MODERNIZING THE APPROACH TO ARTICLE 101 TFEU IN RESPECT TO HORIZONTAL AGREEMENTS: HAS THE COMMISSION'S INTERPRETATION EVENTUALLY "COME OF AGE"?

Arianna Andreangeli[1]

Abstract: *This paper considers the recent trends guiding the interpretation of Article 101 TFEU and examines their recent development by having regard to the new Commission Guidelines on its application to horizontal agreements. It is argued that the Commission, faithful to its agenda of "modernisation" of the substantive rules governing prima facie anti-competitive practices, has made a significant step toward bridging the gap between its administrative statements regarding the application of the Treaty competition rules to individual cases and the more recent case law of the EU Courts. The 2010 Guidelines on Horizontal agreements will be scrutinised in light of important judgments such as Wouters, Meca Medina and O2 v Commission and will be relied upon as evidence of the Commission's growing commitment to a "flexible" and economics-based approach to the concept of restriction of competition enshrined in Article 101(1) TFEU. The paper will also consider in brief the implications of this development for the overall structure of Article 101 and especially for the relation existing between its first and its third paragraph.*

Summary: 1. Introduction. 2. Legal analysis of prima facie anti-competitive practices under Article 101 TFEU: to balance or not to balance? A summary. 2.1. Prohibition of anti-competitive agreements under the EU antitrust rules: brief remarks on evolving trends. 2.2. From an "in-context" legal assessment to a "counterfactual analysis" of prima facie anti-competitive practices: 'Meca Medina' and 'O2'. 2.3. 'Barry Brothers' and the legal appraisal of restrictions 'by object': a step forward in the "modernisation" of the EU antitrust standards applicable to horizontal agreements? 3. What now for Article 101 TFEU? The impact of *O2* and *Barry Brothers* on the Commission's legal approach and the road ahead. 3.1. The 2004

1 Lecturer in Law, Liverpool Law School, University of Liverpool; Schuman-Fulbright visiting research fellow, Faculty of Law, University of Michigan. The author is very grateful to Prof. Luis Morais for his feedback. The usual disclaimer applies.

Guidelines and the current case law: is the Commission still "up to speed" with the EU Courts? 3.2. The new Guidelines on horizontal restraints of competition: between the old and the new... 4. From mobile phones to the 2010 Horizontal Practices Guidelines: a "brand new world" for Article 101 TFEU? Tentative conclusions.

1. INTRODUCTION

The interpretation of Article 101 TFEU (formerly 81 EC) has undergone major changes in the past years. Initially understood as a clause catching all agreements restraining the freedom of trade of the undertakings concerned, the prohibition contained in its paragraph 1 is now read in a more "realistic" and "flexible" manner. In this context, a number of commentators have argued that the European Court of Justice and the General Court, responsive to the need to conform to more "economics-based" principles, have now incorporated some of the elements of a "rule of reason" in the assessment of 'by effect' restraints on competition.[2] In addition, and having regard to 'by object' infringements, more recent pronouncements, such as the *Barry Brothers* preliminary ruling[3], illustrate how the EU Courts seem to be applying a similarly "modernised" framework of assessment to practices that would have hitherto been declared unlawful without the need for their "closer" consideration.[4]

Against this background, it is undeniable that both the 2004 Commission Guidelines on the application of Article 101(3) TFEU[5] and the 2001 Notice on horizontal restraints[6] have repeatedly been denounced as being "out of touch" with the evolving legal standards governing these practices and emerging from the EU Courts' case law. In particular, the Commission's insistence on the "egalitarian" division of labour between the prohibition clause – designed to allow an assessment of the anti-competitive effects of individual infringements – and the legal exception contained in paragraph 3

2 See e.g. Marquis, 2007; also Jones, 2006.

3 Case C-209/07, *Beef Industry Development Society v Barry Brothers Ltd* (hereinafter referred to as *Barry Brothers*) [2008] ECR I-8637.

4 See e.g. Odudu, 2008: 13.

5 Guidelines on the application of Article 101(3) of the Treaty, [2004] OJ C101/97 (hereinafter referred to as Article 101(3) Guidelines).

6 Guidelines on the applicability of Article 81 to horizontal restraints, [2001] OJ C3/2 (hereinafter referred to as 2001 Horizontal Guidelines).

– aimed, instead, at the appraisal of their pro-competitive effects - had been perceived by many authors as no longer justifiable in light of decisions such as *Wouters*, *Meca Medina* and especially the *O2* appeal.[7]

In light of these concerns, it is suggested that the new Guidelines on horizontal cooperation published for consultation in 2010[8] represent a welcome development in as much as they offer the Commission an opportunity to bring its approach in line with the current position of the EU Courts.

This note seeks to examine the approach proposed by the European Commission in its new Guidelines against the background of the more recent EU Courts' case law in the area. Firstly, it will give a brief overview of the general trends and principles governing the interpretation of Article 101 TFEU, especially in respect to its structure and to the subject matter of the analysis that ought to be conducted under each of its limbs. Thereafter, it will examine the more recent decisions adopted by the EU Courts and affecting that interpretation in respect to both restrictions 'by object' and restraints 'by effect'. In that context, the note will argue that the position adopted by the Commission in 2004, in as much as it was anchored to the "egalitarian division of labour" between the prohibition clause and the legal exception of Article 101(3) TFEU,[9] whilst compatible with earlier judicial decisions, has become difficult to reconcile with the existing approach adopted by the General Court and the European Court of Justice.

The final part of the note will consider whether, in respect especially to horizontal restraints, the 2010 Guidelines have succeeded in increasing the consistency between the EU Courts and the Commission's approach to Article 101 TFEU. It will be argued that whereas the Commission sought to maintain intact the "dichotomy" existing between restrictions 'by object' and 'by effect', in accordance with the existing case law, it expressly recognised and articulated the "counterfactual analysis" established by the General Court in *O2* as the legal standard applicable to 'by effect' restrictions of competition.

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7 See case C-309/99, *Wouters v Algemene Raad*, [2002] ECR I-1577; case C-519/04 P, *Meca Medina and Majcek v Commission*, [2006] ECR I-6991; case T-328/03, *O2 v Commission*, [2006] ECR II-1231.

8 Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, SEC(2010) 528/2, available at: http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf (hereinafter referred to as 2010 Horizontal Guidelines).

9 See *inter alia* Article 101(3) Guidelines, para. 12, 14 and 32.

The note will conclude that although it is perhaps premature to draw any conclusions as to the future directions of the Commission's approach, the proposed Guidelines seem to have gone some way toward "bridging the gap" existing between the EU Courts' most recent understanding of Article 101 TFEU and the Commission's reading of the same provision. However, it will also be suggested that further reflection will have to be made as regards the legal analysis applicable to 'by object' restraints, to ensure that the ECJ's approach, emerging especially from the *Barry Brothers* preliminary ruling, is appropriately reflected in the forthcoming Guidelines.

2. LEGAL ANALYSIS OF PRIMA FACIE ANTI-COMPETITIVE PRACTICES UNDER ARTICLE 101 TFEU: TO BALANCE OR NOT TO BALANCE? A SUMMARY

2.1. Prohibition of anti-competitive agreements under the EU antitrust rules: brief remarks on evolving trends

The limited purvey of this paper does not allow for an exhaustive examination of the case law relating to the notion of restriction of competition or for a detailed consideration of the relationship existing between the "prohibition" clause, contained in Article 101(1) TFEU, and the legal exception provided by its paragraph 3. It is nonetheless necessary to recall, albeit in brief, the general trends and approaches characterising the interpretation of this provision. It is well known that, whereas in its early judgments the Court of Justice had adopted a "broad" reading of Article 101(1) TFEU according to which all practices having an adverse impact on the parties' freedom to trade would be held incompatible with the Treaty competition rules,[10] its later decisions pointed gradually to a more restrained and rather "selective" view of what would constitute a prima facie unlawful restraint on competition.[11] In *STM* it was held that individual agreements, and especially those not entailing a "serious" infringement of the competition rules, would have to be assessed in their actual context and would be prohibited by Article 101(1) TFEU with a view to determining whether they had actually impaired competition to an appreciable degree.[12] This framework for assessment would have to take

10 *Inter alia*, case 56/64, *Consten and Grundig v Commission*, [1966] ECR 429, pp. 472-473.

