick (i.e. "possibility").

However, this wording is far from being as clear as it may appear at first sight. For example, in the same document the Commission has then clarified that it means "…*such a high potential of negative effects on competition that it is unnecessary to demonstrate any actual effects on the market*". In the same Guidelines the Commission justifies the

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[33] See e.g. Case C-209/07 *Beef Industry Development Society and Barry Brothers (Carrigmore) Meats* [2008], Judgment by the Court of Justice of 28 November 2008, ECLI:EU:C:2008:643, para. 17; Case C-8/08 *T-Mobile Netherlands and Others* [2009], Judgement by the Court of Justice of 4 June 2009 ECLI:EU:C:2009:343, para. 29; Case C-226/11 *Expedia v Autorité de la concurrence and Others*, cit. *supra*, para. 36.

[34] Communication from the Commission, *Guidelines on the Application of Article 81(3)*, (OJ 2004/C-101/97), para. 21; Communication from the Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (OJ 2011/C 11/01), para. 24.

DOI: 10.12870/iar-11744

presumption of harm for object restrictions due to their "…*serious nature*..." and to past experience "…*showing that restrictions of competition by object are likely to produce negative effects on the market*…" (para. 21). In other words, it would seem that, simply using the above passages as the basis for the relevant legal test, in order to qualify a certain practice/agreement as a "restriction by object", a competition authority would need to prove, first of all, its particular pernicious "nature"; and, secondly, that, given such "nature", there is a "high potential" or that it is "highly likely" that negative effects on the market will be generated. Whilst the "serious nature" of an infringement requires a qualitative assessment which in itself may either create more uncertainties or lead to a narrow category of "by object" restrictions (essentially coinciding with the mentioned "hard-core" or naked infringements), the assessment of the criteria of the likelihood of the potential effects associated with a given practice or agreement would seem in line with the need to include in the "object box" only those restrictions which, if implemented, would effectively impact on the competitive process.

More recent case law has instead taken what, at least *prima facie*, appears to be a different (somewhat looser) standard. In particular, in the landmark *T-Mobile* case, the ECJ, after having reaffirmed that for a "…*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*[35], it has then further explained in the same decision that "…[i]*n 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 distortion of competition within the* [internal] *market*…"[36]. If left to their own literal meaning, these two paragraphs would appear contradictory, as whilst the former puts emphasis on the potential/probability of determining an impact on the market, the second one simply considers sufficient the capability (i.e. the possibility) of an infringement to create negative effects, irrespective of whether these are likely or not.

This "capability of generating restrictive effects" test, that is the "mere possibility" of generating restrictive effects, substantially coincides with the position taken by the Italian Antitrust Authority in a number of its decisions, where reference is made to the "*capability*" (or, in Italian, "*idoneità*") of the conduct of simply "…*producing effects*"[37], or of "…*distorting competition on the market*"[38]. Thus, according to this case law, it would seem sufficient that the practice/agreement at issue has the "possibility" of generating negative effects on competition, apparently irrespective

[35] Case C-8/08 *T-Mobile Netherlands and Others*, cit. *supra*, para. 31.

[36] *Ibidem*.

[37] Case I759 – *Forniture Trenitalia*, Decision of the Italian Antitrust Authority of 27 May 2015, no. 25488, para. 278.

[38] Case I776 – *Mercato della produzione del poliuretano espanso flessibile*, Decision of the Italian Antitrust Authority of 10 June 2015, no. 25512, para. 99; case I701 – *Vendita al dettaglio di prodotti cosmetici*, Decision of the Italian Antitrust Authority of 15 December 2010, no. 21924, para. 254.

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of any degree of likelihood that this will effectively happen.

An attempt at reconciling the various expressions adopted on the object/effect dichotomy has been recently tried by the staff of the Commission, and has been reflected in the SWD accompanying the *De minimis Notice* (see above). In this working document, restrictions "by object" are identified as those that "…*by their very nature have the potential to restrict competition* [and][…] *have such a high potential for negative effects on competition*…"; it is then concluded then that "…*such restrictions are likely to produce negative effects on the market*…". Thus, the same (not entirely consistent) expressions seen above are also recalled in this document, somewhat as if they were part of a clear framework of principles, and where the likelihood of effects is brought back as a constituent element of any restriction "by object".

The ECJ has then further elaborated on the concept, indicating that, to qualify as a restriction by object it must be shown that its "…*effect on competition to be sufficiently deleterious*…"[39], and "…*injurious to the proper functioning of normal competition*…"[40], such as that there is "…*no need to take into account of the concrete effects*…"[41]). Thus, indicating that not any negative effects on competition would be sufficient to prove to the required legal standard that the practice/ agreement under scrutiny is a restriction by object, but only those effects that are "sufficiently deleterious" and "injurious".

A similar wording (rather than that related to the "*potential*" or "*capability*" of anticompetitive effects) seem indeed to have been preferred by the latest judicial "episodes" of the object/effects "saga" (i.e., the cited *Card Bancaire* and *Maxima Latvija* decisions), referring *inter alia* to "…*types of coordination between undertakings* […] *regarded, by their very nature, as being harmful to the proper functioning of normal competition*"[42]; and "*reveal*[ing] *in itself a sufficient degree of harm to competition for it to be considered that it is not appropriate to assess its effects*"[43]; as well as "…*considered by their nature as likely to have negative effects*"[44].

Finally, the ECJ consolidated case law has affirmed that the parties' intention is not a decisive aspect, but remains indeed a significant element that could be considered[45].

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[39] Case C-56/65 *Société Technique Minière* [1966], Judgement by the Court of Justice of 30 June 1966, ECLI:EU:C:1966:38, para. 249; C-226/11, *Expedia v Autorité de la concurrence and others,* cit. *supra*, para. 36.

[40] Case C-209/07 *Beef Industry Development Society and Barry Brothers Meats* [2008], cit. *supra*; Case C-8/08 *T- Mobile Netherlands and Others*, cit. *supra*; Case C-226/11, *Expedia v Autorité de la concurrence and others,* cit. *supra*, para. 36.

[41] Case C-56/64 *Consten Grundig* [1966], Judgment of the Court of Justice of 16 June 1966 ECLI:EU:C:1966:41, para. 7.

[42] Case C-67/13 *Cartes Bancaires*, cit. *supra*, para. 50; case C-345/14, *Maxima Latvija*, cit. *supra*, para. 21.

[43] Case C-67/13 *Cartes Bancaires*, cit. *supra*, para. 52; case C-345/14, *Maxima Latvija*, cit. *supra*, para. 20.

[44] Case C-345/14, *Maxima Latvija*, cit. *supra*, para. 19.

[45] Case C-67/13 *Cartes Bancaires*, cit. *supra*, para. 54. At a different level, the intention is also a factor when determining the fine: see Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), para. 29.

