OLD CLASSICS DIE HARD. A FEW COMMENTS ON VERTICAL RESTRAINTS AS OBJECT INFRINGEMENTS

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Not long ago, mentioning object infringements in European Union (EU) competition law would entice few, but hardly surprising reactions: post-modernization and well into the *more effects-based approach to article 101 TFEU*, object infringements would be confined to that very clear and undisputed category of competition restraints that no-one is able to reasonably argue against, such as price-fixing horizontal agreements or bid-rigging cartels.

As the orthodox approach to efficiency arguments in the Commission's 2004 guidelines on article 81(3) EC resonates, "*as a matter of principle all restrictive agreements that fulfil the four conditions of Article 81(3) are covered by the exception rule. However, severe restrictions of competition are unlikely to fulfil the conditions of Article 81(3)*" (§46). Even if the same guidelines recall that this reasoning applies indistinctly to object or effect infringements (§20), they go on to state that "*these* [object infringement] *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 81(1) to demonstrate any actual effects on the market*" (§21). The two-pronged approach to article 101 TFEU (Is it prohibited? Can it be justified?) would somewhat look out of fashion in such cases, since in object infringements the prohibition rule in article 101(1) TFEU would hardly be met by the exception of article 101(3) TFEU, and at last, the transatlantic divide between the EU and US approaches would be closed, as the debate in

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Europe would surely shift towards an efficiency, or to be more precise from a Chicagoan perspective, a *consumer-welfare* approach, with only the most serious offences being treated as *object* infringements, akin to *per se* prohibitions in US antitrust.

A few notes of dissent, however, clouded this otherwise clear horizon. Firstly, a handful of cases brought before the European Court of Justice (Court) from the late-2000's onwards appeared to unravel that prospective consensus surrounding object infringements; then, vertical infringements, long gone from the Commission's case docket, were again brought to the fore, generally to reinstate, on the eve of the expiration of the Block Exemption Regulation (to occur in 2022), decades-old principles of EU competition law on vertical restraints. I would like to focus my comments on these two points.

THE COURT'S APPROACH TO OBJECT INFRINGEMENTS

Starting from *T-Mobile* (delivered in 2009[1]), moving on to *Allianz Hungária* (from 2013[2]), and ending in *Groupement des Cartes Bancaires* (delivered in 2014[3]), the Court issued an array of decisions the focus of which was the exact scope, and boundaries, of object infringements in EU competition law. To recap, in *T-Mobile* – dealing with a preliminary ruling request – the Court faced a request to assess if an isolated exchange of sensitive information could be qualified as an infringement of competition, and an object restriction at that; in *Allianz Hungària* – again, a preliminary ruling request – the Court had to deal with the qualification of a "*complex bundle of agreements*"[4], including horizontal and vertical agreements involving insurance companies, car dealers and their association, as an object infringement. Finally, in *Groupement des Cartes Bancaires* – on appeal against a General Court judgement upholding a Commission decision against the *Groupement*, an association of French banks in charge of the management of a card-based payment system – the Court had to assess if a set of fees established by the *Groupement* and applicable to its members according to their card issuing and acquiring activities should be considered an object infringement.

1 Case C-8/08 *T-Mobile*, EU:C:2009:343.

2 Case C-32/11 *Allianz Hungària*, EU:C:2013:160.

3 Case C-67/13P *Groupement des Cartes Bancaires*, EU:C:2014:2204.

4 In the words of Advocate General Cruz Villalón, in his opinion on the case (EU:C:2012:663), §51.

While other judgements from the same period could be mentioned here, I will focus on the topical conclusions that can be drawn from these examples, especially since they could not cover more distinct behaviours nor economic and legal contexts: if the exchange of information in *T-Mobile* could easily be configured as a textbook cartel (since the case dealt with a meeting between competitors where information on future prices was being exchanged and, arguably, agreed upon), the bundle of agreements in *Allianz Hungària* and its complex arrangement raised more doubts from a qualification standpoint, since arguably an effects analysis would have to be carried out to fully understand the impact of these agreements in the market; in *Groupement*, the Court had to deal with the notion of object infringements in two-sided markets (or more generally, in complex markets), where the negative effects of a restriction of competition in one side of the market can generate clearly positive benefits on the other side[5].