11 See e.g. case 56/65, *STM v MBU*, [[1966] ECR 337. For commentary see, *inter alia*, Odudu, 2006: 98.

12 Case 56/65, *STM*, cit. (fn. 11), p. 249.

into account the nature and quantity of the products affected, the size of the concerned parties and the existence of any "networks" of similar practices, with a view to considering ultimately whether the agreement had appreciably contributed to the foreclosure of the relevant market.[13]

It is also clear that this relatively more "restrained" reading of the concept of restriction of competition has a direct impact on the scope and manner of interpretation of the exemption clause, which is applicable, at least in principle, to all prima facie ant-competitive practices, even those entailing particularly "nefarious" antitrust breaches.[14]

According to the well known General Court's decision in *Metropole*, Article 101(3) TFEU would provide the forum within which to assess the pro- and anti-competitive effects of all practices restricting the freedom of trade of the concerned parties, having regard to their economic and legal context.[15] The Court emphasised that this interpretation would prevent Article 101 from "extending abstractly and without distinction" to any arrangement that has the effect of restraining the freedom to trade of its parties.[16] In light of *Metropole*, the Commission took the view in its 2004 Article 101(3) Guidelines that the application of Article 101 TFEU would be articulated in two parts: the first would involve a consideration of whether individual practices had an anti-competitive object or effect, having regard to their content and purpose and in light of their economic and legal context; the second part, instead, which would only become relevant if the first part of the assessment had a positive outcome, would require a consideration of whether the anti-competitive impact of the agreement could be counterbalanced by beneficial effects for competition, expressed in the form of productive as well as of allocative efficiency gains.[17]

Commenting on the relationship between the prohibition and the exemption clauses within Article 101 TFEU, Jones suggested that the approach suggested by the EU Courts up to *Metropole*, and crystallised by

13 13 For commentary, see e.g. Whish, 2008: 116-117.

14 See e.g. case C-17/93, *Matra Hachette v Commission*, [[1994] ECR II-595, para. 85. See also Commission Guidelines on the application of Article 81(3), [2004] OJ C101/97 (hereinafter referred to as Article 81(3) Guidelines), para. 32-33.

15 Case T-112/99, *Metropole and others v Commission*, [2001] ECR Ii-2458, para. 74 and 76.

16 Id., para. 75.

17 Commission article 101(3) Guidelines, para. 11-12.

the Commission in its Guidelines, had resulted in de facto "dividing up" the assessment of anti-competitive practices into two prongs: Article 101(1) TFEU, aimed at gauging whether an arrangement had had a negative impact on competition whereas the legal exception would allow the defendants to plead that their agreement, despite restricting competition, had a beneficial impact on productive efficiency which outweighed its negative effects on rivalry.[18] However, the relatively generous view of the concept of "restriction of competition" came to be criticised by commentators. It was argued that such a broad understanding of restraint of competition as catching de facto any restraint on the freedom of trade of the parties resulted in "economically indefensible" conclusions as regards pretty "harmless" practices. More generally, it was suggested that this interpretation could lead to the de facto shifting of a significant part of their assessment to the framework of paragraph 3.[19] In response to these concerns, the Commission, as part of its plans of "Modernisation" of the competition enforcement structures, sought to elaborate a more "economics-based" approach to the prohibition clause.

Already in its 2004 Guidelines the Commission attempted to reconcile this "bipartite structure" for article 101 TFEU, according to which the assessment of individual practices was "divided" between the prohibition clause – focused mainly on its negative effects for competition – and the exemption clause – concerned instead with the assessment of the extent to which a prima facie restrictive practice could yield benefits, according to the four conditions listed therein, with the need to confine the remit of the antitrust rules to genuinely anti-competitive conduct.[20] Consequently, it took the view that prima facie unlawful conduct could nonetheless be "tolerated" as being compatible with the over-arching objective of Article 101 TFEU, i.e. the pursuit of economic efficiency to the benefit of the consumer if it fulfilled the four conditions of Article 101(3).[21]

However, the Commission, consistently with the General Court in *Metropole*, refused to take the view that the "prohibition clause" would provide the forum for the comparative assessment of the pro- and anti-

18 Jones, 2006: 788.

19 Jones, 2006: 748-749; see also Schweitzer, 2009: 140.

20 Commission Article 101(3) Guidelines, para. 33; see also para. 40-41. For commentary, see Schweitzer, 2009: 144-145.

21 Commission Article 101(3) Guidelines, para. 12-13.

competitive effects of an individual practice: it affirmed instead that once a specific agreement had been found to be contrary to Article 101(1), either by reason of its 'object' or of its 'effects', it would be caught by that prohibition.[22] Any allegation that it would be likely to benefit economic efficiency and consumer welfare would therefore only be considered against the framework provided by the exemption clause, without affecting the prior conclusion that the practice had infringed the prohibition clause.[23] Although both the Commission and the General Court affirmed that it was indispensable to consider any allegedly anti-competitive practice in its legal and economic context and, more generally, to subject it to a relatively "flexible" examination, they openly excluded that a "balancing exercise" between pro- and anti-competitive effects could take place outside the framework of the legal exception of Article 101(3) TFEU.[24]

In other judgments the EU Courts seemed to cast doubt at least in part on the "bipartite" structure suggested for Article 101 TFEU in the *Metropole* judgment and later endorsed by the Commission. Thus, in respect to so-called 'ancillary restraints' of competition, i.e. those restrictive practices that are "strictly related and necessary" for the completion of a principal, legitimate commercial transaction, such as the sale of a business,[25] the ECJ held that not all agreements aimed at restriction the freedom of trade of their parties would be caught by the prohibition laid down by that provision.[26] The Court held that contractual restraints limiting the ability to compete on a specific market would not fall within the scope of paragraph 1 if, having regard to their legal and economic context and to the conditions of competition within a given market, they pursued a "legitimate commercial purpose" and were limited in their duration and geographic scope.[27]

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22 Commission Article 101(3) Guidelines, para. 16-17; see also para. 20-22 and 25.

23 *Id.*, para. 32-33. See also e.g. case 56/64, *Consten and Grundig v Commission*, [1966] ECR 429 at 472-473; also case T-112/99, *Metropole and others v Commission*, [2001] ECR II-2459, para. 74.

24 Case T-112/99, *Metropole and others v Commission*, [2001] ECR II-2459, para. 72-74; also Commission Article 101(3) Guidelines, para. 12-13.

25 *Inter alia*, Commission Notice on restrictions directly related and necessary to concentrations, [2005] OJ C-56/24, para. 12-13.

