Effects-based enforcement of Article 101 TFEU: the “object paradox”

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A review of all decisions adopted pursuant to Article 81 EC/101 TFEU between the first of January 2000 and the first of January 2011 reveals that, excluding hardcore cartels, the Commission has issued altogether 18 infringement decisions and 10 commitment decisions. This is in addition to 6 negative clearance decisions and 18 exemption decisions adopted under Regulation 17/62. Among the 28 infringement and commitment decisions, 14 related to vertical restraints and 14 to horizontal restraints. Among the 18 infringement decisions, 10 are posterior to the entry into force of Regulation 1/2003 but only 5 have been adopted over the past 5 years and all in relation to horizontal cases.

More importantly 17 out of the 18 infringement decisions issued since the first of January 2000 were framed in “object” terms, the only exception being the boycott of Morgan Stanley by Visa where the Commission did not expressly exclude the “object” characterisation but simply did not refer to it. All vertical cases decided over that period involved parallel trade or absolute territorial protection issues that were treated as object restrictions. So it was for 8 out of the 9 horizontal cases, even if the picture must be nuanced. Indeed, horizontal cases can be divided into three categories: (i) those where the Commission took a strict approach to the notion of object and did not really discuss it; (ii) those where the Commission carried out a contextual assessment and rebutted the defendants’ arguments before concluding to the existence of an object restriction; and (iii) those where it stated that the agreement/arrangements at hand qualified as an object restriction but then went on to assess their effects, sometimes in great details. Interestingly, all judgments rendered in recent years by the EU Court of Justice (from *Glaxo* to *Pierre Fabre*) were also framed in “object” terms.

What is the practical meaning of the turn toward an effects-based approach in EU antitrust enforcement when all cases are treated as object restrictions (knowing that “*where the restrictive object of an agreement is proven, no further evidence of its restrictive effects needs to be produced*”, as restated by Advocate General Trstenjak in his Glaxo Opinion)? Various practices have disappeared from the antitrust enforcement agenda as a result of the advent of the so-called effects-based approach to Article 101 TFEU. Paradoxically, though, it seems difficult to articulate rule of reason standards that would give legal substance to “effect” restrictions, for the fundamental legal questions of the day revolve around the meaning of the concept of “object”. If the qualification as “object” restriction embodies a presumption of anticompetitive effects, on which grounds can such presumption be established? Is there today an economic consensus to consider anything else than industry-wide price-fixing/market-sharing cartels (or their equivalent) as entailing a strong presumption of negative welfare effects, like the Horizontal Cooperation Guidelines suggested back in 2001? What does it mean that the object qualification is based on the nature, aim and context of the relevant agreement or provision, and on the conduct and intent of the parties to it as suggested in *Société Technique Minière* and repeated all over again to this day (cf. *Pierre Fabre*)? Should not market power be also relevant in object analysis? And why does the Commission sometimes label an agreement as an object restriction when it is able to determine its effects? Those questions are currently the subject of intense doctrinal debates, including during a very stimulating panel discussion at the recent New Frontier of Antitrust conference, and raise fundamentally the question of the place and role of the third paragraph of Article 101 TFEU in the current framework of analysis.

Indeed, one of the great puzzles of this “object paradox” consists in the uncertainty surrounding the appreciation of the possible pro-competitive effects associated with practices qualified as “object” restrictions, which is supposed to be fully part of the modern assessment of any alleged restriction to competition under Article 101 TFEU. The Article 81(3) Guidelines state in that respect that paragraph 3 applies indistinctively to agreements that restrict competition by object and by effect. However, the 2010 Vertical Guidelines take the view that “[w]*here a hardcore restriction is included in an agreement,* […] *it is presumed that the agreement is unlikely to fulfil the conditions of Article 101(3*)”. In recent cases, such as *Glaxo*, *E.ON/GdF* and *ONP*, the Commission expressly held that object restriction were “in principle” not eligible for exemption under 101(3) TFEU. In contrast, the EU Courts, including the Court of Justice, have historically considered that object restrictions are in theory open to justification (remember *Matra/Hachette*), but have never in recent memory overturned a finding that they were not. Hence, what is the scope for efficiency considerations in “object” cases? Is there any? Are those cases “per se” illegal? But then again, what are those cases?

The turn to an effects-based approach to Article 101 TFEU has brought many benefits, not the least that of reducing the antitrust exposure of a myriad of common arrangements that are part of the daily life of many businesses. Yet, it is not immune of paradoxes, the greatest being a tendency, conscious or not, to stretch its rationality or even escape its discipline by having recourse to an ill-defined “object category”, which emerges in plain sight as the great remaining loophole in the enforcement of Article 101 TFEU and questions the scope left to efficiency considerations under paragraph (3) thereof.