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Expanding the "Object Box" and its Perverse Effects

Does EU Competition Law Condemn Innocent Behaviour?

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14.970 words

Abstract

Background

The notion of "anti-competitive object" in the post-modernisation era of competition law has expanded in two ways. First, "new types" of practices have been introduced to the object box. Second, the ECJ has recently suggested that a limited economic analysis may be employed to convert a classic restriction "by effect" into a restriction "by object".

Purpose

The purpose of this paper is (i) to examine our present-day understanding of what is an object restriction and (ii) to assess whether a broad interpretation of the notion and its consequences does not lead to a risk of deterring potentially consumer-enhancing behaviour.

Analysis

First, the paper presents the different methods for identifying an object restriction and brings the abridged competitive analysis approach of the ECJ in *Allianz Hungária* into focus. Second, it examines the appropriate model for selecting the practices that are suitable for a presumption of harm and do not merit a full-blown effects assessment. Third, the paper analyses whether the contents of the object box, and in particular the recent addition of pay-for-delay arrangements, are justified on grounds of economic theory of harm. Finally, it is argued that the notion of object restrictions has expanded in parallel with post-modernisation developments limiting the possibility for defendants to rebut the presumption of harm.

Conclusion

It concludes that object restrictions under EU competition law include practices that do not necessarily lead to harm and may contain redeeming virtues. When combined with a significant limitation of the available defence options to rebut the presumption of harm, the broad view of the object box may lead to an approach that is too formalistic, and may therefore result in errors of over-enforcement.

Keywords

Article 101 TFEU

Article 101(3) TFEU

De Minimis

Effects-based approach

Information exchanges

Object restrictions

Over-enforcement

Presumption of harm

Pay-for-delay

Table of Contents

List of Abbreviations

ATP	Absolute Territorial Protection
CMLR	Common Market Law Review
EU	European Union
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
E.C.R	European Court Reports
E.L.Rev.	European Law Review
JECLAP	Journal of European Competition Law & Practice
NCA	National Competition Authority
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
RPM	Resale Price Maintenance
TFEU	Treaty on the Functioning of the European Union

Introduction

> "Il vaut mieux hasarder de sauver un coupable que de condamner un innocent." (Voltaire)

Competition law in the past 20 years has embraced economic thinking with a view to ensuring more accurate results. In the field of Article 102 TFEU, the Commission binds itself in its Guidance Paper to move away from the previous formalistic approach towards abuse of dominance and to focus on practices harmful to competition, and ultimately to consumers, rather than those harmful to competitors.[1] To achieve this goal, the Commission suggests to apply fairly complex price/cost tests in order to verify whether an "*as efficient*" competitor will be excluded from the market.[2] There are some indications that the Courts may follow this more economics-based approach.[3] In the field of merger control, the main development is the movement away from a test based on the structure of the market towards a test based on the expected effects on competition. The new "*significant impediment to effective competition*" test[4] aims at avoiding both over-enforcement and under-enforcement, thereby resulting in a more accurate assessment.[5]

Despite the significant progress made in incorporating economic theory into Article 101[6] TFEU[7], the approach in the past 10 years to practices having an anti-competitive object, or object restrictions, raises serious concern as regards the appropriate enforcement level in competition law. As Voltaire put it centuries ago, "*it is better to risk saving a guilty man than to condemn an innocent one*"[8]. His view is relevant to present-day competition law in two ways. First, this liberal vision and preference for under-enforcement[9] to over-

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[1] Commission Communication of 24 February 2009, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, O.J. C 45, para 19.
[2] *Ibidem,* para 25 and 26.
[3] *See* Case C-209/10, *Post Danmark A/S v Konkurrencerådet* (not yet reported), judgment of 27.03.2012.
[4] Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings, [2004] O.J. L 24, Article 2(3).
[5] Under the new test, dominance is neither "*sufficient*" nor "*necessary*" for a concentration to be prohibited. *See* L-H RÖLLER & M. DE LA MANO, "The Impact of the New Substantive Test in European merger Control" (2006) 2(1) *European Competition Journal*, p.22.
[6] Reference is made in particular to the regulations, exempting categories of agreements, both vertical and horizontal, from the application of Article 101. In line with economic theory, given the parties' lack of market power and the absence of clauses capable of seriously restricting competition, the agreements are regarded as not having the potential to produce appreciable anti-competitive effect.
[7] All references to Article 101 relate to Article 101 of the Treaty on the Functioning of the European Union.
[8] Free translation from the quote in French at the top of the page.
[9] *I.e*. allowing practices which do result in anti-competitive harm. Also called, false negative or Type 2 errors.

enforcement[10] is the "*prevailing view*" in competition law nowadays, as the latter is likely to "*chill pro-competitive activity and stunt innovation*".[11] Second, now that the criminal nature of the Commission's and NCA's sanctioning powers has been established[12], over-enforcement is all the more of a concern, given that object restrictions usually result in the imposition of a hefty fine. The purpose of this paper is to examine whether the current interpretation in EU competition law of what constitutes an object offence and what its consequences are, does not lead to deterring and condemning "*innocent*" behaviour.

It is submitted in this paper that five post-modernisation[13] developments in relation to object restrictions have limited the role of economics in Article 101, ultimately leading to a higher risk of over-enforcement:

1. The extension of the object box[14] with new types of practices, such as some forms of reverse payment patent settlements and information exchanges.
2. The abridged competitive analysis approach for identifying object restrictions, proposed by the ECJ in *Allianz Hungária*[15].
3. The perception of object restrictions as "*risk offences*", as suggested by AG Kokott in her Opinion in *T-Mobile*[16], and the resulting irrebuttable presumption of harm under Article 101(1).
4. The judgement of the ECJ in *Expedia*[17] leading to the exclusion of *de minimis* arguments in the context of object restrictions.
5. The creation of a strong presumption that object restrictions do not satisfy the conditions for Article 101(3) and the lack of guidance on how to rebut the presumption.

Whereas the first two developments relate to expanding our understanding of object restrictions, the last three concern the perverse effects for defendants flowing from a classification of an agreement as an object restriction.

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[10] *I.e.* prohibiting practices which do not result in anti-competitive harm. Also called, false positive or Type 1 errors.
[11] JONES & SUFRIN, *EU Competition Law*, 5th ed., Oxford University Press, 2014, p.57-58..
[12] *See* ECtHR, *Menarini Diagnostics S.R.L. v. Italy*, judgment of 27 September 2011, No 43509/08; Opinion of AG Sharpston in Case C-272/09 P, *KME Germany AG v. Comission*, delivered on 10 February 2011, para 64.
[13] The modernisation of competition policy started around 1996 and involved not only a movement from form-based to effects-based approach in substantive competition law, but also institutional and procedural developments. *See* JONES, "Left Behind by Modernisation? Restrictions by Object under Article 101(1)" (2010) 6(3) *European Competition Journal*, p.649-656; GERARD, "The Effects-Based Approach Under Article 101 TFEU and its Paradoxes: Modernisation at War with Itself?" in BOURGEOIS and WAELBROECK (eds.), *Ten Years of Effects-Based Approach in EU Competition Law*, Bruylant, 2012, p.18-22.
[14] In this paper the word "object box" is used to describe all restrictions regarded as having an anti-competitive object under EU competition law. *See* WHISH, *infra* note 27.
[15] Case C-32/11, *Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal* (not yet reported), judgment of 14.03.2013.
[16] Opinion of AG Kokott in Case C-8/08, *T-Mobile*, delivered on 19 February 2008.
[17] Case C-226/11, *Expedia Inc. v. Autorité de la Concurrence* (not yet reported), judgment of 13.12.2012, para 37.

Chapter 1 examines what different methods are employed to identify an object restriction (1.1) and what model should be used, from a policy perspective, to select the practices typically regarded as object restrictions (1.2). Chapter 2 provides a critical look at the current contents of the object box and focuses in some more detail on pay-for-delay arrangements (2.2.1). Chapter 3 analyses the impact of recent post-modernisation developments on the possibility for an object restriction to avoid infringing Article 101.

1 What are object restrictions?

1.1 Identifying object restrictions

Some authors argue that recognizing an object restriction is supposed to be an easy task: every legal counsel, not versed in economics of competition, should be able to detect a clause anti-competitive by object without the need to look further into the specific market circumstances surrounding the agreement (1.1.1).[18] Other authors submit that such formalistic reasoning would not reflect the case-law of the European Courts: one cannot simply limit object restrictions to a list of practices, but has to perform a case-by-case assessment of each practice in the broader legal and economic context within which it takes place (1.1.2).[19] In *Allianz Hungária*[20], the ECJ comes up with a third method, which arguably stretches the limits of the contextual approach: an object restriction can be identified by a "quick look" into the likely effects of the agreement (1.1.3).