26 Whish, 2008: 124; see also 126.

27 Case 42/84, *Remia BV v Commission*, [1985] ECR 2545, para. 17-19.

Later case law indicated that these requirements of "necessity" and of "proportionality" could be applied to assess the lawfulness of restrictions on the freedom of trade of undertakings that were agreed not only for broadly commercial purposes, but also to satisfy a "public interest objective".[28] In the other *Wouters* preliminary ruling the Court of Justice acknowledged that the prohibition of multidisciplinary partnerships between lawyers and other professionals, imposed by the applicable rules of professional conduct, limited the freedom to provide services enjoyed by lawyers.[29] However, it took the view that this arrangement, despite being liable to be caught, at least in principle, by Article 101(1) TFEU, had to be examined against its legal and economic context and especially against the objective that it sought to achieve,[30] i.e. upholding appropriate standards of conduct of the legal profession for the purpose of protecting the sound administration of justice.[31] Accordingly, the Court of Justice concluded that having regard to the overall scheme of the regulation of the legal profession in the Netherlands and to the underlying need to reconcile the economic freedom enjoyed by individual lawyers with the application of suitable standards of professional conduct in the public interest, the prohibition of multidisciplinary practices could reasonably be regarded as "necessary" to ensure the proper exercise of the legal profession in the public interest.[32]

The *Wouters* decision was widely criticised and the limited remit of this paper does not allow for further comment on the issues it raised. It is suggested that in the decision the Court engaged in a balancing exercise between the opposing interests of free competition, on the one hand, and the protection of the sound administration of justice on the other hand; it did so, however, not in the context of Article 101(3) TFEU, but in that of the prohibition clause.[33] Whether the Court did so to declare the competition

28 Case C-250/92, *Gottrup Klim e.a. v Dansk Landburgs G. AmbA*, [1994] ECR I-5641, para. 34-35; see also Article 81(3) Guidelines, para. 31-32.

29 *Id.*, para. 90.

30 *Id.*, para. 97.

31 *Ibid.*

32 *Id.*, para. 107-109; see also para. 100-101.

33 See, *inter alia*, Commission decision 2000/475/EC of 24 January 1999, *CECED*, [2000] OJ C47, especially para. 47-51; also Commission decision 94/322/EEC of 18 May 1994, *Exxon/Shell*, [1994] OJ L144/20, especially para. 67-68. For commentary, see Townley, 2009: 148-153.

rules inapplicable to restraints on competition serving a "national" policy interest or other public policy goals,[34] or simply to overcome the difficulties arising from the Commission's "monopoly" on the granting of "exemptions"[35] is still open to question.

However, it is undeniable that *Wouters* had a significant impact on the development of the approach to Article 101.[36] It is suggested that in light of this preliminary ruling it is not longer clear whether the legal exception remains the "exclusive forum" for the appraisal of any positive effects stemming from prima facie infringements of Article 101(1) TFEU. While this uncertainty is surely apparent in respect to the assessment of practices aimed at achieving "non-economic" goals and especially those of a "constitutional" nature,[37] it is undeniable that the approach to the "division of work" existing between the prohibition clause and the legal exception hitherto accepted by the EU Courts and transposed in the Commission's Article 81(3) Guidelines may not easily be reconciled with the pattern of legal analysis adopted in *Wouters*.[38] The next section will examine how later decisions have changed the hitherto "established" approach to the interpretation of Article 101 TFEU and especially to the legal analysis that this provision entails.

2.2. From an "in-context" legal assessment to a "counterfactual analysis" of prima facie anti-competitive practices: 'Meca Medina' and 'O2'

Section 2.1 provided a brief outline of the more "traditional" approach to the interpretation of Article 101. In that context, it was emphasised that the EU Courts' case law had gradually moved from a very generous interpretation of the notion of restriction of competition to a more selective reading of the prohibition clause itself, inspired by stronger economic principles and by a concern for avoiding casting too wide a "net" over potentially harmless restraints on trade. However, it was also illustrated how this move had had significant consequences for the relationship between the 'prohibition' clause and the legal exception. Already the *Wouters* preliminary ruling had seemed

34 Monti, 2002: 1083-85; see also 1086-87.

35 Townley, 2009: 135-138; cf. O'Loughlin, 2003: 64 and 68-69.

36 Whish, 2008: 128-129.

37 See e.g. Monti, 2002: 1084-1085; also Townley, 2009: 134-135.

38 See Jones, 2006: 784-85; see also 788 and 804-805.

to suggest that some consideration of the supposedly "beneficial effects" of prima facie competition infringements should take place within the framework of the prohibition clause. Although the Court of Justice sought to justify this finding on the ground of the need to place each practice in its legal and economic context (especially when its "content and purpose" was not immediately and openly offensive of competition) its conclusions contributed to casting shadow on the extent to which the Commission Article 101(3) Guidelines could be considered "tenable" in light of the evolving judicial approach to Article 101 TFEU.

This section will provide a brief analysis of a number of decisions handed down after *Wouters* and in that context will seek to illustrate their impact on the hitherto "established" interpretation of Article 101, also endorsed by the Commission. In the *Meca Medina* case[39] the Court of Justice examined the question of whether a decision of the International Olympic Committee, seeking to exclude from competitive sports athletes found to be positive to anti-doping tests, constitute a restraint on their economic freedom akin to a restriction of competition caught by Article 101(1) TFEU. The Court took the view that although this decision entailed a limitation in the freedom of action of an 'undertaking' (namely, an individual engaged in sports activities for the purpose of gainful employment),[40] it should not be regarded as automatically prohibited by Article 101.

The Court observed that since they pursued a legitimate aim, i.e. the protection of the health of athletes and the integrity of competitive sports,[41] and were limited to what was necessary to achieve that objective[42], the anti-doping rules and especially the sanctions imposed for their infringement were not incompatible with the Treaty competition rules.[43] Thus, it was concluded that although they resulted in a limitation of the economic freedom of the applicants, these rules were not caught by the prohibition clause.[44]

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39 Case C-519/04 P, *Meca Medina and Majcek v Commission*, [2006] ECR I-6991.

40 *Id.*, para. 24-25. See also, *mutatis mutandis*, case T-193/02, *Laurent Piau v Commission*, [2005] ECR II-209, para. 91-99.

41 *Id.*, para. 43; see also para. 45-46.

42 *Id.*, para. 44; see also para. 47-49.

43 *Id.*, para. 42.

44 *Ibid.*

Just as with *Wouters*, *Meca Medina* was widely debated: commentators argued that with this decision the Court of Justice had appeared to be moving cautiously away from the "bipartite" reading of Article 101 and toward the application of a "standard of reason" in its interpretation, as a result of which some "balancing" between the protection of competition and the pursuit of the public interest would be required before a practice could be regarded as anti-competitive.[45] Other authors, however, suggested that, due to the nature of the case, the Court could have been motivated in its analysis by the circumstance that these rules had not been notified to the Commission: accordingly, it was wondered, just as with *Wouters*, whether the "flexible" approach taken in the judgment could have been a response to the need to overcome the difficulties associated with the "monopoly" on the granting of individual exemptions.[46]

In any event, it is acknowledged that the approach prevailing in *Meca Medina* and *Wouters* does not sit very comfortably with the bifurcated structure of Article 101 TFEU suggested by the Commission in its Article 101(3) Guidelines, as a result of which it should only be for the exemption clause to "weigh" any positive aspects of a prima facie restraint of competition against its anti-competitive effects.[47] It was initially suggested that the pattern of analysis proposed in the decisions could have been regarded as being relevant only for prima facie restrictive practices resulting from the operation of regulatory structures affecting the freedom of trade of undertakings in the public interest.[48] By contrast, the "bifurcated" pattern of assessment entailed by Article 101 TFEU, enshrined in *Metropole* as well as in the Guidelines themselves, should be applicable to restraints on trade having a commercial purpose.[49] However, this view, despite seeming appealing, was relatively quickly brought in doubt by a later decision, namely the General Court's appeal judgment in *O2*. In that case, the applicant challenged the decision with which the Commission had found that a roaming agreement stipulated between O2 and T-Mobile infringed Article 101(1) but could benefit from