The first conclusion that can be drawn from these judgements is that, unlike US's *per se* approach, or closest to home, Richard Whish's *object box*[6], there is no closed catalogue of object infringements: any agreement or collusive behaviour can be found to be restrictive by object, as long as it fulfils the criteria according to which certain behaviours can be regarded as being injurious to competition by their very nature, without the need to consider their effects on the market. This, however, should not be regarded as a *carte blanche* to authorities keen on extending the object boundaries beyond their reach. In fact, in *T-Mobile* the Court apparently veered towards a very open-ended definition of object infringement when affirming that "*it is sufficient that it* [the behaviour] *has the potential to have a negative impact on competition. In other words, … 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 common market*" (*T-Mobile*, §31). However, this statement should always be read together with §29 of the same judgement, where assessing if "*by their very nature, being injurious to the proper functioning of normal competition*" is the deciding factor when adjudicating

5 Remarkably, on the same day of *Groupement des Cartes Bancaires* (11 September 2014), the Court delivered its *MasterCard* judgement, another case where two-sided markets were discussed, again, in card-based payment systems, although the infringements in question had been qualified by the Commission as infringements by effect. Case C-382/12 P *MasterCard*, EU:C:2014:2201.

6 To be clear, Whish's proposition was not about offering a closed list of object infringements, but to summarize the cases where an object infringement had been found and should be regarded as a learning tool, not a policy proposal.

between "infringements by object" and "infringements by effect". This was repeated, again, in *Groupement*, where the Court clearly set out that "*the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition 'by object' is the finding that such coordination reveals in itself a sufficient degree of harm to competition*" (*Groupement*, §57), and that *"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*" (*Groupement*, §58).

Such *sufficient degree of harm* escapes the mere finding of a competition restriction isolated from the assessment of the legal and economic context of which it forms part, something the Court has been affirming since *Société Technique Minière*[7], and, in my opinion, the most sensitive test to be considered when assessing if an infringement should be qualified "by object" or "by effect". Only when – after assessing that context – we can say that a certain behaviour causes sufficient harm to competition, can we forego an effects analysis.

A second conclusion is that context analysis cannot (at least always) be satisfied with a *quick look*. It can be so, when facing "plain vanilla" infringements such as cartels or clearly restrictive contractual clauses, but complex markets or contractual arrangements may justify a more in-depth analysis of the context of which those behaviours are part of, short of a full-blown effects analysis. This, arguably, was something the Court came very close to in *Allianz Hungària*, especially since, when directing the national court to conduct a context analysis, "*that court should in particular take into consideration the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned*" (*Allianz Hungària*, §48). The Court stopped short of telling the national court to show that competition was harmed (or to what extent such harm should be demonstrated), but only to say that to assess the likelihood of such impact on the proper functioning of the market it may be necessary to dig deeper into the market features surrounding the conduct.

This was repeated by the Court in *Groupement*, where, quoting directly from *Allianz Hungària*, the Court recalled the need to "*to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question*" (*Groupement*, §53). However, this should not be considered an effect analysis, something

7 Case 56/65 *Société Technique Minière*, EU:C:1966:38.

the Court had markedly refused, for instance, in its 2009 *GlaxoSmithKline* judgement[8], by setting aside the need to show potential for consumer harm in an object infringement. What can be inferred from this is that the Court is willing to accept object infringements beyond the scope of price-fixing agreements and "black listed" contractual clauses, but only if the *sufficient degree of harm to competition* is clearly revealed. And that should place a greater burden on authorities choosing to rely on default object qualifications, especially when assessing corporate conduct in complex or dynamic markets. This should be kept in mind as I move on to the next point.

THE REBIRTH OF VERTICAL RESTRAINTS AS AN ENFORCEMENT PRIORITY

While possibly not as glamorous as horizontal restraints, and clearly out of the scope of enforcement priorities in Europe for several years, EU competition law and policy owe much to vertical issues.

From *Consten* onwards[9], vertical restraints were in the forefront of EU competition law's unique role in supporting market integration. In the 1990's, from Barry Hawk's 1995 *System Failure*, to the Commission's 1997 *Green Paper on Vertical Restraints in EC Competition Policy*, much of the discussion surrounding the modernization of EU Competition Policy, from a form-based approach to an effects-based approach, focussed on vertical restraints and on the competition assessment of distribution agreements, where an economic analysis of contractual restraints shows a generically more favourable outcome between positive and negative effects. In the US, the Supreme Court's decision in *Leegin* (2007), overruling *Dr. Miles* (1911), the precedent according to which resale price maintenance (i.e., price fixing between manufacturers and distributors) was *per se* illegal under the Sherman Act, renewed this discussion, with the legal acknowledgment across the Atlantic that resale price maintenance may have pro-competitive benefits and should be assessed on a case by case basis.