1.1.1 Textual approach: "l'objet du contrat"

> "I know it when I see it" (Justice Potter Stewart in *Jacobellis v. Ohio*[21] regarding possible obscenity)

The famous quote by Justice Potter Stewart reflects perfectly the idea that some offences are obvious to the naked eye. If you do not see it, then it is not there. This reasoning is similar to the textual approach towards object restrictions. It suggests that in order to determine whether an agreement contains such a restriction, one should look only at the terms of the agreement and should not look further than the "*four angles of the contract*"[22].

The textual reading of object offences is arguably influenced by civil law legal traditions. The French notion of "*l'objet du contrat*" means the legal transaction contemplated by the parties, as determined from all the rights and obligations which the contract creates, at the time of the conclusion of the contract.[23] The objective of an

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[18] NAGY, "The Distinction between Anti-competitive Object and Effect in Allianz: The End of Coherence in Competition Analysis?", (2013) 36(4) *World Competition*, p.555.
[19] KING, "The Object Box: Law, Policy or Myth?", (2011) 7(2) *European Competition Journal*, p.270.
[20] *Allianz Hungária*, *supra* note 15.
[21] US Supreme Court, *Jacobellis v. Ohio*, (1964), 378 U.S. 184.
[22] NAGY, *supra* note 18, p.544.
[23] The provision of the French Civil Code dealing with the object of the contract is Article 1126. There are two readings of this provision in the French legal literature (*See* PELLETIER, *La caducité des actes juridiques en droit privé français*, Paris, Harmattan, 2004, p.43). For example, "l'objet du contrat" can mean either the house, which is being sold, or the sale itself. The latter interpretation is more clearly defined in Article 1412 of the Civil Code of Quebec, from where the quote in the text originates: "*l'objet du contrat est l'opération juridique*

agreement may be, for example, to grant a license or to agree not to compete in certain geographical areas. This should be determined on the basis of the clauses contained in the contract. The main function of identifying "*l'objet du contrat*" in legal systems, wearing the Napoleonic stamp, is to examine whether it does not violate public order considerations.[24] For instance, agreements having as main objective the sale of a person or the formation of a cartel both go against public order, and are therefore null and void.

This rather formalistic reasoning, which does not take into account the broader economic context of the agreement, has left its, albeit rather limited, mark on EU competition law. The Commission states in its Article 101(3) Guidelines that "*restrictions of competition by object are those that by their very nature have the potential of restricting competition*".[25] Furthermore, the distinction between object and effect, as understood by the supporters of the more formalistic textual approach, is best exemplified by the General Court in *European Night Services*. The Court states that in order to assess a practice under Article 101(1), "*account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned, unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets*".[26] In other words, there are certain categories of practices which are under any circumstances presumed to restrict competition under Article 101(1).

According to Whish, one can think of competition law infringements in terms of boxes: the object box and the effect box.[27] The former is a small box containing only restrictions that are "*so clearly inimical to the objectives of the EU that they can be permitted only where they can be shown to satisfy the requirements of Article 101(3)*".[28] Based on the case-law of the European Courts and the decisional practice of the Commission, Whish defines the contents of its object box as follows: "*(i) horizontal agreements to fix prices, to exchange information that reduces uncertainty about future behaviour, to share markets, to limit output, including the removal of excess capacity, to limit sales and for collective*

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envisagée par les parties au moment de sa conclusion, telle qu'elle ressort de l'ensemble des droits et obligations que le contrat fait naître".

[24] Article 6 of the French Civil Code.

[25] Commission Communication of 27 April 2004, regarding Guidelines on the Application of Article 81(3), [2004] O.J. C101/97 (hereinafter "the Article 101(3) Guidelines"), para 21. *See* also Case C-209/07, *Competition Authority v. Beef Industry Development Society and Barry Brothers*, [2008] ECR I-8637, para 17.

[26] *See* Joined Cases T-374, 375, 384 & 388/94, *European Night Services* v. *Commission*, [1998] ECR II-3141, para 136.

[27] WHISH, *Competition Law*, 7th ed., Oxford University Press, 2012, p.120.

[28] *Ibidem,* p.121.

exclusive dealing and (ii) vertical agreements to impose fixed or minimum resale prices and to impose export bans".[29] This suggests that these practices have the object to restrict competition, regardless of the legal and economic context within which they take place. The key question is therefore whether an agreement can be qualified as one of the agreements found in the object box.

There are clear advantages of using this rather simplistic approach of thinking in terms of categories of infringements. The obvious one is legal certainty. Legal counsels can benefit from a list of "no-go" practices. In addition, undertakings will have the certainty that any practice outside of the object box will be given a full-fledged economic assessment.

1.1.2 Contextual approach: "legal and economic context"

> "We need to remember: restrictions by object are serious - but not necessarily obvious." (A.Italianer)[30]

The second approach to identifying an object restriction, albeit more sophisticated, is the one that prevailed in the case-law. It claims that rather than assessing agreements in a "*vacuum*", account should be taken of the legal and economic context within which the agreement takes place. [31] This means that two contracts containing the same wording can be either qualified as restrictions having an anti-competitive object or assessed on their effects, depending on factors external to the contract. Such factors include, for example, the type of industry, the existence of specific IP rights[32] or of documentary evidence showing intent[33]. The European Courts have embraced the contextual analysis in the majority of their judgements.[34] In addition, the Commission in its Article 101(3) Guidelines specifies that "*an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction*

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[29] *Ibidem.*, p.124. The same restrictions *grosso modo* are enlisted in the definition of a hardcore cartel in OECD Council 1998, "Recommendation of the Council concerning Effective Action against Hard Core Cartels", adopted by the Council at its 921st session on 25 March 1998 and reprinted in OECD Report, *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Publications, Paris, 2002, pp. 105-107 and in the list of object restrictions included in the Article 101(3) Guidelines, *supra* note 25, para 23.

[30] Speech of ITALIANER, "Competitor Agreements under EU Competition Law", *40th Annual Conference on International Antitrust Law and Policy at Fordham*, New York, 26 September 2013. Available at: http://ec.europa.eu/competition/speeches/text/sp2013_07_en.pdf, April 20, 2014.

[31] ITALIANER, *supra* note 30, p.5.

[32] *See* Case 262/81, *Coditel v Ciné Vog Films*, [1982] ECR 3381.

[33] Proof of subjective intent is not a necessary condition for a finding of an object restriction, *see* Article 101(3) Guidelines, para 22. Odudu goes even further and argues that although subjective intent is not a *conditio sine qua non* for the finding of "object", it is a sufficient condition, *see* ODUDU, "Interpreting Article 81(1): Object as subjective intention", (2001) 26(1) E.L.Rev., p.60-75.

[34] *See* Joined Cases C-501/06, C-513/06, C-515/06 and C-519/06, *GlaxoSmithKline v. Commission*, [2009] ECR. I-9291, para 58; *BIDS*, *supra* note 25, paras 16 and 21.

constitutes a restriction of competition by object"[35]. The assessment of external circumstances is, however, not supposed to go as far as to examine the effects of the agreement on the market. Otherwise, that would lead to an odd situation where demonstrating some anti-competitive effects is required in order to establish an object restriction.[36]

The contextual analysis is a more refined approach to determining what is an object restriction. It allows for a tailored case-by-case assessment of whether the agreement deserves wearing the object "stigma". Nonetheless, it inevitably leads to more legal uncertainty and can act as a "double-edged sword". On the one hand, looking outside the boundaries of the agreement may serve to pull some typically object restrictions out of the object box, and in some cases even out of the reach of Article 101(1). Both *Coditel II*[37] and *Erauw-Jacquéry*[38] concerned ATP clauses which were found to fall outside Article 101. The ECJ looked beyond the "four angles of the contract" and placed the agreements in their economic context, paying particular attention to the specific nature of the property rights involved[39] and the necessity to protect investments.[40] On the other hand, external circumstances can place a typically effects restriction within the scope of the object box. Chapter 1.1.3 presents the example of *Allianz Hungária*[41].