45 Whish, 2008 130-31; also Jones, 2006: 785.

46 Townley, 2009: 137-138.

47 Jones, 2006: 788.

48 Whish, 2008: 130-31.

49 *Ibid*.

an exemption under Article 101(3) on account of its competition enhancing effects.[50]

On appeal, the General Court confirmed that the assessment of whether an agreement infringed Article 101(1) should be carried out having regard to its legal and economic context and encompass "its object, its effects" and the extent to which it affected the pattern of trade between member states, having regard to the context in which the parties operated, the nature of the products or services affected by it and the features of the market.[51] The Court made clear that this framework for assessment would be applicable to all practices and added that when an agreement did not entail a restriction on competition 'by object', for it to be prohibited the Commission should demonstrate the existence of "such factors (…) which show that competition has in fact being restricted (…) to an appreciable extent."[52]

Most importantly, it was emphasised that this assessment should take into account the state of competition that existed in the absence of the agreement and should compare it with the degree of competition existing in the presence of the agreement itself.[53] In this respect, the General Court emphasised that this type of analysis, far from entailing the "balancing" characterising the "rule of reason approach", whose existence had been repeatedly denied in earlier case law, would only allow the courts to verify that the decision had taken into account the actual impact of the practice on both the actual and the potential competition on the market before reaching the conclusion that the arrangement had in fact restricted appreciably the existing competition.[54]

Perhaps unsurprisingly, the Court found that the roaming agreement had sought to "rebalance" the inequality existing between T-Mobile, who enjoyed a dominant position on the German mobile communications market, and O2, who instead was the last entrant into that market, by providing the latter with access to infrastructure that would have enabled it to compete with the existing incumbents.[55] The Court added that, although this arrangement

50 Case T-328/03, *O2 v Commission*, [2006] ECR II-1231, para. 6.

51 *Id.*, para. 66.

52 *Id.*, para. 67-68.

53 *Id.*, para. 69.

54 *Id.*, para. 70-71.

55 *Id.*, para. 107-108.

had generated a certain degree of dependence between the parties, that dependence was, first of all, destined to whither overtime and, secondly, did not affect the ability of O2 to create its own infrastructure with a view to competing with the other incumbents on an independent footing.[56] In the light of these considerations, the General Court concluded that the Commission decision, by failing to take into account the extent to which the agreement had enabled a new entrant to penetrate the relevant market and thereby would have achieved an increase in competition that would not have been feasible without the agreement itself, was vitiated by a manifest error of assessment and should therefore be annulled.[57] In doing so, the Court recalled the Court of Justice's *STM* decision, according to which it could be doubted that agreements allowing a new entrant to penetrate a novel market would infringe Article 101(1).[58]

It emerges from the above that *O2* represented a breakthrough from established principles governing the interpretation of Article 101 and especially the legal appraisal that should be conducted under the prohibition as opposed to under the exemption clause. Having regard to the administrative decision and especially to the pattern of analysis that characterised it, it could have been legitimately thought that the appeal would have failed, since the Commission had conducted a legal analysis that was fully in line with existing case law and with the 2004 Guidelines.[59] The General Court, instead, "took very seriously" its obligation to carry out an "in-context" and more "economics based" analysis of the agreement, as required, inter alia, by the *STM* judgment, and on that basis took the view that the practice should be subjected to a "counterfactual analysis" of its impact on competition on the relevant market, within the framework of Article 101(1) TFEU.[60] As a result, it was decided that the roaming agreement, far from having a negative impact on competition existing without the agreement itself, the agreement

56 *Id.*, para. 108-109.

57 *Id.*, para. 114-116.

58 *Id.*, para. 69.

59 Commission decision 2004/207/EC, *T-Mobile Deutschland/O2 Germany*, [2004] OJ L75/32, see e.g. para. 91-93; para. 127-130.

60 *Ibid*.

itself had instead resulted in a new entrant establishing itself on the relevant market, thus boosting the degree of rivalry characterising the industry.[61]

In light of the forgoing brief analysis, it is clear that the *O2* judgment constitutes something of a "minor revolution" in the approach to Article 101 TFEU. It is argued that, at least when an arrangement does not constitute an "obvious" restriction of competition, the decision maker should scrutinise the extent to which its "costs" in terms of reduced freedom of action of the parties had actually resulted in an increase of competition – in this case represented by the ability of O2 to enter the market and compete effectively with other suppliers, including T-Mobile, something which, in the Court's view, would not have otherwise been possible due to the "unequal economic strength enjoyed" by each party.[62] Although, as was illustrated above, this appraisal is not entirely inconsistent with established principles and especially with the frame of reference established in the *STM* decision, it results in the relevant legal standards being increasingly difficult to reconcile with the "egalitarian division of work" between the prohibition clause and the legal exception established in earlier decisions, such as *Metropole*[63], and reflected by the Commission Article 101(3) Guidelines.[64]

2.3. 'Barry Brothers' and the legal appraisal of restrictions 'by object': a step forward in the "modernisation" of the EU antitrust standards applicable to horizontal agreements?

The brief analysis conducted in sections 2.1 and 2.2 focused on the implications of the evolving legal standards applicable to 'by effect' infringements of Article 101 TFEU and emphasised that although the "counterfactual analysis" established in the *O2* appeal judgment could at least in part been regarded as consistent with existing authorities, it nonetheless questioned a number of hitherto well-established principles. It was argued that as a result of the General Court's decision, some degree of "balancing" between the anti-competitive effects of an agreement and its benefit for the rivalry characterising the relevant market would have to be conducted already

61 Marquis, 2007: 44.

62 Case T-328/03, *O2 v Commission*, [2006] ECR II-1231, especially paras. 68-69, 71-72 and 75-79. For commentary, see Marquis, 2007.

63 See e.g. Jones, 2006: 770.

64 *Id.*, pp. 804-806; see also Nazzini, 2006: 504-505.

within the framework of the prohibition clause, with clear consequences for the scope and the very nature of the analysis that ought instead to occur in order to apply the legal exception of Article 101(3).

In light of the above, it could be asked whether the "winds of modernisation" have also affected the legal standards applicable to 'by object' restraints on competition: in other words, should this more "flexible" and economics based" approach to the interpretation of Article 101 TFEU be limited only to 'by effects' cases? Or should it also extend to more serious anti-competitive practices, at least in some form? According to a number of earlier decisions, such as *European Night Services*, it appears that the "in-context" legal analysis required by the Court of Justice in its *STM* ruling should only apply to "less serious" infringements of the competition rules, i.e. to restraints 'by effect'.[65] By contrast, "obvious" violations of Article 101(1) TFEU should be regarded as unlawful only on the basis of the examination of their "content and purpose" and especially of the extent to which the latter conflict with the objective of Article 101 itself.[66]

This approach was reiterated by the 2004 Article 101(3) Guidelines: according to the Commission, restraints 'by object' are those practices that "by their very nature have the potential of restricting competition" and can therefore be "presumed" to have anti-competitive effects due to their clear and grave incompatibility with the function of Article 101 itself.[67] Their legal assessment should focus on their "content (...) and the objective aims" they pursue without, however, requiring a consideration of the "concrete effects" they have or are likely to produce on the market.[68]

The Guidelines also emphasised that a consideration of their legal and economic context, whilst being useful in some cases, would not be strictly required to justify a finding of infringement of Article 101.[69] Consequently, it could be argued that, without going as far to affirm that Article 101(1) provided an "exhaustive list" of serious competition infringements which should therefore be outlawed only on the basis of a "formalistic" examination

65 Case T-374-375/94, *ENS v Commission*, [1998] ECR II-3141, para. 136.

66 *Ibid*.

67 Commission Article 101(3) Guidelines, para. 21.

68 *Id.*, para. 22.