Already from the above short, and by any means not exhaustive, illustration of how restrictions by object have been defined over time, the lack of homogeneity or however their overall ambiguity, and thus the significant degree of uncertainty that emerges as soon as one tries to apply them in practice, is apparent.

Further uncertainty stems from the presence of a different category, i.e. that of so called "hard-core/naked" restrictions. As seen, this expression is used for referring to the most serious categories of anticompetitive behaviour, as such unsuitable for any (block) exemption or commitments. Whilst no reference to "hard-core" restrictions is mentioned in the TFEU, this category has found a stable spot in both Commission Notices and Guidelines, as well as, more importantly, in the block exemption regulations. Hard-core restrictions have always been identified with the most serious infringement of competition and considered to be the typical restriction "by object". In this sense, see in particular, in the Commission's Guidelines on vertical restraints[46] (*Vertical Guidelines*), where hard-core restrictions appear to be defined as a subset of the "by object" category[47] and the same is indicated in the recent *De Minimis* Notice[48]. It has been observed, however, that the Vertical Guidelines somewhat "conflate" these two concepts of "hardcore" and "object" restriction, leading to some further confusion around the definition of "hardcore" as a synonym for "object", whilst these should not be interchangeable[49], with one containing the other. In turn, the SWD accompanying the *De Minimis* Notice states that "*…agreements containing one or more "by object" or hardcore restrictions cannot benefit from the safe harbor of the De Minimis notice*": then, in the exemplifying list which follows the wording "*by object or hardcore*" is not always used; for example, where mentioning information sharing or RPM only the expression "object" is used, while considering for example R&D agreements between competitors it is stated that they are "*…also hardcore restrictions and generally considered a restriction by object*"..

4. Object versus effect restrictions: a possible schematization of the main positions

In light of the uncertainties over the domain of the "object" restraints of competition, in this section we will try to provide a summary schematization of the main doctrinal and jurisprudential positions that have been advanced on this topic. Once again, this is not done with the aim of collecting the endless,

[46] EU Commission's Notice, *Guidelines on Vertical Restraints* (OJ C 130, 19.05.2010).

[47] At para. 23 ("*Provided that they do not contain hardcore restrictions of competition, which are restrictions of competition by object…*") and at the following para. 96 ("*Provided that they do not contain restrictions of competition by object and in particular hardcore restrictions of competition…*") of the Vertical Guidelines.

[48] At para. 13.

[49] Goyder, J., "Cet obscur objet: Object restrictions in vertical agreements", *Journal of European Competition Law & Practice*, 2, 4 (2011).

DOI: 10.12870/iar-11744

complex and (in certain cases) authoritative views and positions expressed by commentators or courts over the years. Rather, our aim is to provide a simple outline in order to have a manageable analytical framework for subsequent review.

In this respect, a preliminary clarification seems necessary as to the nature and rationale of the object/effect distinction, since, as we have seen in Section 2 *supra*, this is not neutral to the legal implications which may be attached to each of the two categories of antitrust infringements. In particular, it is our position that the ultimate foundation on which this distinction rests is essentially "quantitative" and not "qualitative"[50]: quite simply, "object restrictions" are deemed more dangerous than those "by effects", that is the former are "more likely" to determine "sufficiently deleterious effects" on competition than the latter. Visually, one could think of a continuum, whereby on one extreme there are the most pernicious restrictions – i.e. the hard-core/naked infringements – whilst on the other end lies the most ambiguous cooperative agreement to be analyzed as a restriction by "effect" and possibly also under Art. 101(3) TFEU.

From a different perspective, this means that all restrictions – whether "by object" or "by effect" – are prohibited for their negative impact on competition, which is either presumed (in case of object restrictions, given the high likelihood of it) or has to be proved (in case of effect restrictions). More in particular, "restrictions by object" are prohibited without the need for actually ascertaining such negative impact *in concreto*. This is presumed and the presumption must rest on the basis of previous findings that a certain kind of infringements will have a "high potential/high likelihood" of generating "sufficiently" negative consequences upon the market. However – and this is a big "however" – until such finding by the ECJ (or a national supreme court, if applying national competition law), any agency intending to qualify a new restriction as a "by object" infringement would have to show the existence for the conduct being reviewed of a "high potential/high likelihood" of generating "sufficiently" negative consequences upon the market. Please note that, in order not to fall in a vicious circle, this type of proof does not, and cannot, equate to showing that the conduct at issue does produce restrictive effects, but only that it is clear that negative effects will likely be generated.

This is consistent with the very institutional purpose of having a "by object" restrictions category, namely to avoid costly and time-consuming analysis of actual or potential effects, in situations where robust and consistent past experience and consolidated economic theories show that the practice

[50] See also LIBERTINI, M., *Diritto della concorrenza dell'Unione Europea*, Milano, 2014, p. 127: "… "*oggetto" ed "effetto" sono dati omogenei, ambedue riferibili alla concreta attitudine di certi comportamenti a restringere la concorrenza, i due termini devono essere intesi in una prospettiva sequenziale, in cui l'"oggetto anticoncorrenziale" è la stessa cosa dell'"effetto anticoncorrenziale", visto però come effetto potenziale e non ancora attuato*…". Whilst the stress on the homogeneity of the two concepts is to be agreed on, the latter sentence does not seem fully in line with EU case law, indicating that even potential effects may be relevant for qualifying an agreement or concerted practice as a restriction by effects.

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always or almost always results in harm to the market[51].

The cornerstones of this approach appear to be now accepted at EU level, with particular regard to the position expressed by the Commission in its soft guidance documents. Moreover, this seems to make a material leap towards completing the convergence with the US "*per se v. rule of reason*" approach[52]. We note that such "quantitative" perspective to the object/effect dichotomy finally departs from the somewhat asserted or implied "qualitative" difference between object and effect infringements, something that – in the view of the authors – represents the ultimate cause of the uncertainty that has developed around this dichotomy.

Having clarified this, the following section attempts a classification of the main positions which have been expressed in the debate at issue. This classification, as it aims at identifying logical boundaries between concepts and thesis instead featuring infinite shades, tends to be framed at a quite abstract level, summarizing the main positions while not necessarily replicating as such a specific author or decision's view.

[51] JONES, A. and SURFIN, B., *EU Competition Law*. 5th ed., Oxford University Press, 2014. p. 57-58. Also in this regard see Commission' Guidelines on Art. 101(3), cit. *supra*, para. 21.