1.1.3 Abridged competitive analysis approach: determining object by looking into effects

> "[T]he line between restrictions by object and those by effect is not always bright. Reading its more recent rulings one may wonder whether the Court, whilst finding a restriction by object, may not have gone rather far towards analysing the effects of the agreement…"[42] (A. Italianer on *Allianz Hungária*)

The abridged competitive analysis[43] approach is an extended version of the contextual approach. It implies that in order to determine whether a restriction has an anti-

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[35] *Supra* note 25, para 22.
[36] *See infra* Chapter 1.1.3.
[37] *Coditel II*, *supra* note 32.
[38] Case 27/87, *Erauw-Jacquéry v. La Hesbignonne*, [1988] ECR 1919, para 11.
[39] While *Erauw-Jacquéry* involved protection granted to a basic seed licensee, *Coditel II* involved an exclusive right to the public performance of a film.
[40] *Erauw-Jacquéry* and *Coditel II* illustrate well the application of the "ancillary restraints" doctrine in EU competition law. For further reading, *see* JONES & SUFRIN, *supra* note 11, p.242-246.
[41] *Supra* note 15.
[42] ITALIANER, *supra* note 30, p.6.
[43] The term originates from Case T-168/01, *GlaxoSmithKline Services v Commission*, [2006] ECR II-2969, paras 119-120; *See* BAILEY, "Restrictions of Competition by Object under Article 101 TFEU", (2012) 49 CMLR, p.585-586.

competitive object, a truncated analysis of the competitive structure of the market, including an examination of market power, may be conducted. Hence, this method falls short of performing a full-fledged assessment of anti-competitive effects.

A recent preliminary ruling judgement of the ECJ, *Allianz Hungária*[44], illustrates well the technique of the abridged competitive analysis. The case raised concerns amongst practitioners that the EU and the Member States are identifying object restrictions by conducting a limited analysis of effects, thereby eliminating any meaningful distinction between the two.[45] *Allianz Hungária* concerned vertical agreements[46] between insurance companies, Allianz and Generali, and car repairers or an association of car repairers. The car repairers wore two hats: they acted as repairers for consumers and as insurance brokers for insurance companies. The provisions of the agreements stipulated that the hourly repair charge paid by the insurance company to the repairer was a function of the number and percentage of insurance policies purchased from the insurance company. In other words, the remuneration of car repairers increased with the number of insurances sold to customers. This created an incentive for car repairers to convince customers to buy an insurance policy from Allianz or Generali. The Hungarian competition authority took the "shortcut" option: it classified the agreement as having an anti-competitive object and did not make the effort to look into effects.[47] The question referred to the ECJ was whether such an agreement could be qualified as an object restriction.[48]

AG Cruz Villalón followed a rather traditional reasoning, in line with previous case-law, to conclude that such an agreement deserved a full-fledged effects analysis.[49] Firstly, he stated that competition law did not expressly prohibit vertical clauses which produce incentives for the distributor to sell more units from the supplier's product, even if the clause was "*intended to increase an undertaking's own sales at the expense of those of its competitors*".[50] After all, even single-branding obligations[51], if limited in time, are tolerated

[44] *Supra* note 15.
[45] See HARRISON, "The Allianz Hungária case - The ECJ's judgment could have ugly consequences", (2013) 12(6) *Competition Law Insight,* p.10-12; NAGY, *supra* note 18.
[46] The case had a horizontal aspect as well, which is not discussed here.
[47] NAGY, *supra* note 18, p.556.
[48] *Allianz Hungária, supra* note 15, para 16
[49] Opinion of AG Cruz Villalón in Case C-32/11, *Allianz Hungária,* delivered on 25 October 2012, paras 61-81
[50] *Ibidem,* para 77.
[51] The agreement at hand in *Allianz Hungária* was not even a *de jure* non-compete obligation, but a clause which might *de facto* have the same effect as a non-compete clause.

by EU competition law.[52] Secondly, the AG referred to earlier case-law, where the Courts examined non-compete clauses on account of their effects.[53]

Unlike AG Cruz Villalón, the ECJ did not exclude that the agreement at hand, "*following a concrete and individual examination of the wording and aim of those agreements and of the economic and legal context of which they form part*", could be classified as an object restriction.[54] The ECJ gave guidance to the referring court as to the elements which should be considered when determining whether the specific clause had an anti-competitive object. Two of them appear novel and seem to deviate from previous case-law on similar vertical restraints.

First, the ECJ submits that Hungarian consumer protection laws, requiring that car repairers acting as insurance brokers be independent from insurance companies, is a relevant criteria for identifying an object restriction.[55] It looks like the ECJ provides for a possibility to correct the malfunction of another field of the law[56], consumer protection, by the application of competition law.[57]

Second, the ECJ holds that an object restriction can be found where, "*having regard to the economic context*", and in particular "*the structure of the market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned*", "*it is likely that* […] *competition on the market would be eliminated or seriously weakened*".[58] This reasoning is problematic in two ways. From a normative point of view, it creates confusion as to where object analysis stops and effects analysis begins. It is striking that the ECJ establishes a test for determining object restrictions, which is based on a limited analysis of the competitive structure, in order to conclude that a more in-depth analysis is unnecessary. In fact, the criteria mentioned by the ECJ in paragraph 48 are almost identical to the relevant criteria employed to establish

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[52] Opinion of AG Cruz Villalón in Case C-32/11, *Allianz Hungária, supra* note 49, para 77
[53] *Ibidem,* para 80; *See* Case C-234/89, *Delimitis* [1991] ECR I-935, paras 13-15.
[54] *Allianz Hungária, supra* note 15, para 51.
[55] *Allianz Hungária, supra* note 15, para 47.
[56] A similar idea can also be found in another recent case, *see* Case C-457/10 P, *AstraZeneca AB and AstraZeneca plc* v. *European Commission* (not yet reported), judgment of 6.12.2012, where competition law provided a remedy for the malfunction of the patent system.
[57] *See* NAGY, *supra* note, p.561, who states that "*perverted cases normally entail perverted judgments*"; VEDDER, "Allianz and the Object-Effect Dichotomy in Article 101(1) TFEU: A Practical Solution Meets Not So Practical Competition Law", *European Law Blog,* 8 April 2013. Available at: http://europeanlawblog.eu/?p=2147#sthash.6FYzqXCT.dpuf, who regards the Court's reasoning as a "*spectacular misconception of competition law*".
[58] *Allianz Hungária, supra* note 15, para 48.

foreclosure in classic effects cases[59], such as *Delimitis*[60] and *Brasserie de Haecht*[61]. Hence, it is not entirely clear to what extent the abridged competitive analysis, as proposed by the ECJ in *Allianz Hungária,* differs form the full-fledged analysis, applied by the Courts in *Delimitis* and *Brasserie de Haecht*. From a practical point of view, the judgment appears to authorize the Commission and the NCAs to present as much economic evidence as they have in possession, or are willing to collect, so as to classify a practice as an object restriction. Such a policy will not only deprive undertakings of their legitimate expectations to have their agreements assessed under a full-blown economic analysis, but will also significantly reduce the odds of a successful defence[62]. Hence, the conversion of a typically effects restriction into an object one, is more likely to lead to an incorrect result. When the external circumstances relevant for the abridged assessment are not such as to guarantee that consumer harm would inevitably occur, a comprehensive analysis of effects is more appropriate in order to avoid a Type 1 error - the risk of over-enforcement.

[59] The two cases concerned exclusive purchasing provisions for the supply of beer in vertical agreements between breweries and pubs.
[60] *Supra* note 53.
[61] Joined Cases T-49-51/02, *Brasserie Nationale* v. *Commission*, [2005] ECR II-3033.
[62] Object offences face an irrebuttable presumption of appreciable harm under Article 101(1) and a presumption of not satisfying the conditions for Article 101(3). *See infra* Chapter 3.

1.2 Ratio legis of the object/effect dichotomy

Having examined the three methods employed to identify an object restriction, we now turn to analysing the very rationale behind the existence of the object/effect divide. This Chapter explores the following questions: what is the relationship between object and effect (1.2.1); what is the appropriate model to select which practices should be regarded as object restrictions (1.2.2); are object restrictions sanctioned even when they fail to produce anti-competitive effects (1.2.3).

1.2.1 Object or effect: alternatives

> "The concept of restriction of competition is an economic one, and as a general proposition economic analysis is needed to determine whether an agreement could have an anti-competitive effect."[63] (Whish)

Article 101(1) prohibits agreements which "*have as their object or effect*" restriction of competition. The conjunction "or" suggests that effect and object are not cumulative requirements, but alternatives. The Courts have confirmed this view in several cases.[64]

The mechanism of Article 101(1) is as follows. If it is demonstrated that the agreement has an anti-competitive object, there is no need to look at its effects on the market. It is presumed to have anti-competitive effects. However, if no anti-competitive object is proven, an analysis of the effects of the agreement must take place. To perform this exercise, it is necessary to establish a counterfactual. The ECJ stated in *John Deere* that "*in order to determine whether an agreement is to be considered to be prohibited by reason [of] its effects, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute*"[65].