In the EU, however, that was not be the case. If the review of EU's rulebook on vertical restraints from 1999 resulted in a less formalistic approach to distribution agreements, the Commission's 2004 Guidelines on article 81(3) EC kept resale price maintenance as an object infringement under EU

8 Case C-501/06 P *GlaxoSmithKline Services*, EU:C:2009:610.

9 Case 56-58/64 *Établissements Consten*, EU:C:1966:41.

competition law, and that would remain the "law of the land" with the 2010 Block Exemption Regulation. And, if the enforcement side seemed dormant, at least since the Commission's last resale price maintenance decision, with *Yamaha* back in 2003[10], a resurgence of resale price maintenance cases from 2017 onwards showed that the Commission was clearly looking into vertical restraints with renewed interest, mostly to uphold and reaffirm those same old principles in relation to vertical price fixing.

Timing is a factor not to be discarded in this revival: the 2015 Commission e-commerce sector inquiry, and its 2017 final report, revealed that pricing limitations were (still) the most common type of vertical restraints, even in online marketplaces, which are facilitated by the specific features of the digital economy, especially since the use of algorithms, and price comparison and market monitoring tools, is leading to increased transparency, potentially facilitating price alignment and (at least) vertical price fixing. Coupled with the potential negative effects of old-school contractual clauses, such as most-favoured customer-type arrangements, and old-style territorial restraints, such as geo-blocking[11], when transplanted to this new environment, it is easy to conclude why the Commission found here a perfect ground to assert old principles.

Also, in 2022 the current Block Exemption Regulation will expire, and if some might argue whether specific rules on vertical agreements are still required, the development of an increasingly dynamic digital economy (with interesting challenges elsewhere for Competition Policy, as recurring dominance investigations at EU and national levels involving digital platforms show), reveals that the current set of rules and guidelines is looking increasingly outdated, and clear approaches to online marketplace conduct, new players such as digital marketplace platforms and comparison websites, and to new distribution arrangements, are required. The consultation launched by the Commission between February and May 2019 on the relevance of the block exemption and its guidelines had many of these issues in sight, and I expect the publication of the consultation's contributions and report will clarify major concerns and, hopefully, show the major trends in the assessment of such issues.

10 Case COMP/37.975 *PO/Yamaha*.

11 Which justified a standalone regulatory approach for geo-blocking measures imposed unilaterally by non-dominant undertakings. See Regulation 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment (OJ 2018 L60/1).

Looking forward, the opportunity brought by the expiration of the Block Exemption Regulation should allow for a renewed debate on the assessment of vertical restraints, especially concerning long-held certainties (this side of the Atlantic) surrounding the qualification of vertical price-fixing agreements as object infringements in light of the careful balancing act required to uphold competition policy goals and formal prohibitions in highly dynamic markets. In this regard, the Court, in its assessment of object infringements, can be shown to be giving plentiful guidance when addressing the need to consider the "*nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question*" (*Groupement*, §53, quoting from *Allianz Hungària*) before a final conclusion on the object of the infringement is reached. I would certainly expect the Commission to strongly argue the case for resale price maintenance as an object infringement in a renewed Block Exemption, in light of developments in Competition legal and economic analysis.

However, it would appear that the stage is being set for a more cautious and formal approach to competition policy in the digital economy. The April 2019 Commission-sanctioned report "*Competition Policy for the Digital Era*", while prepared by three experts independent from the Commission, favours a more formal approach to enforcement, while (ominously) advocating a greater reliance on presumptions of harm and shifts of the burden of proof from the authorities to the market players. While these proposals are mostly based on the risks of under-enforcement largely resulting from the inability (or incapacity) of competition authorities to keep track of developments in a rapidly-changing environment, it would seem strange – at least from a legal perspective – to err on the side of over-enforcement and give rise to a succession of false positives, at the expense of innovation and market dynamics.

Hopefully, open debate within the "competition community" will help to shed some light on this discussion and find a right balance between legal certainty (for enforcers and market players alike) and innovation; but certainly, it will keep the 50-year old debate "object vs. effect" well alive in the foreseeable future.