[52] Although, admittedly, there is still the need to reconcile in a systematic way the particular structure of Art. 101 TFEU with the "rule of reason" analysis structure.

i) Object restriction as mere capability/possibility of anticompetitive effects

Under a first position, showing that a conduct/agreement has an anticompetitive object should mean to prove that they have the mere capability of generating anticompetitive effects, with no real interest for the economic context surrounding the agreement. Such formalistic approach could be to some extent traced back to the landmark case *Consten and Grunding*, where the ECJ ruled that the distribution agreement (providing for so called absolute territorial protection) had the "object" of relieving Consten from the competition of other distributors regarding the wholesale of Grunding products. Consequently, there was no need to prove not only that these effects did exist but also that they were theoretically plausible given the structure and dynamic of the relevant market context (not to say whether such protection also addressed other efficiency-related concerns) and the agreement was deemed automatically to infringe the predecessor provision to Art. 101(1) TFEU[53,54].

[53] Cases C-56/64 and C-58/64 *Consten and Grundig v Commission* [1966], cit. *supra*.

[54] This approach has been questioned by some authors who put some arguments against applying a presumption of harm indistinctly to all such agreements, starting from the assumption that competition policy has been undergoing a significant shift in economic theory and political ideology as well as its institutional enforcement structure. See e.g. MONTI, G., "Article 81 EC and Public Policy", in CMLR 39, 5, 2002: in particular, referring to agreements hindering parallel trade, the author affirmed that "…[e]*conomic evidence shows that it is impossible to state either that all territorial restraints by firms which lack market power are efficiency-enhancing (as some Chicago School lawyer*

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This position is consistent with a string of IAA decisions in which, in order to establish the existence of an infringement of Art. 101(1) TFEU "by object", it is deemed sufficient to demonstrate that a conduct/practice/ agreement has the mere "capability" ("*idoneità*") of restricting competition. The IAA has repeatedly reaffirmed its constant view in these regards, which appears to be centered on the concept of "capability" of a conduct of producing effects on the market. In particular, the IAA has used a series of similar but not always clear wordings: it has made reference to a (not further defined) "*capability*" of the conduct of simply "*producing effects*"[55], or of "*distorting competition on the market*"[56]. Relevant variations include: a conduct "*capable of producing an appreciable restriction of competition*"[57]; "*capable of producing serious anti-competitive effects*"[58]; "*affecting trade dynamics*"[59]; or capable of "*irreversibly altering the competitive strategies of firms*"[60]. In some cases[61] the IAA reverted to the EU case law mentioned above[62], recreating the same ambiguity present at EU level.

Recently, it would seem that ECJ showed some renewed sympathy towards this approach. As seen, in *T-Mobile*[63], it held that "…*the concerted practice must simply be capable in an individual case of resulting in the prevention, restriction or distortion of competition…*". It is at least doubtful whether the ECJ actually meant to establish a mere "capability" test, despite the semantic choice made. In all fairness to at least some competition agencies, in certain, admittedly limited, cases, even when adopting this "mere capability" approach, the agencies try in any event to corroborate their analysis with an assessment of the likelihood of effects. For example, the IAA, even when supporting the argument that a "by object" restriction eliminates the need for an evaluation of the actual effects of the conduct, in some cases has corroborated its assessment of the

would contend) nor that they are all inefficient (as Consten and Grunding suggest)…".

55 Case I759 – *Forniture Trenitalia*, cit. *supra*, para. 278.

56 Case I776 – *Mercato della produzione del poliuretano espanso flessibile*, cit. *supra*; I701 – *Vendita al dettaglio di prodotti cosmetici*, cit. *supra*.

57 Case I775 – *Procedure di affidamento dei servizi di ristoro su rete autostradale ASPI,* Decision of the Italian Antitrust Authority of 22 April 2015, no. 25435, para. 87.

58 Case I718 – *Enervit contatti di distribuzione*, cit. *supra,* para. 4; I720 – *Carte di credito,* Decision by the Italian Antitrust Authority of 3 November 2010, no. 21768, para. 404 (which use a similar wording: "*capable of producing anti-competitive effects on the merchants and on consumers*").

59 Case I760 - *Roche – Novartis/Farmaci Avastin e Lucentis,* Decision by the Italian Antitrust Authority of 27 February 2014, no. 24823, para. 214.

60 Case I733 - *Servizi di agenzia marittima,* Decision by the Italian Antitrust Authority of 22 February 2012, no. 23338, para. 209; I722 – *Logistica Internazionale,* Decision by the Italian Antitrust Authority of 15 June 2011, no. 22521, para. 271*,* with a variation in I729 – *Gara d'appalto per la sanità per le apparecchiature per la risonanza magnetica,* Decision by the Italian Antitrust Authority of 4 August 2011, no. 22648: "*capable of alter, beyond any reasonable doubt, the competitive strategies of the firms*".

61 Case I689C – *Organizzazione servizi marittimi nel golfo di Napoli*, Decision by the Italian Antitrust Authority of 28 January 2015, no. 25295, para. 261.

62 Case I748 – *Condotte restrittive del CNF,* Decision by the IAA of 22 October 2014, no. 25154, para. 122.

63 Case C-8/08, *T-Mobile Netherland*, cit. *supra.*

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unlawfulness of the "by object" agreements with a verification, albeit brief, of the effects actually produced or that could be produced by the conduct within the market[64].

The criticism towards this position lies on the inherent contradiction embedded in it. Limiting the requirement for demonstrating an "object restriction" to the mere "capability" of a conduct/practice/agreement to generate restrictive effects seems at odds with the idea that "object restrictions" are the most pernicious infringements of competition. In fact, having the mere "capability" of generating negative effect does not say anything about the likelihood that such negative effects could materialize. Indeed, when a conduct/agreement is considered to be capable of generating a restrictive effect, it simply means that such effect is merely possible, not that the same is likely. In other words, to establish an "object restrictions" – as argued below – should require a high likelihood to generate negative effects (i.e. well clear above 51%), whilst being merely "capable" only indicates that negative effects may descend from that conduct/practice/agreement, something that could be said for a disproportionate number of cases where however the probability that they may materialize is indeed remote (i.e. if there is a 10% probability, this means that in 10 cases out of 100 that conduct its indeed "capable" of determining a negative effect).

[64] Case I773 - *Servizi di agenzia marittima*, cit. *supra*; I723 - *Intesa nel mercato della barriere stradali*, Decision by the Italian Antitrust Authority of 28 September 2012, no. 23931.

ii) Object restrictions requiring some form of market analysis (sort of "truncated analysis")

In a number of judgments, the EU courts have held that even the ascertainment of an object restriction could not be done without due consideration of the "legal and economic context" of the conduct/practice/agreement[65]. This is the main EU position, at least in terms of common statements as to what is required to establish an infringement "by object".