69 *Ibid*.; see also para. 20.

of their characteristics,[70] their legal appraisal should be limited to a consideration of their "content" and of their objectives, without extending to the impact they had, actually or potentially, on the degree of rivalry existing on the relevant market.[71]

This approach can, however, be contrasted with later decisions of the Court of Justice. In *Barry Brothers*, the Court considered whether an agreement restricting output both by providing incentives for incumbents to relinquish the market and by limiting the possibility of entry, constituted an infringement of Article 101(1) by object.[72] The parties had alleged before the domestic courts that since the arrangement was expressly aimed at facilitating the "restructuring" of the industry and did not fall into any of the "categories" listed in the Treaty itself, it should not be regarded as a competition infringement 'by object'.[73]

On a reference from the Irish Supreme Court, the European Court of Justice adopted what appeared to be a very "orthodox" reading of Article 101 TFEU and especially of the prohibition clause. The ECJ reiterated the "alternative" nature of the 'by object' and 'by effects' requirements and held that each prima facie anti-competitive practice should be assessed in light of its actual content and of the objectives it pursued. If as a result of that assessment it emerged that the arrangement was "by [its] very nature injurious to the functioning of normal competition" then it could be regarded as unlawful without the need to further consider its actual impact on the rivalry existing on the market."[74] The Court emphasised that this "presumptive" analysis was justified by the circumstance that, according to long-standing experience, certain types of prima facie infringements were particularly dangerous for competition and could therefore be expected to lead almost inevitably to its impairment.[75] By contrast, any practice whose anti-competitive nature was not equally self-evident would have to be subjected to a full-blown examination as to its

70 See e.g. case C-209/07, *Barry Brothers*, [2008] ECR I-8637, para. 16-17; see also AG Opinion, para. 42-43.

71 See *ENS*, cit. (fn. 65), para. 136; also case T-112/99, *Metropole and others v Commission*, [2001] ECR II-2459, para. 76-77; see also Commission Article 101(3) Guidelines, para. 22.

72 Case C-209/07, *Barry Brothers*, [2008] ECR I-8637, para. 3-4.

73 *Competition Authority v BIDS,* 27 July 2006, per Mr J McKechnie, [2006] IEHC 294, para. 96-98.

74 Case C-2019/07, *Barry Brothers*, cit. (fn. 72), para. 16-17.

75 *Ibid.*

impact on rivalry and would only infringe article 101(1) if it had actually adversely affected competition to an appreciable degree.[76]

However, the ECJ, unlike the General Court in *ENS*, was reluctant to restrict the "in-context", more "flexible" appraisal applied in, inter alia, *STM*, to less serious infringements of the EU competition rules. It was emphasised that the question of whether a specific practice infringed Article 101(1) by reason of its 'object' or of its 'effects' could only be answered after having examined "its provisions and the objectives which it is intended to attain" in light of its economic context;[77] or to put it in a different way, this appraisal should not be limited to the "formalistic" elements of the arrangement and especially to considering whether the latter could fall in one of the "abstract categories" listed in Article 101(1)[78] but would have to encompass the factual and legal background against which the agreement was destined to produce its effects.[79] As was aptly explained by AG Kokott in her Opinion, this obligation to assess each practice in its legal and economic context must "be taken seriously".[80] Consequently, she expressed the view that the category of restrictions 'by object' should not be limited to practices whose anti-competitive object is "clear at first sight",[81] but should also extend to arrangements whose "content and purpose" turn out to be clearly incompatible with the objectives of Article 101 TFEU "upon a closer examination"[82] and, perhaps most importantly, without falling into one of the "types" listed in the prohibition clause.[83]

Consistently with this pattern of analysis, the ECJ found that the arrangement in issue in *Barry Brothers* was clearly inconsistent with the function of Article 101, i.e. to protect the independence of each undertaking on the market, and therefore constituted an infringement of Article 101(1) 'by object'. The Court held that as a result of the agreement the parties (who

76 *Id.*, para. 15.

77 *Id.*, para. 21.

78 *Id.*, para. 23.

79 *Id.*, para. 16; see also Opinion of AG Kokott, para. 43.

80 Per AG Kokott, para. 50.

81 *Id.*, para. 47.

82 *Ibid.*

83 *Id.*, para. 48-49.

controlled around 90% of the existing demand) had been able to achieve the "minimum efficient scale" of production in an industry characterised by long term stagnation.[84] However, they had done so by framing and implementing a common policy designed to encourage "less efficient competitors" to leave the market[85] and to share the costs involved in increasing their own share of it, especially by "buying out" the customers of the rivals that had decided to abandon the market.[86] Thus, rather than being exposed to the "uncertainty" characterising their future conduct on the market and especially their ability to withstand the effects of the crisis in their industry, they had opted for coordinating their reciprocal action in such a way as to increase the transparency and concentration of the relevant market as well as to protect the market itself from the possibility that new entrants could attempt to establish themselves in it.[87]

It could be argued that the ECJ did "nothing new" in conducting such a careful assessment of the arrangement at issue in the *Barry Brothers* case: just as it was also suggested by the Advocate General, the Court conducted a close appraisal of the "content and purpose" of the agreement against its legal and economic context and, without being swayed by the "literal" interpretation suggested by the parties, found that the agreement entailed such "nefarious" restrictions of competition as to warrant the application of the "presumption" of anti-competitive effects reserved for 'by object' case. However, if the preliminary ruling is seen against the background of earlier judgments, it is apparent that the ECJ moved a step forward in the process of "modernising" its legal approach not only to 'by effect' restrictions, but also to 'by object' cases. In fact, the *Barry Brothers* preliminary ruling was characterised by a very careful and detailed analysis of the features and of the implications of the arrangement for the structure and the possible evolution of the relevant market, something which represents a relatively novel development in the pattern of analysis hitherto adopted in respect to "serious" competition breaches.[88]

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84 Case C-209/07, cit. (fn. 72), para. 32.

85 *Id.*, para. 33.

86 *Id.*, para. 35.

87 *Id.*, para. 36-38.

88 See case T-374-75, 384 and 388/94, *European Night Services and others v Commission*, [1998] ECR II-3141, para. 136; cf. case C-209/07, cit. (fn. 72), para. 21.

Unlike in other judgments, such as the *European Night Services* appeal, the Court was prepared not only to consider the arrangement's object and purpose in its actual context, but also to assess the implications for competition of the "means" employed to achieve the reduction of capacity sought by the parties.[89] Or to put it in a different way, the Court did not stop at the consideration of the objectively "hard-core" nature of the deal, as a result of which it could have declared its 'object' incompatible with Article 101(1) TFEU. Instead, it chose to conduct a careful scrutiny of its individual clauses in the context of the features and of the state of the specific industry and on the basis of such a painstaking analysis concluded that the arrangement, both as a whole and in its individual parts, had restricted competition 'by object'.[90] In doing so, the Court of Justice chose to analyse the "obvious" restrictions on the freedom of the parties to act on the market within the scope of the prohibition clause.[91]

It could legitimately be wondered whether the Court could have been prompted to adopt this pattern of analysis by the limited remit of the reference, which was confined to the question of whether the arrangement constituted an infringement of Article 101(1) 'by object' and did not therefore allow for the consideration of whether it met the legal exception's four conditions.[92] Although these "practical" concerns cannot be downplayed, it is however submitted that the framework for analysis adopted in *Barry Brothers* appears clearly justified by its commitment to applying a more economics based approach, not just to 'by effects' cases, but also to more "serious" infringements of the competition rules.[93]

In light of the above analysis, it could also be questioned whether the apparently sharp distinction between "less serious" and "obvious" restrictions of competition, drawn by the General Court in the *ENS* judgment, remains consistent with the legal approach emerging from more recent case law. It is in fact clear from the preliminary ruling that the Court scrutinised the agreement according to economics-principled parameters,[94] such as the

89 *Id.*, para. 36 *et seq.*

90 *Id.*, para. 37-39.