The Commission often reminds that proof of an infringement of Article 101(1) is not "*the end of story*".[66] As a matter of principle[67], in both scenarios, whether a restriction by object or by effect is established, undertakings can revert to Article 101(3) in an attempt to justify the agreement on account of efficiencies offsetting the negative anti-competitive effects.

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[63] WHISH, *supra* note 27, p.117
[64] Case C-56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECR 235, para 249.
[65] Case C-7/95P, *John Deere Ltd v. Commission*, [1998] ECR I-3111, para 76.
[66] ITALIANER, *supra* note 30, p.7.
[67] It is argued in Chapter 3.2 that, in practice, it is very difficult for undertakings to rely on Article 101(3).

1.2.2 Balancing exercise: likelihood of harm vs costs of economic analysis

> "Restrictions of competition by object … 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." (Article 101(3) Guidelines[68])

Thinking in terms of object restrictions is an imperfect, but a sensible policy choice. Although the object approach is more likely to lead to errors than an effects-based approach, it produces significant benefits relating to legal certainty and reasonable use of resources.[69] First, it informs undertakings of the type of practices which are presumed anti-competitive and will not be given a full-fledged effects analysis. Given the criminal nature of the fines[70], it is of utmost importance that an economic operator is fully aware that a certain practice constitutes a criminal offence[71]. Second, it reduces enforcement costs, as it avoids complex and costly economic analysis.

Reliance on a presumption of anti-competitive effects as an essential part of antitrust policy is not a typically European phenomenon. In *Northern Pacific Railway*, the US Supreme Court stated that "*there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.*"[72] The *per se* approach to antitrust offences in the US is similar in design, but not identical to the EU object approach. While the presumption of illegality for US *per se* restrictions is irrebuttable, EU object restrictions can, in principle, be justified under Article 101(3). Given their stricter nature, *per se* restrictions in the US form a smaller box than object restrictions in the EU.[73]

Having shown the benefits and the worldwide use of a system based on a category of practices presumed illegal, we now turn to exploring the criteria used for selecting the practices that warrant a presumption. In the words of the Commission, the presumption of harm for object restrictions in the EU is justified by their "*serious nature*", and by past "*experience showing that restrictions of competition by object are likely to produce negative effects on the market and jeopardize the objectives pursued by the Community competition*

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[68] *Supra* note 25, para 21.
[69] Opinion of AG Kokott in *T-Mobile*, *supra* note 16, para 43.
[70] *See Menarini* and Opinion of AG Sharpson in *KME*, *supra* note 12.
[71] The idea that criminal provisions should be sufficiently clear is part of the "*nullum crimen, nulla poena sine lege*" principle enshrined in Article 7 ECHR.
[72] US Supreme Court, *Northern Pacific Railway Co. v. United States*, 1958 356 U.S. 5.
[73] For example, RPM is treated under rule of reason in the US and as an object restriction in the EU. *See* US Supreme Court, *Leegin Creative Leather Products Inc v PSKS, Inc*, (2007) 551 US 877.

rules".[74] The reference to "*experience*" should be broadly interpreted so as to include not only previous EU Court an Commission cases, but also "*experience from another jurisdiction*" and "*insights of industrial organisation*".[75]

As a rule of thumb, a good model to determine whether a practice should be classified as an object restriction is as follows. If, on account of past experience, it is demonstrated that a practice always (or almost always) leads to a not insignificant harm to consumers, the practice should be an object offence. Cartels are a good example of practices suitable for the object box because past experience and theory of harm show with sufficient certainty that cartels lead to consumer harm.[76] On the other hand, if the practice does not always (or almost always) lead to consumer harm and an economic analysis is fairly easy to conduct, then it should fall outside the object box. These two scenarios are rather clear-cut.

The problems arise where the behaviour is not always (or almost always) anti-competitive, but the assessment of effects is complicated, costly and time-consuming. Zenger & Walker argue that theory of harm related to practices, such as restrictions of parallel trade, resale price maintenance and multi-lateral interchange fees in payment card markets, does not demonstrate that they are almost always harmful.[77] Theory of harm related to some new types of infringements, such as reverse payment patent settlements, does not show conclusive anti-competitive effects either.[78] Classifying these practices as object restrictions in the absence of a robust theory of harm can possibly lead to prohibiting behaviour which is not necessarily anti-competitive – type 1 error. Such a policy would be acceptable only if the likelihood of harm caused by the behaviour is typically very high and close to "always or almost always" and there are strong arguments against conducting an economic analysis in a particular case.

But, what are the main objections against performing a full-blown economic assessment in every case where anti-competitive effects are not certain? First of all, assessment of effects does not always guarantee correct results. This could be due to the complexity of the exercise, the different possible approaches or the lack of data. Second,

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[74] Article 101(3) Guidelines, *supra* note 25, para 21.
[75] BAILEY, *supra* note 43, p.564-565.
[76] ZENGER & WALKER, "Theories of Harm in European Competition Law: A Progress Report" in BOURGEOIS and WAELBROECK (eds.), *Ten Years of Effects-Based Approach in EU Competition Law*, Bruylant, 2012, p.195-196.
[77] *Ibidem*, p.196-202.
[78] *See infra* Chapter 2.2.1.3.

sophisticated economic analysis can be very time-consuming[79]. This is of particular concern where a timely solution to the anti-competitive practices is of utmost importance.[80] On that account, in some cases there are good policy reasons to avoid complex and time-consuming economic analysis, where the risk of getting it wrong by using a presumption remains low.

1.2.3 "Risk offences": punishable regardless of harmful effects

> "In a way, it is a bit like speed limits. It is presumed – based on experience – that driving too fast is dangerous, and it is therefore prohibited. That prohibition applies irrespective of whether someone drove safely above the speed limit, whether the offence actually resulted in an accident or whether someone had other, perhaps laudable motives for driving too fast."[81] (A. Italianer)

Object restrictions are more than a shortcut for identifying anti-competitive harm. Currently, they are regarded as serious violations of the law which should be punished even if they do not harm consumers in a specific case. To support this view, Mr Italianer recently compared them to speed limit violations.[82] Previously, AG Kokott in her Opinion in *T-Mobile* expressed the view that object restrictions are similar to "*risk offences*" in criminal law, such as driving under the influence.[83] Offenders receive a criminal or administrative sanction regardless of whether any damage was caused.

The distinction between the two rationales is not purely theoretical and has important consequences. Under the more economic rationale, which identifies, based on theory of harm and past experience, practices that always or almost always result in damage to consumers, the parties should be allowed to present evidence showing that in the specific case their behavior did not cause harm. In other words, the presumption of harm under Article 101(1) should be rebuttable. However, this is not the case under the "risk offences" approach applied by the Commission and the Courts. In practical terms, it is not a valid argument for a cartel participant to demonstrate that an agreement to raise prices did not produce anti-competitive effects because, for example, it was not implemented yet or the participants

[79] It took the Commission approximately nine years from AMD's complaint to adopting a decision in Commission Decision of 13.05.2009, COMP/37.990*, Intel*, OJ C227/13. Five years following the appeal, we are still awaiting the judgment of the General Court.
[80] This is the case in fast-moving technology markets and industries with network effects.
[81] ITALIANER, *supra* note 30, p.5.
[82] *Ibidem*.
[83] *Supra* note 16, para 47.

constantly cheated by undercutting each other's prices. AG Kokott in her Opinion in *T-Mobile* confirms the impossibility to rebut the presumption of harm under Article 101(1).[84]

The "risk offences" rationale takes us one step away from a purely economic approach and one step closer to a criminal enforcement model. Sanctioning behavior irrespective of whether it caused, or is capable of causing anti-competitive effects, is a sound policy when applied to cartels. Since they are often secretive and are capable of causing great damage, cartel-like behavior can be placed in the criminal realm. Given the difficulty of detecting collusive practices, the need to increase deterrence and the absence of any redeeming virtues, it makes sense to send a clear signal to undertakings that such behavior will not be tolerated. The same cannot be said with respect to other object restrictions, such as resale price maintenance, restrictions of parallel trade, cooperation agreements containing hardcore restraints, multi-lateral interchange fees and reverse payment patent settlements. Not only are such practices usually contractual, and therefore not difficult to detect, but they are also capable of being welfare-enhancing. Thus, in such cases alleged infringers should be given the chance to demonstrate that their agreements did not have anti-competitive effects.

1.3 AG Wahl: the voice of clarity

The very recent Opinion of AG Wahl in *Groupement de cartes bancaires*[85] sums up well the appropriate approach to object restrictions and allows us to draw conclusions for Chapter 1.