Recently, in *Allianz Hungaria*[66] the ECJ has seemed to expand the scope and depth of such analysis and required a more structured potential effect analysis to be conducted even in object cases. In particular, at para. 48 it held that there is "…*a restriction of competition by object in the event the referring court found that it is likely that competition on the market would be eliminated or seriously weakened…*". In particular such "truncated analysis" seems to amount to a somewhat simplified assessment of the effects of a practice in which a number of economic factors must be taken in consideration (such as,

[65] E.g., Joined cases C-501/06, C-513/06 and 519/06 *GlaxoSmithKline v Commission* [2009], Judgment by the Court of Justice of 6 October 2009, ECLI:EU:C:2009:409; Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence et al.* [2011], Judgement by the Court of Justice of 13 October 2011, ECLI:EU:C:2011:649; Case C-110/82, *IAZ International Belgium and others v Commission* [1983] ECLI:EU:C:1983:310, para. 25. Lastly, see case C-373/14 P, *Toshiba Corporation v Comission* [2016], Judgment of the Court of Justice of 20 January 2016, ECLI:EU:C:2016:26, para. 27.

[66] C-32/11, *Allianz Hungária Biztosító Zrt, et al. v. Gazdasági Versenyhivatal,* Decision by the Court of Justice of 14 March 2013 ECLI:EU:C:2013:160.

the nature of goods, the real conditions and the functioning and structure of the market)[67]. According to certain authors, para. 48 of *Allianz Hungaria* could indicate that the ECJ considers the existence of a third category of restriction that sits between object and effect[68]: a full effect analysis would not be required if it revealed from such "truncated market analysis" that competition would be impeded or seriously weakened.

The issue then arises as to what such "truncated analysis" is and to what extent this shall be different from a full effects analysis. Some attempts have admittedly been done in this direction. In its Opinion Advocate General Whal in *Cartes bancaires* observed that while the "…*more standardized assessment resulting from recourse to the concept of restriction by object requires a detailed individual examination of the agreement in question,* [that examination] *must be clearly distinguished from the examination of the actual or potential effects of the conduct of the undertaking concerned*…". In a more recent opinion released in the context of the *Toshiba Corporation* case[69] Advocate General Whatelet, whilst referring to *Cartes bancaires*, arguably went even further, trying to define the criteria to identify "by object restrictions": "…*the question whether a contract had a restrictive object cannot be divorced from the economic and legal context in the light of which it was concluded by the parties* […] *while it is not precluded that other types of agreements may have an object capable of preventing restricting or distorting competition, their prohibition requires a more thorough analysis of the economic and legal context of which they form part, although the analysis does not go so far as an examination of the effects of the agreement*". Recalling the parameter of "capability", Advocate General Whatelet indicated that, outside the clear situations which are "*intrinsically harmful*" (probably referring to the hard-core/naked restrictions sub-category), before qualifying a certain practice/agreement as a restriction by object, some sort of analysis of the impact on the market is necessary. Advocate General Wahl, in its opinion in *ING*[70], stated somewhat (correctly, in our view, but rather confusingly) that "…*the economic and legal context in order to identify an anti-competitive object must* […] *be clearly distinguished from the demonstration of anti-competitive effects under the second part of the alternative referred to in that provision. Consideration of the context in identifying the anti-competitive object can only serve to reinforce or counteract the actual examination of the terms of a purported restrictive agreement. It can in no way remedy a failure actually to identify an anti-competitive object by demonstrating the potential effects of the measures in question". Advocate General Wahl hence rightly suggested that the judgment on the existence of an anticompetitive object requires the assessment of the context in which the relevant agreement takes place. However, its opinion does not seem to shed any light (quite the contrary) on the type of analysis that

67 See on this point NAGY, C.I., *op. cit.*

68 NAZZINI, R. and NIKPAY, A., "Object Restriction and two sided Markets in EU Competition Law after Cartes Bancaires", *Competition Policy International*, 10, 2 (2014).

69 Case C-373/14 P *Toshiba Corporation v EU Commission* [2015], Opinion of AG Whatelet of 25 June 2015.

70 Case C-172/14, *ING Pensii Societate de administrare a unui Fond de Pensii ADMINISTRAT PRIVAT sa C. Consiliul Concurentei*, Opinion of AG Wahl of 23 April 2015.

DOI: 10.12870/iar-11744

must be carried out when assessing the relevant legal and economic context for establishing a "by object" restriction and how this should be differentiated from a complete "effect" analysis. Most recently, the Court has (somewhat tautologically) stated that "…*the analysis of the economic and legal context of which the practice forms part may thus be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object*"[71].

In this respect, it is our position that identifying object restrictions by conducting a limited analysis of effects could address some of the consequences that may derive from an uncontrolled expansion of the "object box" delineated above. The prosecuting agency would in fact at least have to show that, on the basis of a preliminary analysis, the conduct/agreement under scrutiny is indeed likely to generate sufficiently deleterious effects on competition, given the legal and economic context in which it occurs, testing its correctness against the relevant theory of harm being pursued. At the same time, we note that the recourse to this truncated analysis might, if not properly circumscribed, run the risk of eliminating in practice any meaningful distinction between the two categories, if not properly defined.

Thus, to conclude, the scope of such truncated analysis remains unclear: what really is it? What is the difference from effects analysis? This uncertainty ultimately leaves significant discretion to the investigating authority as to the standard of the evidence it needs to produce. Only hard-core restrictions – as argued below – should be exempted from the need of even such "truncated", or other impact, analysis.

iii) Object infringements as hard-core restraints

Under a further, possible approach, the category of object restrictions shall be limited to very serious, and already clearly established, competitive infringements, thus tending to correspond to so-called "hard-core" agreements.

Under this approach, for "object" restrictions, which work as a category building notion, only "textual" analysis shall be carried out (i.e. no context)[72]: indeed, the administrative merits of the by object category would be largely lost if market circumstances had to be scrutinized. In turn, for any other non-obvious infringements, a full and complete effects analysis would have to be carried out[73].

Following this line of reasoning, the EU "by object" approach would therefore get closer to the US *per se* rule. However, even if similar, the

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[71] Case C-373/14 P, *Toshiba Corporation v Comission*, cit. *supra*, para. 29.

[72] See in this respect the recent case C-345/14, *Maxima Latvija*, cit. *supra*, where it states that an effects categorization is to be adopted when "…*an analysis of the content of the agreement does not reveal a sufficient degree of harm to competition*" (para. 17) (see also para. 23: "*the analysis of the content of those agreements would not* […] *show, clearly, a degree of harm with regard to competition sufficient for those agreements to be considered to constitute a restriction of competition 'by object*'").