91 *Ibid.*

92 See e.g., *mutatis mutandis*, case T-17/93, *Matra Hachette v Commission*, [1994] ECR II-595, para. 85 and 109-110.

93 Case C-209/07, cit. (fn. 72), per AG Trstenjak, para. 52-54.

94 *Id.*, para. 36-38 of the judgment.

degree of concentration existing, respectively, before and after the agreement had been implemented and the extent to which the market had, as a result of it, been appreciably "insulated" from outside competition.[95] Consequently, its conclusions that the arrangement had infringed Article 101 TFEU by reason of its 'object' were drawn from a legal examination going well beyond its "superficial" nature, as it seemed to be suggested in *ENS*, and encompassing, instead, more complex questions and considerations which hitherto would have been relevant mainly for the assessment of less serious *prima facie* breaches,[96] as well as for the application of the legal exception of Article 101(3) TFEU.[97]

Against this background, it is concluded that, just as *O2* was for 'by effect' restraints of competition, *Barry Brothers* constitutes something of a "minor earthquake" for 'by object' breaches since it extends to them the more economics based approach advocated for less obvious infringements. However, it is unclear what impact this outcome is likely to have on existing legal standards and especially on the position adopted by the Commission in its 2004 Article 101(3) Guidelines. These questions will be addressed in the next section.

3. WHAT NOW FOR ARTICLE 101 TFEU? THE IMPACT OF O2 AND *BARRY BROTHERS* ON THE COMMISSION'S LEGAL APPROACH AND THE ROAD AHEAD

3.1. The 2004 Guidelines and the current case law: is the Commission still "up to speed" with the EU Courts?

Section 2 briefly examined the more recent case law of the EU Courts concerning the notion of 'restriction of competition': it was illustrated that the General Court and the ECJ, consistently with their commitment to adopting a more economics based and less formalistic approach to prima facie restrictive practices, sought to apply the same "in-context" and "flexible" reading of Article 101(1) TFEU to both "more serious" and less "obvious"

95 *Id.*, para. 36-38 of the judgment. Cf. para. 36-41 with case T-112/99, *Metropole and others v Commission*, [2001] ECR II-2459, para. 156-160.

96 See case C-209/07, cit. (fn. 72), e.g. para. 32 and 35-36.

97 See, *inter alia*, *id.*, para. 36-39; cf., *mutatis mutandis*, Commission decision 84/380/EEC, *Synthetic Fibres*, [1984] OJ L207/17, para. 43-44.

alleged infringements of the Treaty competition rules. On the one hand, the Courts upheld the "bifurcated" structure of Article 101 between the prohibition clause and the legal exception. On the other hand, however, in applying Article 101(1), they were willing to subject all prima facie restrictive practices to an exacting appraisal, which would take in account not only their "formal" content but also their implications for the dynamics of the relevant market before applying the appropriate legal standard for the assessment of their impact on competition – whether the "presumption of anti-competitive effects", reserved for more serious breaches or the actual assessment of their effects, applicable instead to less grave infringements.

Although the *O2* and *Barry Brothers* judgments must be welcomed as evidence of a renewed commitment to the "substantive modernisation" of the competition rules, they also openly question the extent to which the current Commission Guidelines on the application of Article 101(3) remain consistent with the relevant legal standards. It was illustrated in section 2.1 that, in respect to 'by object' infringements, the 2004 Guidelines, inspired by, inter alia, the *ENS* and the *Metropole* decisions, had stated that the appraisal of particularly grave restraints of competition should concentrate on their "content (...) and objective aims" and not so much, therefore, on their "concrete effects", actual or potential, on the market,[98] whose anti-competitive nature can therefore be presumed.[99] As regards, instead, 'by effect' violations, the Guidelines expressed the view that the appraisal required by Article 101(1) should extend only to the extent to which the practice had resulted in competition being appreciably impaired, whereas any positive gains in terms of allocative efficiency should instead be appraised against the framework of the legal exception.[100]

In light of the analysis conducted in sections 2.2 and 2.3, it may legitimately be doubted whether the 2004 Article 101(3) Guidelines remain consistent with the Courts' case law. On this point, it should be emphasised that the chasm existing between the Commission's views and those of the ECJ had already become apparent after *O2* and had prompted commentators to call the Commission to attempt to reconcile its approach to that emerging

98 *Id.*, para. 22.

99 Commission Article 101(3) Guidelines, para. 21.

100 *Id.*, para. 25-26.

from the more recent judicial statements.[101] It was argued that with the O2 judgment the General Court had seriously questioned the Commission's approach and that the legal analysis required under the prohibition clause should encompass a consideration not only of the negative effects of each practice on competition but also of its ability to enhance rivalry, for instance by facilitating new entry.[102]

It is added that the discrepancies existing between the 2004 Guidelines and the case law have become even more apparent after the *Barry Brothers* preliminary ruling: it is argued that after this decision even particularly "nefarious" breaches of Article 101 TFEU cannot escape a careful, "economics-principled" assessment of their content and purpose before any anti-competitive effect can be "presumed" as opposed to ascertained "on the ground".[103] This view has however a number of significant implications for the interpretation of Article 101 as a whole: in respect to the prohibition clause, it is submitted that the legal analysis of prima facie anti-competitive practices, rather than being fashioned around a stark contrast between more serious and less obvious infringements, is, at least in its initial stages, common to both types of arrangements. In fact, it would appear to be focused on their "content and purpose" and on the extent to which the latter are so pernicious that are almost inevitably likely to harm consumer welfare. In that case, they will be caught by the prohibition clause without the need to conduct an autonomous inquiry into their actual impact on competition in the relevant market.[104] If instead this "initial inquiry" does not reveal such negative features, "the (...) agreement (…) must be tested according to its anti-competitive effects" and will only be prohibited if it actually distorted competition.[105]

As regards instead the relationship between the prohibition clause and the legal exception, it is acknowledged that the implications of this view are more complex. In respect to 'by effect' restraints, adopting a "counterfactual" pattern of analysis would result in the allocative efficiency gains of individual

101 See, *inter alia*, Jones, 2006: 805-806; also Marquis, 2007: 43-44.

102 Odudu, 2006: 157-158; see also Nazzini, 2006: 504-505.

103 See e.g., *mutatis mutandis*, case C-551/03, *General Motors v Commission*, [2006] ECR I-3173, para. 64 and 66.

104 *Inter alia*, case 56/65, *STM v MBU*, [1966] ECR 235 at 249; also case C-209/07, cit. (fn. 72), para. 15.

105 Whish, 2008: 118; see e.g. case 56/65, *STM v MBU*, [1966] ECR 235 at 249.

practices being subsumed in the appraisal required by the prohibition clause:[106] as a result, it is suggested that the legal exception's four conditions should be read as capturing the benefits arising individual practices to, e.g. technological advancement or to the Treaty's ultimate goals, even those of a more "social" and less "economic" nature.