As regards the correct method for identifying object restrictions, he expresses a strong preference for the contextual approach.[86] To support his view, he gives the example of a price-fixing agreement between two companies having a tiny market share.[87] Even if such an agreement, in principle, leads to considerable harm to competition, this is not the case if the market shares of the parties - the economic context - are extremely low. On the other side, he recognizes that the contextual approach should know its limits. He argues that it is of utmost importance to create a clear distinction between, on the one hand, analyzing an agreement within its economic context in order to determine whether it is an object

[84] *Ibidem*, para 45.
[85] Opinion of AG Wahl in Case C-67/13 P, *Groupement de cartes bancaires (CB) contre Commission européenne*, delivered on 27 March 2014.
[86] *Ibidem,* para 41.
[87] *Ibidem,* para 42.

restriction and, on the other hand, conducting an effects assessment[88]. The contextual analysis can only be applied to confirm or neutralize the terms of the agreement.[89] It should not go as far as to look at potential anti-competitive effects. It would be inappropriate to seek to qualify the agreement as having an anti-competitive object by conducting a "quick look" analysis of effects, so as to compensate for the absence of a "genuine" object restriction.[90]

As regards the appropriate criteria for deciding which practices should be treated as "by object" and which practices deserve a full-fledged economic analysis, AG Wahl reasoned as follows. First, he recognizes that a formalistic approach relying on object restrictions is not unproblematic.[91] Then, he proposes to restrict the notion of object restrictions only to that behavior whose harmful nature is uncontested, based on experience and economic science.[92] Hence, agreements which either show ambivalent effects on the market or lead to restrictive effects, which are necessary for achieving a non-restrictive main objective of the agreement, should not fall in the object box.[93] To sum up his understanding of object restrictions, the irrebuttable presumption of harm should not apply (i) where no past experience, based on economic theory of harm, shows that the agreement will inevitably lead to harmful effects or (ii) where the agreement contains a restrictive clause which is necessary for the main, neutral or positive towards competition, objective of the agreement to take place. Chapter 2 examines whether the European Courts and Commission follow this sensible approach.

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[88] *Ibidem,* para 44.
[89] *Ibidem,* para 44.
[90] *Ibidem,* para 44; For his criticism of *Allianz Hungária, see* paras 47-52.
[91] *Ibidem*, para 54
[92] *Ibidem,* para 56: "Ne devraient donc être considérés comme restrictifs de concurrence par objet que les comportements dont le caractère nocif est, au vu de l'expérience acquise et de la science économique, avéré et facilement décelable…"
[93] *Ibidem,* para 56: "…et non les accords qui, au vu du contexte dans lequel ils s'insèrent, présentent des effets sur le marché ou qui sont porteurs d'effets restrictifs accessoires nécessaires à la poursuite d'un objectif principal non restrictif de concurrence"

2 Infatuation with objects: expanding an already large object box

There is an ongoing tendency by both the European Commission and the European Courts towards finding object restriction. In the period between 2000 and 2011 the Commission issued, excluding cartels, 18 infringement decisions, 17 out of which involved object restrictions and only one case that was a restriction by effect.[94] At the level of the ECJ, it is barely possible to find an Article 101 judgment which does not conclude that the practice at hand is an object restriction.[95]

The Courts and the Commission are pushing the boundaries of the object box, in some cases beyond what is advisable on grounds of competition economics. On the one hand, recently, new types of infringements[96] have been introduced to the list of object restrictions. This Chapter examines the suitability of applying a presumption of harm to some types of information sharing (2.2.2), and more in detail, to reverse payment patent settlements (2.2.1)[97]. On the other hand, it is not only the enlargement of the object box that is questionable, but also some of the vertical agreements that have been there for years. This Chapter touches briefly upon some of the arguments against applying a presumption of harm to agreements restricting parallel trade (2.1.1) and to resale price maintenance clauses (2.1.2). It is submitted that, considering the benchmark established in Chapter 1 for determining when a restriction should be an object one, namely (i) a conclusive theory of harm and (ii) absence of a non-restrictive main legitimate objective which would not be achieved without the restrictive clause, it is questionable whether the four practices deserve their place in the object box.

[94] GERARD, *supra* note 13, p.38.
[95] *Ibidem,* p.38.
[96] New types of infringements, as opposed to classic object restrictions, are those that are not mentioned in the list of the OECD and the Article 101(3) Guidelines, see *supra* note 29.
[97] Reverse payment patent settlements are a highly debated topic at that moment and provide for a good case study of a new addition to the list of object restrictions. Therefore, the Commission's policy towards this practice will be examined more extensively.

2.1 Classic object restrictions

2.1.1 Agreements hindering parallel trade

> "Economic evidence shows that it is impossible to state either that all territorial restraints by firms which lack market power are efficiency-enhancing (as some Chicago School lawyers would contend) nor that they are all inefficient (as Consten and Grundig suggests)"[98] (G. Monti)

Agreements aimed at limiting parallel trade are traditionally regarded as object restrictions.[99] Examples include export bans or other mechanisms, such as quotas and dual pricing. Such agreements that restrict the territory to which the distributor may supply, are "blacklisted" under Article 4(b) of the Vertical Block Exemption Regulation ("VBER").[100]

Economic theory states unequivocally that restrictions of parallel trade do not necessarily have anti-competitive effects.[101] In many cases their main objective is to allow companies to set different prices in different Member States. Such price discrimination can have welfare-enhancing effects, as it provides firms with "*the ability to locally react to the specific competitive conditions prevailing in different geographic regions*"[102].

Nevertheless, the ECJ in *GSK*[103] persisted in classifying limitations on parallel trade as object restrictions. The case concerned an indirect way to restrict parallel trade, namely via a dual pricing policy. Spanish wholesalers were charged higher prices if they were to sell the drugs outside of Spain than if they were to sell them in Spain. Interestingly, the General Court narrowed down the possibility for the Commission to qualify a restriction of parallel trade as an object restriction. It required that, in order for such a clause to constitute an object restriction, detriment to the final consumer be proven on the basis of an abridged economic analysis, an in-depth analysis of the legal and economic context of the agreement.[104] The ECJ overturned the General Court and ruled that no condition of proving consumer harm is required.[105] Although the test proposed by the General Court would have

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[98] MONTI, "Article 81 EC and Public Policy", (2002) 39(5) CMLR, p.1066.
[99] The ECJ held in as early as 1966 that granting absolute territorial protection ("ATP") to exclusive distributors by preventing exports of products by the distributor to other Member States or imports of these products from other Member States infringes Article 101(1). *See* Case-56 58/64, *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299.
[100] Commission Regulation 330/2010 of 20 April 2010, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L102.
[101] ZENGER & WALKER, supra note 76, p.196-197.
[102] *Ibidem,* p.197.
[103] *Supra* note 34.
[104] *Supra* note 43, para 117. The specific circumstances concerned the regulation of prices in the pharmaceutical sector at national level.
[105] *Supra* note 34, para 64.

been problematic[106], it recognized the need to put competition law on parallel trade restrictions more in line with competition economics.

The ECJ confirmed its formalistic object approach in two subsequent cases regarding an export ban on decoding devices used for broadcasting football games in pubs, *Football Association Premier League*[107], and an absolute ban on sale of cosmetics and personal care products via the internet, *Pierre Fabre*[108]. This line of cases demonstrates that classic object restrictions are kept in the object box regardless of convincing economic theory stating that they do not necessarily cause consumer harm. It appears that with regard to ATP internal market objectives trump competition economics.[109]

2.1.2 Resale price maintenance (RPM)

> "The dramatic evolution of US law in this area has fuelled the debate about the strict approach against […] RPM in the EU."[110] (Jones & Sufrin)

Imposing, directly or indirectly, fixed or minimum prices in a vertical agreement is "blacklisted" under Article 4(a) of the VBER.[111] However, economists argue that the presumption of harm regarding RPM does not find support in competition economics.[112] First, there is often a legitimate pro-competitive motive to introduce RPM. The aim is to provide incentives for distributors to perform brand-specific investments, thereby increasing non-price competition.[113] Second, the fear of facilitating collusion by means of RPM is not warranted where a manufacturer, facing strong inter-brand competition, applies the practices unilaterally.[114]

In 2007, the US Supreme Court embraced economic thinking with respect to RPM. It ruled in *Leegin*[115] that imposing fixed or minimum prices in vertical agreements should escape the illegality of a *per se* approach and fall under a rule of reason approach.

