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What to consider restrictive by object?

Christian Bergqvist (University of Copenhagen) · Friday, November 13th, 2020

What to consider a restriction of competition under Article 101 (1) is complex. However, the text of Article 101 (1) refers to agreements that are anti-competitive by *object* or *by effect*. A segregation utilized in early cases such as *Consten and Grundig* and *Société Technique Minière*. Both from 1966 and both involving the appraisal under Article 101 (1) of exclusive distribution agreements. In the first, the parties had attempted to (ab)use an exclusive distribution agreement to prevent parallel imports from outside the allotted territory, which was detrimental to the object of Article 101 (1). In the latter, the Court of Justice stated that restriction by object or effect was not cumulative, but two alternative ways of analyzing potential restrictions.

The doctrine did not mature before the turn of the millennium

Assuming that the doctrine was fully developed from the beginning would be manifestly wrong. Rather, it did not come about in its own right before the turn of the millennium, making it difficult to use older cases. It's even doubtful that a list of object infringements can be tabled, making it more correct to take a case-by-case approach, where restrictive elements, depending on the context, can be either object or effect-infringements.

Why do we have the concept of restrictive by object

A justification for having a category of object infringements has been provided by referring to the concept of "risk offences" in general criminal law, e.g. driving under influence of alcohol or drugs. Here, punishment is warranted wholly irrespective of whether actual danger or accident is endured. In *Toshiba*, para 26-27 the Court of Justice also provided justification by noting how:

"… certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition …."

With this background it becomes apparent that restriction *by object* does more than creating a presumption of unlawfulness, but relates to actions that, by their very

nature, are harmful to normal competition, thus reducing the need for further analysis.

What to consider restrictive by object

Restriction by object covers classic infringements of Article 101 (1), such as agreements on prices, output and sharing of markets and customers. Beyond these, what to consider restriction by object becomes blurred.

In order to help identify by object-infringements, DG COMP in its *Guidelines on Article 101 (3)*, recital 21 explained how:

"Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101 (1)] *to demonstrate any actual effects on the market…."*

Further elements were provided in two rulings from 2020. In *Budapest Bank*, the Court of Justice was requested to clear if a national agreement on interbank fees was restrictive by object. In reply, the Court (para 44 and 82-83) held that an agreement that was cable of having pro-competitive effects should not be considered restrictive by object. Even when the later was found, the actual effect could still be of relevance for the classification. In *Generics*, also involving the matter of when to accept an agreement as restrictive by object, the Court of Justice (para 82 and 87-90) essentially held that this could be assumed when the agreement served no other purpose but the restriction of competition.

When does a restriction harm the proper functioning of normal competition?

From these cases and consideration, it follows that the concept of restriction *by object* relates to actions that by their very nature are harmful to the proper functioning of normal competition. This encompasses behaviour where the anti-competitive effect can be expected (see *Guidelines on Article 101 (3)* recital 21) from **i**) their serious nature **ii**) experience or **iii**) high potential for damage. An assessment undertaken against the objective content, purpose and legal context and background (see *Compagnie royale asturienne*, para 25-26) of the behaviour in question, including any alternative explanation than the pursuit of an anticompetitive aim (see AG in *F Hoffmann-La Roche*, para 148).

In contrast, is it immaterial **iv**) what the parties subjectively intended (see *Beef Industry*, para 21), or **v**) if they lacked commercial interest in limiting competition (see *Sumitomo Metal Industries Ltd*, para 45-46), **vi**) pursued another, and more acceptable purpose (see *General Motors*, para 64) and **vii**) acted in full public (see *Toshiba*, para 26) or with the endorsement from public authorities (see *Horizontal Guidelines*, recital 22). However, **viii**) the elements in questions should not be

considered restrictive by object if ancillary (see AG in *Groupement des cartes bancaires*, para 56) to an (unproblematic) agreement allowing even horizontal price agreements to elute.

Finally, the concept should be used restrictively (see *Groupement des cartes bancaires*, para 58) and would most likely not be warranted if **ix**) a procompetitive rationale cannot be excluded without looking at actual effects (see AG in *Budapest Bank* (para 81), or **x**) the organization of the market exclude any potential for competition (see *E.ON Ruhrgas*, para 84).

Two readings of the concept of object-infringements

Regardless of elements to the mosaic, no operative definition has been developed that can be applied in practice. That is of course unless it's accepted that restrictions by object are agreements that have no plausible purpose but the restriction of competition. However, two readings are possible where one command a segregation between *obvious and less obvious* by object infringements, where the later requires more substantial examinations, including reviewing the parties' subjective intent. This idea was advanced by the e.g. AG in *Toshiba*, para 87-90, where the first would cover the examples provided in Article 101 (1) and the second would require a more thorough analysis of the economic and legal context, including reviewing the parties' subjective intent.

An alternative reading of the concept would involve *a two-step analysis,* where regard first must be made to the *content* of the practice in question and then its economic and legal *context*. This would involve if the content of the agreement looks anti-competitive e.g. by pursuing an object normally considered a hardcore restriction and then if this can be rebutted by virtue of its context. Under the two-step analysis, even horizontal price agreements could fall short of being restrictive by object and normally benign agreements be included. Of particular relevance would be the ability (or inability) to refer to a legitimate explanation for the practice and how the competition would have developed void of this.

Regards must be made to content and context

When reviewing the content and context of an agreement the object the parties hope to secure plays a role. In this references have been made to **i**) the hardcore lists incorporated in the different block exemptions, (see *De Minimis Notice),* recital 13) **ii**) the absence of a legitimate purpose, (see AG in *F Hoffmann-La Roche*, para 148) and **iii**) the examples offered in Article 101 (1) (see *Toshiba*, para 89-90). However, the concept is not confined to these (see *Beef Industry*, para 23) but also covers surrogates pursuing any of these objects.

Under the context analysis even traditional hardcore infringements of Article 101 (1) as price agreements could elude labelling as anti-competitive by object if concluded within joint production, research or purchase arrangements (see *the by object notice*,

section 2) or for the purpose of public safety or health (see *Vertical Guidelines*, recital 60). The same would apply to market sharing that follows from a trademark assignment (see *IHT Internationale Heiztechnik*, para 59).

And it's even possible to undertake some analysis

While positive or pro-competitive elements only are relevant under Article 101 (3) (see *Beef Industry*, para 19-21) a broader approach, involving some analysis is not precluded. In *Groupement des cartes bancaires*, para 53 and 58 the Court of Justice appeared unwilling to see horizontal agreements on interbank fees as restrictions by object. The Court remanded the case to the General Court commanding a restrictive use of the concept and the need to view the agreements broader than against their naked content commanding some analysis. Under this approach, even traditional hardcore infringements of Article 101 (1) could elude labelling as anti-competitive by object if pursuing certain (acceptable) objects (see *the by object notice*, section 1 and 2). In contrast, it is immaterial if the agreements have not been implemented (see *PO/Amino acids*, recital 376), or could be considered *de minimis*, (see *Expedia*, para 37) i.e. concluded between undertakings normally considered too small to thwart competition.

Only two things remain persistent

The only solid and persistent elements to the concept of restrictions by object is the call for a restrictive application and the matter of alternative explanations. It then rests with the enforcers to provide a plausible link between the tabled theory of harm and the agreement in question.

This entry was posted on Friday, November 13th, 2020 at 9:08 am and is filed under Competition law, European Union, Restriction by object
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