Having regard, instead, to 'by object' breaches, it is acknowledged that even adopting a more "flexible" and "in-context" analysis of individual arrangements under Article 101(1), the legal exception would necessarily entail a consideration of a wider range of aspects. It is argued that in these cases the exemption clause would not only retain its function of productive efficiency and public policy "exception", but also provide a forum within which to appraise any allocative efficiency benefits, if the latter could be "made to fit" within the four conditions of Article 101(3) TFEU.[107] Accordingly, it is suggested that the inquiry required for the application of Article 101(3) TFEU to more serious infringements would have to be wider than for less obvious restraints on competition and encompass a consideration of the "gains" arising from the agreement itself in terms of allocative efficiency, of technical advancements, as well as of the ability of the practice to pursue public policy objectives.[108]

Against this background, it may be concluded that the 2004 Article 101(3) Guidelines appear to be increasingly "out of step" with the EU Courts' case law: by relying on an apparently stark distinction between more serious and less grave infringements of Article 101(1), as well as on an increasingly "strained" view of the relationship between the prohibition and the legal exception, the Commission's view seems badly in need of a "fine-tuning" with the current case law. A reconsideration of the legal analysis required for 'by effect' prima facie restraints, as well as of the approach that should be adopted in the appraisal of more serious breaches, seems to be particularly urgent and could also help addressing any inconsistencies relating to the nature of the assessment required for the application of the legal exception itself. The question of whether the Commission's recent revision of its administrative

106 Cf. case T-328/03, *O2 v Commission*, [2006] ECR II-1231, especially para. 40 et seq., with Commission Article 101(3) Guidelines, para. 11-13; for commentary, see Jones, 2006: 804-805.

107 See e.g. Article 81(3) Guidelines, para. 32-34.

108 See e.g. Article 81(3) Guidelines, para. 32-35, 46-47; also case C-209/07, cit. (fn. 72), per AG Trstenjak, para. 56-57; *Competition Authority v Beef Industry Development Society and others*, judgment of 3 November 2009, [2009] IESC per Kearns J, part (b); see also concurring judgment of Fennelly J, para. 3 and 7.

practice in the area (at least in respect to horizontal restraints) is likely to address these concerns will be discussed in the following section.

3.2. The new Guidelines on horizontal restraints of competition: between the old and the new...

Section 3.1 discussed the issues arising from the impact of the more recent EU Courts' case law on the concept of restriction of competition on the existing Commission's Guidelines on the application of Article 101(3) and argued that time may be ripe for a reconsideration of the administrative policy concerning the legal appraisal that should be conducted within the scope of, respectively, the prohibition clause and the legal exception. Although to date the Commission has not released a new Notice detailing its approach to this matter, it is noteworthy that it has recently conducted an extensive consultation exercise aimed at revising the existing position as regards the application of Article 101 to specific types of practices. This section will consider whether the new Guidelines on the application of Article 101 TFEU to horizontal cooperation agreements[109] have marked any progress toward "bridging the gap" between the new legal approach adopted by the EU courts and the pattern of analysis developed by the Commission in respect to Article 101 *prima facie* infringements.

Due to the limited purvey of this paper, it is not possible to examine in detail the content of the 2001 Guidelines on horizontal restraints:[110] suffice to say that in its assessment of individual practices, the Commission had placed significant emphasis on factors such as the content and purpose of the agreement and the extent to which any of the parties concerned by them wielded significant market power, the latter measured in light of the undertaking's market shares.[111] In addition, it was clear from the 2001 Notice that certain restraints, such as agreements fixing prices, limiting output or sharing markets, would be "almost always prohibited" in view of their "harmful" nature vis-a-vis the competitive process.[112] However, perhaps most tellingly, the Commission was not prepared to engage in any detail

109 2010 Horizontal Cooperation Guidelines, cit. (fn. 8).

110 Commission Guidelines on the applicability of Article 101 to horizontal cooperation agreements, [2001] OJ C3/2.

111 *Id.*, para. 26-30.

112 *Id.*, para. 24-25.

consideration of these agreements beyond a general statement that, since they constituted 'by object' infringements, they would be unlikely to have any "redeeming features".[113]

The 2001 rather "terse" approach to horizontal restraints generally may be compared with the new Guidelines. Their section 20 reiterates the "two-step" nature of the assessment entailed by Article 101, which requires a consideration of whether, first of all, an individual practice infringes the prohibition clause by reason of its 'object' or its "actual or potential restrictive effects on competition"; and secondly, only if the answer to this first question is positive, it entails a consideration of whether the prima facie anti-competitive practice has "pro-competitive effects [that] outweigh the restrictive effects on competition", in accordance with the framework of analysis provided by Article 101(3).[114]

In respect especially to restrictions 'by object', it is noteworthy that the Commission, consistently with more recent decisions of the EU Courts, placed its emphasis on the content and objectives of the agreement, examined against the "economic and legal context of which it forms part".[115] In particular, as the Court of Justice itself had stated in *Barry Brothers*,[116] it was emphasised that, despite being a factor that could be taken into account in the legal appraisal, the "parties' intention [would not be] a necessary factor in determining whether an agreement has an anti-competitive effect."[117] It is suggested that although the Commission's treatment of more serious infringements remains rather concise, the new Guidelines are consistent with the latest developments of the relevant case law and, perhaps most importantly, with the more "economics principled" and "in-context" framework established in the Court of Justice's newer judgments.[118]

However, it is argued that the most important development brought about by the new Guidelines concerns the analysis of by effect restraints of competition. After confirming that, just as for more serious infringements,

113 *Id.*, para. 25.

114 2010 Horizontal Cooperation Guidelines, para. 20.

115 *Id.*, para. 24.

116 Case C-209/07, cit. (fn. 72), para. 17.

117 2010 Horizontal Cooperation Guidelines, para. 25.

118 See also, e.g., case C-501/06, *GlaxoSmithKline and others v Commission*, [2009] ECR I-9291, para. 55; see also para. 58-60.

the starting point of the legal assessment should be the "nature and content of the agreement" and the possibility for the parties to acquire or reinforce a significant degree of market power,[119] paragraph 29 states that a "counterfactual analysis" should inform the legal appraisal of the arrangement itself. As a result, the assessment of the prima facie anti-competitive effects of the agreement should "be made in comparison to the actual legal and economic context in which competition would occur in the absence of the agreement" and should take into account "actual or potential competition that would have existed in the absence of" it.[120] An agreement would therefore be likely to have anti-competitive effects if it could be shown that, as a result of "all its alleged restrictions", rivalry had been or was likely to be appreciably hampered.[121]

It emerges from the above that the 2010 Guidelines have been drafted in a manner which is clearly consistent with the *O2* judgment and therefore have been "tuned in" more closely to the pattern of analysis developed by the General Court. It is submitted that this development should be welcomed, not only as a means to ensuring more consistency vis-a-vis the judicial approach applicable to 'by effect' restrictions, but also as concrete evidence of the Commission's willingness to embrace a more economics-based framework for the analysis of these practices.[122]

It is suggested that the Commission's efforts appear even more evident regard being had to its analysis of commercialisation arrangements.[123] In the 2001 Guidelines the Commission stated that the appraisal of these agreements would always entail the definition of the relevant market in each case; furthermore, it drew a distinction between those arrangements leading, either directly or indirectly, to the fixing of prices and other, "less serious", restraints.[124] Whereas the former would "almost always" be incompatible with Article 101 TFEU,[125] the latter should be appraised more closely. In

119 2010 Horizontal Cooperation Guidelines, para. 29.

120 *Id.*, para. 29.

121 *Ibid.*

122 See *id.*, para. 4-5.

123 Commission Guidelines on the applicability of Article 101 to horizontal cooperation agreements, [2001] OJ C3/2, para. 139 et seq.

124 *Id.*, para. 144; see also para. 146-147.