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[106] On the concerns regarding the abridged economic analysis approach, *see* Chapter 1.1.3.
[107] Joined cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others* (not yet reported), judgment of 04.10.2011, paras 141-144.
[108] C-439/09, *Pierre Fabre Dermo-Cosmétique v President de l'Authorité de la Concurrence*, [2010] OJ C24/49, para 47.
[109] As Bishop and Walker put it, "*the pursuit of market integration will sometimes clash with the pursuit of economic efficiency and consumer welfare*", *see* BISHOP & WALKER, *The Economics of EC Competition Law*, 3rd ed., Sweet & Maxwell, 2010, p.207.
[110] JONES & SUFRIN, *supra* note 11, p.798.
[111] *Supra* note 100.
[112] ZENGER & WALKER, *supra* note 76, p.198-199.
[113] *Ibidem*, p.198.
[114] *Ibidem*, p.199.
[115] *Supra* note 73.

Regardless of economic science and the recent developments in the US, the EU persists in applying a presumption of harm towards RPM. This is not necessarily a bad policy decision. However, in light of the recent *Expedia* judgment[116] rendering appreciability arguments under Article 101(1) impossible and the current concerns regarding the "*death*" of Article 101(3)[117], the object approach to RPM in the EU is *de facto* almost identical as the previously applied *per se* approach in the US, and therefore arguably out of tune with competition economics.

2.2 Expanding the box beyond classic object restrictions

2.2.1 Reverse payment patent settlements (pay-for-delay)

> " Today's decision is yet another warning that these so-called "pay for delay" agreements are illegal in the European Union "[118] (J. Almunia)

2.2.1.1 Traditional position towards patent settlements: effects analysis

Reverse payment patent settlements, also called "pay-for-delay", "*occur when a patentee and an infringement defendant settle infringement litigation with an arrangement under which the patentee pays the alleged infringer to stay out of the market for the period covered by the settlement"*.[119] These settlements are common in the pharmaceutical industry in the context of disputes between manufacturers of patent-protected drugs (the originators) and manufacturers of generic drugs. While most IP settlements lead to the grant of a license, where the main anti-competitive concern relates to the scope of the licensing agreement, reverse payments settlements do not result in transfer of technology.[120] Since, contrary to most patent settlements, pay-for-delay agreements hinder potential early entry from manufacturers of generics, a closer antitrust scrutiny is justified.

As regards the application of Article 101 to patent settlements, the Commission initially held a very liberal view. In *Bayer v Süllhöfer*, the Commission regarded a no-challenge clause as compatible with Article 101(1) when in the context of a genuine patent settlement agreement, *i.e.* where "*the existence of the industrial property right which is the*

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[116] *Supra* note 17.
[117] *See infra* Chapter 3.2.
[118] Speech of J. ALMUNIA, "Fentanyl case", Strasbourg, 10 December 2013. Press release is available at: http://europa.eu/rapid/press-release_SPEECH-13-1053_en.htm, 20 April 2014.
[119] HOVENKAMP, "Antitrust and Patent Law Analysis of Pharmaceutical Reverse Patent Settlements", 2011, p.1. Available at SSRN: http://ssrn.com/abstract=1741162, 20 April 2014.
[120] *Ibidem*, p.1.

subject-matter of the dispute is genuinely in doubt".[121] The ECJ disagreed with the proposed approach and held that the application of Article 101(1) to a no-challenge clause should not be excluded, even if it the agreement is *a bona fide* patent settlement.[122] Nevertheless, the Court did not go as far as to state that such a restriction has an anti-competitive object. It is striking how the Commission's view on no-challenge clauses as part of patent settlements changed from "*compatible with Article 85(1)*"[123], when they involve the grant of a license, to "by object", when they prohibit entry of generic medicines and involve a (significant) value transfer.[124] This testifies of a drastic increase in scrutiny.

In its Final Report of the Pharmaceutical Sector Inquiry the Commission concluded that, in order to assess the compatibility of a settlement agreement with EU competition law, "*an in-depth analysis of the individual agreement, taking into account the factual, economic and legal background*" is required.[125] This can be taken to mean either that the Commission adopts an effects-based approach or that the Commission can qualify patent settlements as object restrictions relying on an extended contextual analysis similar to the one suggested by the Court in *Allianz Hungary*[126].

As regards the application of Article 101 to reverse payment patent settlements, the Commission states in its new TTBER Guidelines[127] that "pay-for-delay" settlements *"are based on a value transfer from one party in return for a limitation on the entry and/or expansion on the market of the other party and may be caught by Article 101(1)"*.[128] The choice of the word "may" means the patent settlements involving a transfer of value and restriction of entry do not necessarily infringe Article 101(1).

To sum up, nothing in the early approach of the Commission or the ECJ, the more recent Final Report on the Pharmaceutical Sector Inquiry or the new TTBER, provides a warning sign that certain types of patent settlement agreements will be classified as object restrictions.

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[121] Case 65/86, *Bayer AG v Heinz Süllhöfer*, [1988] ECR 05249, para 14.
[122] *Ibidem*, paras 15-16.
[123] *Ibidem*, para 14.
[124] See *infra* notes 129,130 and 131. The main differences between *Bayer v Süllhöfer* and *Lundbeck* are the restriction of entry of generics, as opposed to the grant of a license, and the transfer of value.
[125] European Commission Final Report of the Pharmaceutical Sector Inquiry of 8 July 2009, para 574. Available at: http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf, 21 April 2014.
[126] *See supra* note 15.
[127] Commission Communication of 28 March 2014, Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, O.J. C89/03, (hereinafter the "TTBER Guidelines").
[128] *Ibidem,* para 238.

2.2.1.2 Lundbeck et al.: object restrictions

Two recent Commission infringement decisions, cases COMP/39.226 *Lundbeck*[129] and COMP/39.685 *J&J*[130], and one statement of objections, COMP/39.612 *Servier*[131], put an end to assessing all patent settlements on their anti-competitive effects. In all three cases the Commission adopted an object approach and imposed hefty fines. Whether it makes sense from a legal and economic point of view to qualify such practices as object restrictions, is examined below.

Lundbeck involved a classic reverse payment patent settlement. The originator, Lundbeck, paid several manufacturers of generic medicines not to challenge the validity of its patent and to stay out of the market for citalopram, an antidepressant medicine, which was also Lundbeck's best selling drug.[132] Although the patent for the citalopram molecule had already expired, Lundbeck claimed exclusivity on account of its process patents. Nevertheless, a few generic companies were preparing their entry and one of them had already put its generic products on the market. Subsequently, the parties concluded a settlement agreement, whereby the generic manufacturers agreed to delay their market entry "*in return for substantial payments and other inducements from Lundbeck amounting to tens of millions of euros*". The Commission framed the practice as an object restriction. Since the decision is not published yet, there is uncertainty as regards the decisive criteria in the case, which convinced the Commission that there is no need to conduct an effects analysis. Based on the information available in the press release, one can think of at least three propositions, starting from the broadest approach towards object restrictions to the narrowest:

1. The Commission might defend the view that every patent settlement agreement involving a value transfer and limiting entry has the object to restrict competition.
2. The Commission might reserve the notion of object restriction only for those patent settlements where the value transfer is substantial.

[129] Commission decision of 19.06.2013, *not yet published*. Press release is available at: http://europa.eu/rapid/press-release_IP-13-563_en.htm, 20 April 2014.
[130] Commission decision of 10.12.2013, *not yet published*. Press release is available at: http://europa.eu/rapid/press-release_IP-13-1233_en.htm, 20 April 2014.
[131] Commission statement of objections of 30.07.2012. Press release is available at: http://europa.eu/rapid/press-release_IP-12-835_en.htm, 20 April 2014.
[132] The only source regarding the facts of the case is the press release, *see supra* note 129.

3. In addition to a substantial value transfer and limitation of entry, the Commission might require that some evidence of anti-competitive intent be provided for a pay-for-delay settlement to constitute an object restriction.[133]

While the first proposition completely disregards the possible legitimate objectives of reverse payment settlements[134], the third one seems to go against the idea that subjective intent is not necessary for determining object restrictions[135]. Hence, the significant amount of the value transfer is most likely to emerge as the pivotal criteria for distinguishing between pay-for-delay settlements, which merit an effects analysis, and those that do not. Some insider information presented by Mr Italianer in his speech at Fordham appears to confirm the above assumption. He revealed that the Commission had evidence that "*the value which Lundbeck transferred took into consideration the profit or turnover the generic producer expected if it had successfully entered the market*"[136]. However, until the decision is published, this assumption remains a mere speculation.

The *J&J* case was relatively more straightforward.[137] Contrary to *Lundbeck*, it did not concern a patent settlement because Johnson & Johnson's patent on fentanyl, a pain-killer, had already expired. Although the entry on the market was completely open for generic manufacturers, the Dutch subsidiaries of Johnson&Johnson and Novartis, decided to substitute competition for concluding a "co-promotion agreement". Since its patent had expired, the originator of the drug agreed to pay "*monthly payments exceeding the profits that the [generic manufacturer] expected to obtain*". In the absence of any other motive for the value transfer, such as for example the incentive to settle and avoid litigation, the "co-promotion agreement" was nothing less than a market-sharing agreement aimed at sharing monopoly profits. In that respect, it was rightfully qualified as an object restriction by the Commission.