[73] NAGY, C.I., "The distinction between anti-competitive Object and Effect after Allianz: the End of coherence in competition analysis", *World Competition: Law and Economics Review*, 36, 4 (2013).

two categories are not identical in design: *per se* restrictions in the US are considered to be the exception to the rule of reason and are covered by an irrebuttable presumption, while in the EU framework restrictions by object could in principle still be justified under Art. 101(3) TFEU, which hence is usually seen as the key provision in differentiating the EU object approach from the US *per se* illegality. Also, in practice, the case law covered by the *per se* rule in the US is far more narrow than the "by object box" in the EU[74]. However, the authors' view is that the difference between the two categories, at least as far as its nature and objective purpose are concerned, shall not be overrated: the ultimate aim – as explained above – of these categorizations is to allocate in a possibly fair and efficient manner the burden of proof to be satisfied by the parties, on the basis of the experience and economic knowledge about the market harm caused by commercial behaviour.

Recently, *Cartes bancaire* has been hailed (though with diverging views as to its degree of innovation[75]) as a positive re-statement that object restrictions are an exception. The ECJ followed the AG Wahl opinion in stating that "*…only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should* […] *be regarded as a restriction of competition by object…*". Most importantly, at para. 58 the ECJ, criticizing the General Court, affirmed that this "*….erred in finding* […] *that the concept of restriction of competition by 'object' must not be interpreted 'restrictively'. The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition…*"[76]. A narrow interpretation of the "object" notion, most recently, has also been expressly confirmed by the ECJ in the *SIA Maxima Latvija* preliminary ruling case[77].

The *Cartes Bancaire* jurisprudence has indeed the merit of (hopefully) restraining "abuses" of the concept of "object" restrictions by antitrust authorities. However, it arguably leaves certain doubts and open issues.

For instance, it seemingly overlooks any distinction, and related regime implications, between the hard-core *species*, and the "object" *genus*, which instead – as seen above – has a significant practical relevance. Although a

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[74] For example, RPM is treated under rule of reason in the US and as an object restriction in the EU. See US Supreme Court, *Leegin Creative Leather Products Inc v PSKS, Inc*, (2007) 551 US 877. See on this point also Italianer, cit. *supra*.

[75] See CALZADO J.R., SCORDAMIGLIA-TOUSIS A., "GCB v Commission: Shedding light on what is not a by object restriction of competition", *Journal of European Competition Law and Practice* (2015), and NAZZINI R., NIKPAY A., "Object restrictions and two sided markets in EU competition law after cartes bancaires", cit. *supra*.

[76] Case *Cartes Bancaires*, cit. *supra*, para. 56 and para. 58. On this point see also P. FATTORI, "The impact of Groupement des Cartes Bancaires on Competition Law Enforcement", *Italian Antitrust review*, 2 (2015).

[77] Case C-345/14, *SIA 'Maxima Latvija' v Konkurences padome* [2015], cit. *supra*.

narrower scope of the "object" category is to be welcomed, the authors' view is that, under the architecture of Art. 101 TFEU, this category could not be limited to hard-core infringements.

Further, by narrowing down the area of object restrictions, this judgment appears to exceed the limits allowed by statutory interpretation canons to the extent it requires "actual effects" – as suggested by its very wording emphasized above – to be proven for any non-object infringement: as explained in greater details below, proof of likelihood of effects should suffice.

5. THE PROPOSED FRAMEWORK OF ANALYSIS

Two of, if not, the main critiques that have been made over the years to the way the distinction between "by object" and "by effects" infringements has been construed is that it fails to provide sufficient legal certainty whilst overstretching the scope of behaviour that are prohibited, leading to over-deterrence. The Commission has tried to attenuate this by issuing "soft law" measures, in particular in the context of horizontal cooperation as well as vertical relationships, attempting to find a balanced compromise. However, the Commission has not been able to prevent an expansion of the "object box", both by the Commission itself as well as by the NCAs. Legal certainty is necessary as undertakings could know in advance what is permissible and what is not and guide their behavior. Legal certainty in itself however does not exhaust the list of qualities that good antitrust laws must have, particularly if by doing so it sacrifices to its altar efficiency-enhancing conducts and practices. The proposed interpretation offered here tries to provide a scheme that factors in all these elements on the basis of the criteria that should lead any antitrust analysis, that is the likelihood that a given conduct or practice could indeed be the cause of serious anticompetitive effects.

As anticipated, the core concept lying at the heart of the distinction between "object" and "effect" should be that of the "likelihood" of the agreement or concerted practice to cause anticompetitive effects. A "by object" restriction should always be associated with a high degree of probability of leading to restrictive effects, as only if the probability is high, the EC legislator could justifiably require less evidence to prove the infringement[78]. In other words, the relevant element required to satisfy the burden of proof, and that must be showed, should be traced in the degree of probability that a certain agreement or concerted practice will produce anti-competitive effects[79].

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[78] See also PEEPERKORN L., "Defining "by object" restrictions", *Concurrences* 3 (2015) pp. 40-50: a "…*classification as a by object restriction is justified if, and to the extent that, it can be credibly argued that the type of restriction will generally result in net negative effects*…".

[79] See also ZAMPA G. L., and ATTINÀ, G., "Il riparto dell'onere della prova ai sensi dell'art. 3 Reg. 1/2003 anche con riferimento all'art. 101 § 3 TFUE", *Dizionario sistematico del diritto della concorrenza* (a cura di Pace F.), Jovene (2013).

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This is clearly neither a new nor an original idea. It is consistent with common sense and logic and, in fact, to some extent, it is in line with the fact that often authorities – as already recalled – will (albeit unsystematically) look at likelihood of effects even when they have qualified the conduct as an "object" infringement.

The analysis of the degree of likelihood of competitive harm that may derive from an agreement or concerted practice would thus guide the classification at issue. Despite the use of percentages (which is done just to support the illustration), it is and remains a non-mathematical analysis: numbers are a useful aid to support the arguments and show the direction of the analysis. Against this backdrop, three categories of infringements may be in principle identified:

a) hard-core[80] or "naked" infringements, where there is an extremely high (say, for example, ≥90%) likelihood of anticompetitive effects. The degree of probability is established on the basis of previous experience/case law as formally recognized by the ECJ (or a national supreme court as the case may be). In relation to this category, evidence of the existence of the agreement or concerted practice is sufficient to establish the violation of Art. 101(1) TFEU (save for any unlikely application of the legal exception under Art. 101(3) TFEU);

b) "simple" object infringements: in such cases, the Commission or NCA still needs to prove likelihood of actual/potential effects, rectius that these are clearly more likely than not to occur (say, for example, ≥65%), on the basis of the theory of harm construed in light of the parties' activities and relationships, the relevant markets structure and dynamic, in the context of the counterfactual scenario;

c) effect infringements: evidence of actual or potential effects, based on empirical analysis, is needed to prove that these are more likely than not to occur (that is, at least ≥51%). This is a residual category, which essentially indicates that, given that, on its face, the agreement or concerted practice is not a "by object" restriction - that is neither a hard-core/naked restriction (category a), nor, after a preliminary market analysis applying the relevant theory of harm, it was possible to show that it was *clear* infringement by object (category b)-, the likelihood of anticompetitive effects must be substantiated in full.