125 *Id.*, para. 145-146.

the course of this assessment, the Commission identified as "key risks" of commercialisation the possibility to exchange "sensitive information" and to encourage commonality of costs, on the one hand, and, on the other hand, the danger of market partitioning and of facilitating artificial transparency.[126]

However, and just as what had been the case in general, the Guidelines did not engage in a detailed assessment of these "less dangerous" practices: in a similarly "terse" language, the Commission expressed the view that they would only infringe Article 101(1) if the parties enjoyed some degree of market power, measured by reason of their market share, and if, as a result, the market was already concentrated and therefore liable to increase the likelihood of artificial transparency.[127] This rather "cursory" appraisal of 'by effect' prima facie anti-competitive commercialisation arrangements may be contrasted with the approach adopted in the 2010 Guidelines. After outlining the major competition concerns arising from these practices, i.e. the likelihood that they may lead to price fixing, to the segmentation of markets and to the exchange of "strategic information", the Guidelines distinguish 'by object' infringements from practices having anti-competitive effects and in this respect reiterate the importance of defining the relevant market.[128]

Nonetheless, although the concerns outlined remain analogous to those emerging from the 2001 document, the Commission's pattern of analysis appears to diverge sometimes significantly from that enshrined in the earlier Guidelines. Thus, in respect to 'by object' infringements, the new Guidelines consider both arrangements capable of leading to price fixing and to market partitioning as particularly serious breaches of Article 101(1), whereas the earlier document had considered the likelihood of allocation of customers or outlets among the "anti-competitive effects" of these practices.[129] As to less serious infringements, the Commission placed significant emphasis on the likelihood that certain commercialisation agreements may allow new entrants to penetrate novel market and would therefore not be in contrast with Article 101(1) TFEU in as much as, by way of the arrangement, competition would be enhanced. Although a similar remark had been made in the 2001 Notice, it

126 *Id.*, para. 147.

127 *Id.*, para. 148.

128 2010 Horizontal Cooperation Guidelines, para. 229.

129 *Id.*, para. 234, 236; cf. Commission Guidelines on the applicability of Article 101 to horizontal cooperation agreements, [2001] OJ C3/2, para. 147.

is suggested that the approach adopted in the more recent document appears far wider ranging in its pattern of economic analysis. It is argued that the Commission, going beyond the consideration of market power and of market shares,[130] incorporates in its appraisal the analysis of the extent to which the agreement is likely to reduce the independence of the parties' decision-making processes and could therefore result in a "collusive outcome".[131]

In this specific context, the circumstance that the practice is capable of leading to significant commonality of costs and/or of facilitating the exchange of "sensitive information" constitutes evidence of whether the autonomy of the parties on the market has or may have been limited and, consequently, of whether competition could have been distorted as a result of the arrangement.[132] On this specific point, it is argued that the pattern of analysis suggested in the 2010 Guidelines appears broadly analogous to that adopted by the General Court in the *O2* judgment:[133] just as the General Court had required the Commission to establish whether, as a result to a prima facie restrictive practice, competition had actually been distorted,[134] the new Guidelines put the spotlight on the need to prove the existence of "restrictive effects on competition",[135] in the form of commonality of a significant percentage of the costs borne by the parties or of the exchange of "strategic information" that goes beyond what is required to implement the arrangement itself.[136]

In light of the above, it can be concluded that the 2010 Guidelines represent a concrete "step forward" made by the Commission in order to bridge the gap between its own administrative policy statements and the EU Courts' legal analysis that had been emerging after more recent judgments, such as the *O2* and the *GlaxoSmithKline*[137] decisions. Although it is premature to attempt to gauge their impact, due both to the timescale and to their limited

130 2010 Horizontal Cooperation Guidelines, para. 240-241.

131 *Id.*, para. 238-239; see also para. 242 et seq.

132 *Id.*, para. 243-245.

133 Case T-328/03, *O2 v Commission*, [2006] ECR II-1231.

134 *Id.*, see e.g. para. 107-109.

135 2010 Horizontal Cooperation Guidelines, para. 238.

136 *Id.*, para. 243-245.

137 Case T-168/01, *GlaxoSmithKline and others v Commission*, [2006] ERC II-2969; but cf. case 501/06 P, [2009] ERC I-9291

scope, it is submitted that the new Guidelines constitute evidence of the Commission's commitment to a more economics-based, more "realistic" and "flexible" approach to the analysis of prima facie anti-competitive practices, which is therefore closer to the pattern of appraisal established by the Courts themselves. It is added that the 2010 Guidelines bide well for the revision of the 2004 Notice on the application of Article 101(3), a development which, it is hoped, will contribute to ensuring more consistency between the judicial and the administrative approach to prima facie Article 101 TFEU violations.

4. FROM MOBILE PHONES TO THE 2010 HORIZONTAL PRACTICES GUIDELINES: A "BRAND NEW WORLD" FOR ARTICLE 101 TFEU? TENTATIVE CONCLUSIONS

This paper sought to provide a brief account of the evolution of the interpretation of Article 101 TFEU. It was illustrated that the rather formalistic and hence generous view of the notion of "restriction of competition" has gradually left room for a more economics-based and therefore more selective approach to what constitutes a prima facie infringement of Article 101(1). In this process the EU Courts have demonstrated a clear willingness to embrace the push toward the "modernisation" of the EU competition rules and, consequently, to implement an agenda that goes beyond the procedural aspects of antitrust enforcement and encompasses also its substantive content. Judgments such as *Meca Medina* and *O2* for "by effect" infringements and *Barry Brothers* for more serious breaches of the Treaty competition rules bear witness to the emergence of more "realistic" and economics-principled legal standards which, despite not going as far as to incorporating all the elements of the 'rule of reason', nonetheless allow for a full examination of the actual impact of individual practices on the degree of rivalry existing on the relevant market.

As a result, it was argued that the Commission's own approach to Article 101 TFEU, by stressing the "bipartite" reading of this provision, and therefore rejecting any suggestion that an analysis of the positive effects of individual practices for allocative efficiency in the context of the prohibition clause appeared increasingly out of touch in comparison with the EU Courts' more recent decisions. It was submitted that especially after *O2* both the 2001 Horizontal Restraints Guidelines and the 2004 guidance on the application of Article 101(3) had become difficult to reconcile with the judicial approach to the concept of what constituted a "restriction of competition", especially in "less serious" cases. Seen in this context, the *Barry Brothers* preliminary

ruling, with its more "flexible" and realistic reading of 'by object' restraints on competition, could only be regarded as further evidence of the need for the Commission to "modernise" its "substantive" approach to the competition rules, just as it had been the case for the procedural and institutional arrangements concerning their application.

It is therefore against this background of change that the new 2010 Guidelines on Horizontal Restraints should be analysed. Section 3 considered their essential features and analysed them in light of the more recent judicial decisions as well as in comparison with the pre-existing administrative policy statements. It was argued that the new Guidance governing arrangements between rivals mark a step forward in the process of bridging the gap with the EU courts' interpretation of Article 101 TFEU: their express reliance, at least for 'by effect' restrictions of competition, on the "counterfactual analysis" developed by the General Court in *O2* and the more developed and more comprehensive reading of what constitutes an "obvious" infringement of the prohibition clause, can be regarded as evidence of the Commission's renewed commitment to its own "Modernisation" agenda, not just in respect to procedural rules but also when it comes to the application of the substantive competition principles enshrined in the EU Treaty.

It could be argued that these are still "early days" for the new Guidance and that, in any event, the 2010 document only considers arrangements between rivals and does not, for instance, touch upon the interpretation of the legal exception or indeed upon the more general question of how we should construct its relationship with the first paragraph of Article 101. Although these concerns are justified and their resolution will depend on future developments in the Commission's own administrative policy, it is submitted that the 2010 Horizontal Restraints Guidelines represent a clear step forward in developing more economics based and realistic legal standards for prima facie restrictions of competition. It is clear that in many ways only time will tell whether this process of development will bear fruit by marking the elimination of all the substantial differences between the Commission's and the EU Courts' view of this concept. Nonetheless, in light of the analysis provided by this paper, it is concluded that this objective is clearly within reach.

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