Finally, in *Servier* the originator of perindopril, a cardio-vascular medicine, was accused of both unilateral behavior, the acquisition of scarce competing technologies, and of concluding patent settlement agreements hindering the entry of generic manufacturers.[138] It appears that the case concerned an unmeritorious patent that should not have been granted.

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[133] In *Lundbeck*, *supra* note 129, the Commission found internal documents referring to a "*club*" being formed and "*a pile of $$$*" to be shared among the participants.
[134] *See infra* Chapter 2.2.1.3.
[135] *See supra* note 33.
[136] ITALIANER, *supra* note 30, p.9.
[137] The only source regarding the facts of the case is the press release, *supra* note 130.
[138] The only source regarding the facts of the case is the press release, *supra* note 131.

In *Les Laboratoires Servier v Apotex Inc*[139], Lord Justice Jacob of the UK Court of Appeal said that "*it is the sort of patent which can give the patent system a bad name*". If the invalidity of the patent was so obvious, then there could have been no other impulse for the reverse payments than the restriction of competition.

2.2.1.3 Does pay-for-delay fit the object box?

Having explained the previous position of the Commission to patent settlements and the new approach adopted in its recent cases, we now turn to the question whether patent settlements, involving a transfer value and a limitation of entry, should be qualified as object restrictions, and if so, under what circumstances. As a reminder, Chapter 1 established that where no past experience, based on economic theory of harm, demonstrates the significant likelihood of harmful effects or where the restrictive clause is ancillary to the main non-restrictive objective, the agreement should not be deprived of a full-fledged effects analysis. It is submitted that pay-for-delay arrangements, except in some exceptional circumstances, do not meet the appropriate standard for being regarded as object restrictions.

As regards the reliance on past experience, there are no existing precedents on reverse payment settlements either from the Commission or the European Courts. It appears that the Statement of Objections in *Lundbeck* relied to a great extent on *BIDS*[140].[141] The case concerned agreements to pay processors of beef to exit the Irish beef market, purportedly in order to reduce overcapacity. Although the two cases have some similarities, as they both involve payments in return for limiting entry on or ensuring exit from the market, there is one important distinction. *Lundbeck* was the holder of a patent which, if valid, grants the right to exclude products from the market. This renders the use of *BIDS* as a precedent case inappropriate.

As regards the robustness of the theory of harm, it is argued that pay-for-delay arrangements are not always or almost always harmful. The main anti-competitive concern is that "*the patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement*".[142] When such monopoly profits are shared with the generic manufacturers in return for their staying out of the market, the agreement looks very much

[139] [2008] EWCA Civ 445.
[140] See *supra* note 25.
[141] Presentation by SUBIOTTO, "Legal Assessment of Patent Settlement Agreements Containing "Reverse" Payments", *Fordham IP Conference*, New York, 5 April 2013, slide 10. Available at: http://fordhamipconference.com/wp-content/uploads/2013/04/2013.subiotto.pharma.pdf, 20 April 2014
[142] US Supreme Court, *FTC v. Actavis*, (2013), 570 U.S., p.17.

like a market-sharing arrangement. Nevertheless, a reverse payment patent settlement does not necessarily lead to a collusive outcome.[143] The uncertainty of the outcome is to a great extent due to the probabilistic nature of patents[144]. There are at least three scenarios where the exclusion in a pay-for-delay setting equals the exclusion in a plausible counterfactual setting[145]:

1. The originator's patent is valid, and therefore the generic manufacturer loses the litigation.
2. The decision of the court is rendered only after the expiry of the patent, so that early entry does not occur.
3. Generic manufacturer decides to discontinue the litigation.

In view of the various possible outcomes, applying a presumption of harm to reverse payment settlements goes against economic theory. Hence, it is necessary to perform an effects analysis. This involves establishing the appropriate counterfactual situation absent the agreement and taking into account factors, such as the strength of the patent, the profits upon entry for the generic manufacturer and its probability of winning the litigation.[146]

As regards the main objective of the agreement, it cannot be concluded with sufficient certainty that the transfer of value necessarily aims at sharing monopoly profits. It is argued that genuine fears of irreversible harm that might result from infringing entry by generic firms[147] makes it perfectly possible that the value transferred in return for limitation of entry is ancillary to the objective of settling a *bona fide* dispute. Let us explore the alternative to settlement for the patent holder – litigation. There are at least two downsides to the choice of litigation: (i) it is often complex and costly and (ii) it might take years[148]. The long duration of patent proceedings is a thorny issue for originators and becomes even more apparent where a timely interim relief is not available.[149] First, they will lose significant sales due to the entry of generics. Second, since most EU Member States control prices of

[143] OXERA ECONOMICS, "Bad medicine? An effects-based approach to 'pay-for-delay' agreements", October 2013. Available at: http://www.oxera.com/Latest-Thinking/Agenda/2013/Bad-medicine-An-effects-based-approach-to-pay.aspx, 21 April 2014.
[144] Unlike other property rights, patents do not necessarily give the right to exclude rivals. Instead, they give the right to try to exclude rivals. In other words, there is always the possibility that the patent may be found invalid. *See* LEMLEY & SHAPIRO, "Probabilistic Patents", 19(2) *Journal of Economic Perspectives*, Spring 2005, p.75-76.
[145] OXERA ECONOMICS, *supra* note 143.
[146] *Ibidem*.
[147] SUBIOTTO, *supra* note 141, slide 21.
[148] Patent litigation in the EU in the period between 2000 and 2007 lasted on average for 2.8 years, *see* Final Report of the Pharmaceutical Sector Inquiry, *supra* note 125, paras 635-636.
[149] Interim relief in patent disputes in the EU was granted in less than 50% of the requests made by originator companies and its average duration was 18 months, *see* Final Report of the Pharmaceutical Sector Inquiry, *supra* note 125, paras 641-644.

medicines, the national health regulators of drug prices are likely to put the price down as a result of the entry of generics. Once litigation is over, it would be a difficult and burdensome task for the originator to convince the regulator to grant authorisation to sell again at the previous higher price. Hence, the settlement alternative might be attractive even when the originator strongly believes that he has a valid patent. These drawbacks of litigation testify that entry of generics can cause originators to "*suffer irreversible commercial losses*" which go much further than legal cost.[150] Therefore, the value transfer, even if significant, should not be taken to mean that the objective of the agreement could only be anti-competitive.

As a result of the lack of comparable precedents, the inconclusive harmful effects and the plausible non-restrictive main objective, pay-for-delay arrangements merit a full-blown effects analysis and not a treatment as object restrictions.[151] Applying an (irrebuttable[152]) presumption of harm to such agreements leads to an enforcement regime which is overly prohibitive. It is likely to push parties to court litigation, thereby undermining the "*public's "strong interest in settlement" of complex and expensive cases*"[153]. Hence, it is of utmost importance to establish the right balance between preserving the benefits of object restrictions, namely increasing legal certainty and reducing enforcement costs, and safeguarding incentives to settle *bona fide* disputes. So, under which circumstances would it make sense to classify pay-for-delay arrangements as having an anticompetitive object?

It is submitted that there are three situations which justify the application of a presumption of harm to reverse payment patent settlements:

1. "Beyond-scope" settlements: which go beyond the scope, including the duration, of the contested patent.
2. "Sham" settlements: where it is obvious that the patent is invalid.
3. "Transfer-of-value" settlements, only where the value[154] clearly exceeds the costs, whether monetary or not, related to genuine litigation concerns. This is, for example, a settlement where a generic manufacturer is compensated by the amount of its expected profits if it is to successfully enter the market.[155]

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[150] *See* Final Report of the Pharmaceutical Sector Inquiry, *supra* note 125, para 640.
[151] This was also the conclusion reached in *Actavis*, *supra* note 142, where the US Supreme Court adopted a "rule of reason" approach.
[152] *See infra* Chapter 3.
[153] *Actavis*, *supra* note 142, p.14.
[154] The value is not necessarily in the form of a payment, but can also be in other forms, such as side deals.
[155] The US Supreme Court in *Actavis* stated that "*patentees sometimes pay a generic challenger a sum even larger than what the generic would gain in profits if it won*" which may be taken to mean that "*the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market*", *supra* note 142, p.15.

In all three circumstances, there is no other plausible motive for the settlement than sharing the monopoly profits.