Remarkably, only the categorization under a) is taxonomical, i.e. based on (abstract) categories. These types of infringements shall be identified on the basis of ECJ past decisions (and national supreme court judgments) and for specific practices, possibly on the basis of the black-listed provisions contained in BERs[81].

[80] GOYDER, J., "Cet obscur objet: Object restrictions in vertical agreements", cit. *supra*, p. 331, notes however that the "hard-core" concept concerns art. 101(3), hence it may not be the suitable notion for an art. 101(1) issue or setting.

[81] Although such clauses simply lead to exclude the applicability of safe harbours, without triggering automatic application of Art. 101(1) TFEU, it is clear that the European legislator considers them as a naked

Consistently with recent case law, "soft" law will not be able to identify in a compulsory manner hard-core infringements[82].

Categorization under b) and c), in turn, depends on the ability/possibility by the Commission/NCAs, in the specific circumstances, to demonstrate the likelihood of effects.

In other words, only the concept under a) can be used as "category building", that is, properly, as a box. Outside this space, the qualification as "object" or "effect" restraints of the investigated agreements shall instead be not a purely abstract, and preliminary, categorization exercise. It should rather be the outcome of the analysis undertaken by the Commission or NCA on the agreement/concerted practice at issue.

From a practical perspective, this would require a sequential approach to Art. 101 TFEU analysis of a given agreement/concerted practice:

i) first of all, the analysis would require to verify whether the agreement/concerted practice being reviewed could be classified as a hard-core/naked restriction on the basis of the relevant experience, as reflected in the ECJ/national supreme courts case law and relevant primary legislation;

ii) secondly, if the response to the first step is negative, it should be tested whether, on the basis of the legal and economic features of the agreement/concerted practice, in the context of the relevant market, the applied theory of harms indicates a clear likelihood of anticompetitive effects;

iii) thirdly, if the response to the second step is negative, a deeper/empirical analysis as to show whether indeed the agreement or concerted practice is more likely than not to determine anticompetitive effects should be undertaken;

iv) finally, it should be verified whether Art. 101(3) may play any role, taking into account that this is a sliding scale analysis which indicates that the more likely an agreement/concerted practice is to determine anticompetitive effects, the higher the efficiencies needed to counterbalance such effects, the less likely the same agreement/concerted practice could benefit of the legal exception under this article.

6. The proposed approach in action: case studies

The approach just presented will be briefly considered below in the context of a) information exchanges practices as well as in relation to b) MFN clauses and with regard to both references will be made to past cases where frequent recourse to the "by object" category was made, arguably overstretching its scope.

violation of Art. 101 TFEU, although capable in theory (less in practice) to be saved through the application of the legal exception in Art. 101(3) TFEU.

[82] See case C-226/11, *Expedia*, cit. *supra*.

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a) Information exchanges/concerted practices by object revised

Information exchanges are an inherent feature of the proper functioning of any competitive market and as such, should not be subject to a rigid *per se* rule or to its close category of "restrictions by object". Failing to properly understand information sharing by condemning it without considering its effects risks stifling innovation and hampering the development of fast-evolving markets. The inherently neutral nature of information exchanges is thus the reason why these practices should in principle, save for very limited exceptions, get assessed through the lens of the "*by effect*" category, in order to verify whether they are actually capable of generating a competitively relevant restriction under Art. 101(1) TFEU. Further, for the very same reasons most information exchanges are also suitable to be tested under the legal exception to the prohibition provided under Art. 101(3) TFEU in order to permit a full economic balancing exercise, trading off possible anti-competitive effects against the efficiencies that are likely to be generated.

As a matter of practice, however, both the Commission and the NCAs, when considering their enforcement tool-box, are quick to place information exchanges into the category of concerted practices infringing Art. 101(1) TFEU for their object. It is well known that classifying a conduct as a concerted practice "by object" allows the relevant agency to rely on its presumptive *probatio diabolica* which relieves it from having to show that the information exchanged has been put to a use or was functional to a specific collusive dynamic. Under the current state of development of the case law in the EU it seems in fact hardly possible to rebut the mentioned presumption that applies to the concerted practices by object: when there has been an exchange of confidential information between undertakings, under this consolidated case law, as long as the parties to it remain active on the market, there is a (in theory) rebuttable presumption that they have altered their competitive behaviour accordingly. Parties facing such presumption must in fact give evidence to a degree that will allow to "*…exclude any connection whatsoever between the concerted practice and the decision by the undertaking to operate in a certain way in the market…*" [83]. This test, as far as the authors are aware, has never been satisfied and for this reason it has been named a case of *probatio diabolica*.

Thus, the expansion of the "object box", when combined with the presumption developed by the case law of the ECJ on concerted practices, impacts materially on how exchanges of information are reviewed. This calls once again for a careful analysis of what falls within the scope of "by object" restrictions, prosecuting an exchange of information only when it is likely to generate anticompetitive effects. In this regard the proposed approach to the "object/effect" divide appears to give more certainty in the application of the different categories and could increase the efficiency of enforcement tools through a clearer definition of the relevant notions. This point will be

[83] Case C-449/11 P *Solvay Solexis v Commission* [2013], Judgement by the Court of Justice of 5 December 2013 ECLI:EU:C:2013:802, para. 35-37.

DOI: 10.12870/iar-11744

briefly developed here below, in particular, in relation to financial/commodity trading as well as by revisiting the seminal 2000 *RC Log* case decided by the Italian Antitrust Authority.

a.1) Information exchanges, concerted practice by object and financial trading

During the last years the sector of financial trading has been scrutinized by the Commission in several occasions[84]. In doing so, the Commission has heavily relied on the concerted practice by object category which, when applied to information sharing practices, represents an extremely powerful tool. At the same time, however, an excessive use of this category represents a significant risk factor for undertakings, particularly for those operating in sectors where the exchange of information is a structural feature of their daily market interactions. As financial traders do exchange on a daily, if not hourly, basis competitively sensitive information, by using the concerted practice by object category the seen negative presumption of illegality triggered by the "concerted practice by object" qualification would automatically kick in irrespective of whether the practice is likely or unlikely to have any restrictive effects (e.g. if the exchanged information can in fact affects the parties' future commercial behaviour). Whilst the attention of the competition agencies seems to have focused, rather formalistically, on the prohibition of any contact between competitors, any activity which by definition requires that competitors are in constant contact - such as in case of financial or commodity trading - would (quite paradoxically) have a significant chance of being prohibited.

The EU judges seem to apply a very low threshold when assessing whether an information exchange amounts to an object restriction. As recently as on 19 March 2015 the ECJ issued a judgement confirming that a "…*concerted practice may have an anticompetitive object even though there is no direct connection between that practice and consumer prices*…."[85]. Also in the *V&B*[86] case the exchange of fairly general information (not broken down by individual products, specific export trends or specific growth potentials) regarding turnover and exports forecast was found to qualify as a restriction of competition by object because it allowed the parties to better foresee their competitors' future behaviour on the market.

In our view, an object test clearly based on evidence showing "likelihood of effects" in the sense illustrated above could in many cases permit to show that either the information exchanged is not competitively sensitive, or that the exchange did not materially affect the

[84] For an overview of the latest EU Commission decisions on the trading/commodity sector see ZAMPA, G.L., "Information exchanges, concerted practices by object and financial commodity trading", *Competition Law & Policy* 1.2 (2015).

[85] Case C-286/13 *Dole v. Commission*, cit. *supra*, para. 121, relying heavily on case C-8/08 – *T-Mobile Netherlands and Others,* cit. *supra*.

[86] Joined Cases T-373/10, T-374/10, T-382/10 and T-402/10 *Villeroy Boch v Commission* [2013], Judgments by the General Court of 16 September 2013, ECLI:EU:T:2013:455, currently under appeal before the Court of Justice.

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market behaviour of the parties as the latter kept a conduct that was incompatible with any collusive scenario. In fact, against the described *probatio diabolica* developed by the jurisprudence of the EU, the proposed model would in fact have the important consequence of providing specific and objective boundaries within which economic evidence could be properly considered to rebut the presumption at issue. This would permit therefore a clear distinction between those activities that require a flow of information between competitors but are neutral or where there is at least uncertainty as to whether they will generate restrictive effects (to be assessed within the context of the "by effect" category), on one hand, and those conducts which instead are linked with collusive behaviours (to be judged within the "by object" category)[87].

a.2) The RC Log case[88]

This case lends itself well to the subject-matter of this article as it concerns the qualification as a concerted practice by object of an exchange of information between a large number of insurance companies in Italy in relation to third-party motor vehicle insurance services.

In this landmark case - which actually owes its importance to the fact that it gave rise to the first wave of follow-on damage actions in Italy – the IAA essentially concluded that the provision of certain information services by a consultants firm (RC Log), which developed and managed a comprehensive data base that the insurance companies could have access to by registering and paying the related fees, constituted an illegal systematic exchange of competitively sensitive information and infringed competition law "by object". The IAA found that this conduct was to be qualified as a concerted practice by object and, accordingly, did not carry out any in-depth analysis on its merit neither in relation to the actual effects that the practice at issue could have created, nor assessed in any complete way whether there was any likelihood that from such practice could stem restrictive effects, consistently with the relevant theory of harm. In other words, by simply qualifying the RC Log-related flow of information as a restriction by object, the IAA was relieved from not only quantifying any market effects that the practice (that had been in place for a number of years by then) had possibly generated, but also from analytically testing the probabilities that such collusive outcome could derive from it.

This was particularly striking as the IAA essentially arrived at this result by considering that the exchange of past information represented a facilitating practice which, by impacting the informational set which the various insurance companies could access to, influenced their market conduct, presumptively leading to a collusive market outcome. The IAA thus adopted the analytical framework

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[87] From a different angle, it is also noted that whilst the information sharing that forms part of a hard-core cartel is typically and pacifically considered as part of the latter, stand-alone sharing of disaggregated, confidential information on future intentions between competitors is more complex, given its potential for enabling competitors to come to a collusive agreement. In this sense see also BENNET, M. and COLLINS, P., "The law and economics of information sharing: the good, the bad and the ugly", *European Competition Journal* (2010).

[88] Case I377 – *RC Auto,* Decision by the IAA of 28 July 2000, no. 8546.

typically applied to symmetric oligopolistic markets, arguing that the information exchange under review transformed a tacit collusion environment into, in essence, an illegal cartel. However, by relying on the "objective" nature of this infringement, in the ex-post view of the authors, the IAA failed to properly consider that the relevant market was very far from having an oligopolistic structure (with around 42 insurance undertakings active in the third-party motorway insurance market in Italy, some national and some belonging to multi-national groups) and even more distant in terms of symmetry, given the limited leading role of few insurance companies. Further, no real weight was given to the fact that the information contained in the data base run by RC Log was past information and was limited to insurance products which were already available on the market.

In order to qualify the practice as a restriction by object against those facts, in our view, and in light of what is argued in this article, the IAA should have assessed whether the specific features of the considered exchange of information were likely to generate the envisioned collusive outcome: in doing so, it should have verified whether, under the relevant legal and economic scenario, the information exchange effectively facilitated any convergence of collusive terms, which were capable of being monitored and eventually what were the tools available to the parties to punish any deviation from the same. Further, it should also have verified whether the fact that at least 20% of the supply-side of the market did not purchase the RC Log information service, was in itself something capable of disrupting any collusive outcome. In conclusion, in order to qualify it as a restriction "by object" the IAA should have tested its findings in relation to the relevant theory of harm in order to show that there was a high likelihood that the RC Log practice would have determined a collusive outcome.

b) The recent review of MFN clauses

A further area of great interest in the recent enforcement by antitrust authorities, and which may serve as another example of the approach proposed in this article, is that of most-favoured-nation (*MFN*) clauses. These provisions typically oblige one party not to grant other customers a better treatment (in terms of prices or other terms of business) than that given to the beneficiary of such MFN status. MFN clauses have been dealt with in a number of decisions by the same Commission[89]. However, they have drawn greater attention in the last years, both at academic[90] and enforcement level. The recent

[89] Press release by the Commission, IP/04/1314 of 26 October 2004: "Commission closes investigation into contracts six Hollywood studios with European pay-TVs"; Press release by the Commission, IP/05/710 of 10 June 2005: "Commission secures changes to gas supply contracts between E.ON Ruhrgas and Gazprom"; Press release by the Commission, IP/11/257 of 4 March 2011: "Commission closes probe into Hollywood studios after they change terms of contracts for digitisation of European cinemas".

[90] In particular, these price restrictions have been recently viewed within the wider context of price relationship agreements (*PRAs*), i.e. agreements under which the price (or other business term) is contractually regulated as related to another price (or term) set by the same supplier or by other players in the market. In particular, MFN belong to so-called "across-customers" PRAs, given that the price to be paid by (or to) the MFN

DOI: 10.12870/iar-11744

focus has been on a specific kind of MFN clause, used in the context of (on-line) platforms, and in which the price affected by the clause is that charged by the supplier (i.e. a hotel) to final customers in an online selling platform[91] (i.e. on Booking.com). These clauses are widely used and have been investigated by antitrust authorities particularly in the hotel[92] and e-books distribution sectors[93].

As these clauses may serve a number of different and complex business aims (such as, arguably, the protection of investments made by the platform manager), they may normally be seen as provisions that could be condemned only when their effects[94] are proved and, in any case, with some chances of being in any case permitted under article 101(3) TFEU.

For the purpose of our debate, what seems more interesting is that, as far as the relationship between suppliers (i.e. hotels) and platforms (i.e. on-line travel agencies, or OTAs) is concerned, the MFN may be seen as operating essentially as a (reversed) RPM, preventing the supplier (i.e. hotel) from offering its products/services (i.e. room accommodations) on either another platform and on their own websites at prices lower than those offered through the relevant platforms. Thus, an MFN applied in this context could be seen as essentially eliminating any competition both between platforms, as they will not have any incentive to lower their fees for hosting the supplier on the platform as the price charged on it could not be lower than on other platforms. An antitrust agency would thus have to show that such outcome has a high likelihood of happening to qualify it as a "by object restriction" and this would require a careful analysis of the legal and economic context in which the MFN at stake will be applied. In other words, as far as an agency demonstrates that such anticompetitive effects are clearly likely, as well as their actual relevance versus a credible counterfactual

party is related to the price set by the obliged undertaking *vis-à-vis* other customers. This PRAs definition and schematization has been introduced in "Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements", a report prepared for the OFT by Lear, 2012 (with Gian Luca Zampa and Alessandro Di Giò contributing). See also Hviid, M. and Akman, P., "A Most-Favoured-Customer Guarantee with a Twist", *European Competition Journal*, 2(1) 2006, pp. 57–86. Across-customers clauses are opposed to "across-firms" clauses, where the reference price is instead that offered by competitors for the same good, such as in the case of English clauses or best price guarantees.

91 That is, a price not between the parties to the MFN agreement (so called "third party" PRAs: see Lear, cit. *supra*, p. 84 ss.).

92 Cases have been brought in this area by many agencies worldwide and particularly by EU NCAs: see most notably the parallel decisions by the Italian (case no. I779), French (Décision n° 15-D-06) and Sweden (case no. 596/2013) authorities published on 21 April 2015 accepting Booking.com's remedies, as well as the decisions of infringements by the German authority v. HRS (20 December 2013) and most recently v. Booking.com. (23 December 2015, appeal pending).

93 Press release by the Commission, IP/15/5166 of 10 June 2005: "Antitrust: Commission opens formal investigation into Amazon's e-book distribution arrangements"; *United States of America v. Apple Inc., et al.,* 12 Civ. 2862 (DLC), 10 July 2013.

94 In the decision by the German competition authority v. HRS for its MFN clauses (case B 9 - 66/10) the question as to whether such clauses amount to object or effects restrictions was expressly left open.

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scenario and theory of harm, a "simple" (non-hard core) "object" qualification would seem reasonable. This would then shift the burden on the undertaking to satisfy the requisites of Art. 101(3), including most notably any efficiencies that the MFN mechanism may bring about (e.g. in terms of avoidance of free-riding) and the indispensability/proportionality of the restrictions.

c) Other agreements

A similar approach may arguably prove useful in other contexts and in respect of other kind of practices which have raised doubts and complexities in the past – an in-depth analysis of which clearly goes beyond the scope and reach of this article. The mind would obviously go, at first, to multilateral interchange fees (MIFs) used in the context of payment cards, which by no coincidence triggered the *Card Bancaire* judgement[95]. Whilst it is clear (in light of this decision, as well as more generally on the basis of general principles of competition policy) that this kind of cooperative agreements (often decisions of associations of undertakings) can neither be deemed a naked or hard-core infringement, nor *de facto* be treated as such (that is, be enjoined by an authority on the basis of mere and unmotivated assertions of their anticompetitive nature), it still *prima facie* seems to the authors that in certain specific circumstances, an object qualification, following to a serious construction of a theory of harm in light of the market context and the likelihood of negative effects, could not be excluded *a priori*. Further, it may be questioned whether even RPM, especially when used in the context e.g. of complex goods or adopted in a non-general manner, should be treated as *per se* infringements for the purpose of Art. 101(1) TFEU, automatically shifting the burden to the undertaking to defend itself under Art. 101(3), i.e. without any need for the authority to provide any reasoning on the actual capacity of such practice or clause to produce harmful effects. The same efforts could arguably be requested in hub-and-spoke and price signalling scenarios, where the possible horizontal collusion takes place in a more complex setting of incentives and interests by parties.

7. Conclusions

This article has attempted to argue for the importance of a clear framework of analysis for identifying object and effect restrictions of competition. The proposed approach, casting away some doubts and confusion brought about by a number of unclear judicial and doctrinal positions adopted over time, is centered around the concept of likelihood (*probabilità*) of anticompetitive effects, consistently with the rationale of article 101(1) TFEU while not contradicting the core case law of the ECJ on this issue.

The proposed approach appear to have the advantage of – *inter alia*:

[95] See also case I720 – *Carte di credito*, Decision by the Italian Competition Authority no. 21768 of 3 November 2010; C-382/12 P - *MasterCard and Others v Commission*, Judgment of the Court of Justice of 11 September 2014 ECLI:EU:C:2014:2201.

DOI: 10.12870/iar-11744

i) excluding unequivocally that a mere “capability” (*idoneità*) of anticompetitive consequences is sufficient to lead to a finding of an object infringement;

ii) bringing clarity on the fact that no market/potential effects analysis is needed (only) for hard-core/nude infringements, whilst beyond this area (the only real “object box” which can be identified as a category building tool) it would always be required a seriously construed theory of harm applied against the relevant legal and economic context and considering any relevant counterfactual;

iii) clarifying that even beyond cartels or naked restrictions, there is still room for “object” infringements when it is clear that effects are likely to occur as a consequence of the investigated agreement/practice;

iv) eliminating any residual confusion concerning the concrete application of antitrust rules in relation to object restrictions, on the distinction between, on one hand, likelihood of restrictive effects (to ascertain the infringement) and, on the other hand, actual proof of anticompetitive effects (for the purpose of evaluating the seriousness of the agreement/concerted practice)[96].

Nonetheless, even under the proposed framework a significant flexibility in the qualification of object restrictions by antitrust enforcers remains. This ultimately depends on the open-ended formulation of Art. 101 TFEU as well as, in turn, on the unfeasibility of rigid schemes for legal tools which instead necessarily require full understanding of, and malleable adaptation to, complex and evolving economic facts and dynamics. What matters is then that the inherently difficult use of such tools is not complicated in vain by (conceptual or even just semantic) confusion on the fundamental notions and on the authentic rationale underpinning legal prohibitions.

[96] This appears particularly important to correct the practice of considering of the highest seriousness object infringements, when setting fines, without any analysis of effects or evidence of the same.

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