The Commission decisions in *J&J* and *Servier* appear to fall within the first and the second category, respectively. Therefore the object approach to these two cases is justified. Once the decision in *Lundbeck* is published, it will become apparent whether *Lundbeck* was treated as an object restriction precisely because it fell within the third category described above. If so, then fears of over-enforcement and chilling incentives to enter into *bona fide* patent settlements in this field are exaggerated.

Whether the Commission will adopt an identical approach to pay-for-delay arrangements as the one proposed above, namely an effects approach with three categories of object restrictions, is of lesser importance. However, there is a pressing need to adopt a policy that is in line with economic theory, easy to work with and clearly communicated to the public, so that legal certainty in the sector can be restored.

2.2.2 Information sharing

> "Almost under any circumstances information exchange could be good or bad."[156] (Kai-Uwe Kühn)

The enforcement policy towards information sharing has recently become more intense. When exchange of information takes place within the framework of a broader cartel arrangement, it forms part of a classic object restriction. When exchange of information takes place within the framework of a cooperation agreement, an effects analysis should be conducted.[157] Information sharing can also occur on a standalone basis: outside the framework of a cartel or a cooperation agreement ("pure" information exchanges). It is the Commission's policy to treat "pure" information exchanges in certain circumstances as object restrictions.

As illustrated by the above quote by Kai-Uwe Kühn, previous Chief Economist of DG Comp, the effects of information sharing on the market are ambivalent.[158] Such

[156] KUHN, "Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results" in OECD Report, *Policy Roundtables: Information Exchanges Between Competitors under Competition Law* (DAF/COMP(2010)37), p.416.
[157] In that event information sharing is assessed within the framework of the cooperation agreement concerned, *see* Commission Communication of 14 January 2011, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] O.J. C11/1 ("Horizontal Guidelines"), Sections 3-7.
[158] KUHN, *supra* note 156.

uncertainty as to the positive or negative effects would normally warrant a case-by-case analysis of effects instead of singling out a category of information exchanges presumed harmful. However, in its Horizontal Guidelines the Commission states that "*information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object*".[159] Most economist[160] and lawyers[161] agree to treating exchanges of future pricing or quantity intentions as object restrictions. Such practices are likely to be employed as a means to reaching a collusive outcome and are not likely to be justified by the existence of another motive for the exchange than an anti-competitive one.[162] Regrettably, it would appear that classifying the exchange of future prices or quantities as object restrictions is simply an example rather than the exception to the principle of effects analysis of information sharing.[163]

In the famous *T-Mobile* judgment[164] the ECJ produced some statements which, if taken literally, eliminate any meaningful distinction between object and effect restrictions. The case concerned a single meeting between mobile operators, where discussions between competitors regarding future remuneration of mobile phone dealers took place. As regards the notion of object restrictions, the Court appears to suggest that it is sufficient that a practice "*has the potential to have a negative impact on competition*".[165] It could not possibly have been the aim of the ECJ to establish a test of "potential" anti-competitive effects in order to determine whether the restriction has the object of restricting competition. Such an interpretation would leave no room for the analysis of restrictive effects under art 101(1). As Jones & Sufrin put it, this approach is "*overly-expansive*" and "*worryingly vague*".[166] As regards information sharing, the Court ruled that it is "*tainted with an anti-*

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[159] Horizontal Guidelines, *supra* note 157, para 74.
[160] BENNETT and COLLINS, "The Law and Economics of Information Sharing: the Good, the Bad and the Ugly", (2010) 6(2) *European Competition Journal*, p.330; KUHN, *supra* note 156, p.422-423.
[161] ORTEGA GONZALES, "Object analysis in information exchange among competitors", (2012) 1(5) *Global Antitrust Review*, p.1-57, p.35.
[162] The conclusion reached following the OECD policy roundtables was that whereas "*private information exchanges and discussion about future intentions may be suitable for per se prohibitions*", "*[o]ther types of exchanges should be considered on a case by case basis following a rule of reason type of analysis with a full evaluation of their effects and due deference to potential efficiencies*". *See* OECD Report, *Policy Roundtables: Information Exchanges Between Competitors under Competition Law* (DAF/COMP(2010)37), Executive Summary, p.12.
[163] Horizontal Guidelines, *supra* note 157, para 72-73.
[164] Case C-8/08, *T-Mobile Netherlands BV v Raad van beestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529.
[165] *Ibidem*, para 31. The reference to "*potential*" cannot simply be a mistake as the Court continues and explains that "*the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market*".
[166] JONES & SUFRIN, *supra* note 11, p.213.

competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings."[167] Such a broad test, based on the capacity of the exchange to "*remove uncertainties*", could catch many exchanges previously dealt with under an effects approach. The unnecessarily[168] wide view of the Court on when on information sharing constitutes an object restriction might encourage the Commission and other competition authorities to circumvent proof of effects in exchanges other than those concerning future intentions.

[167] *T-Mobile*, *supra* note 164, para 43

[168] According to Meyring, the discussions between competitors in *T-Mobile* were ancillary to a price-fixing. Thus, there was no need for the Court to make such "*bold statements*" regarding "pure" information exchanges. *See* MEYRING, "T-Mobile: Further Confusion on Information Exchanges between Competitors", (2010) 1(1) JECLAP, p.30-32.

3 The perverse effects: relying on presumptions

Relying on presumptions in competition law is a pragmatic and sound approach. However, it should not come at the cost of inaccurate results. Having demonstrated in Chapter 2 that object restrictions are a broad concept, which may include practices that do not always result in harm and may contain redeeming virtues, it is crucial that presumptions remain rebuttable in order to avoid errors of over-enforcement. In other words, the defects of the object box should not be worsened by overreliance on presumptions. It is submitted that object restrictions give rise to the following presumptions: irrebuttable presumption of appreciable anti-competitive effects (3.1) and a strong presumption of not satisfying the conditions for Article 101(3) (3.2).

3.1 Irrebuttable presumption of appreciable anti-competitive effects

3.1.1 No need to show anti-competitive effects

> "[F]or the purpose of applying Article [81(1)], there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition."[169] (ECJ in *Consten & Grundig*)

It is settled law that once an object restriction has been found to exist, it is unnecessary to prove the existence of anti-competitive effects.[170] This reflects the very purpose of relying on a category of practices presumed harmful. The objective is to avoid unnecessary, costly and time-consuming analysis of effects, where past experience and economic science show that the practice always or almost always results in harm. A system based on a category of practices, which are presumed anti-competitive, has many advantages, is widely applied in other developed jurisdictions[171] and is generally not criticized[172]. The anti-competitive effects of an object restriction are not without any relevance. They will be reflected in the amount of the fine and the award of damages.

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[169] *Consten and Grundig*, *supra* note 99, p.342.
[170] *Consten and Grundig*, *supra* note 99; *BIDS, supra* note 25, para 16.
[171] *See supra* Chapter 1.2.2.
[172] JONES & SUFRIN, *supra* note 11, p.202.

3.1.2 No possibility to demonstrate absence of anti-competitive effects

> "[T]he prohibition on 'infringement by object' may not be interpreted as meaning that an anti-competitive object gives rise merely to some kind of presumption of unlawfulness which may be rebutted, however, if in the specific case no negative consequences for the operation of the market can be demonstrated." (AG Kokott)[173]

Not only is there no need for the Commission to establish anti-competitive effects, but also there is no possibility for the undertaking to claim that the agreement did not (or could not have) caused harm. In other words, the presumption of harm accompanying object restrictions appears irrebuttable under Article 101(1).[174]

If the only rationale for object restrictions were to create a shortcut for establishing the anti-competitive effects of certain practices that always or almost always cause harm, the irrebuttability of the presumption of harm would seem counterintuitive. Provided that the term "by object" were merely a quicker and less burdensome means of arriving at effects, then why would an undertaking be prevented from demonstrating that the presumed harmful effects did not materialize? This is where the logic of "risk offences" comes into play: an object offence is punishable even when it did not cause any harm. As explained in Chapter 1.2.3, this rationale may make sense from a policy perspective when applied to hardcore cartels, but not necessarily when applied to other restrictions, such as pay-for-delay, RPM and ATP.

Odudu proposes to distinguish between "induction-based" presumptions, which should remain rebuttable, and "intent-based" presumptions, which should be irrebuttable.[175] Although sound from a theoretical point of view, this model would not be easy to work with, as it relies on proof of intent, and so far finds no support in the case law. Hence, when an object restriction is involved, the current state of the law precludes the undertaking from showing absence of anti-competitive effects, even when the practice relates to non-cartel-like behaviour where anti-competitive intent is not necessarily present.

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[173] AG Kokott in *T-Mobile*, *supra* note 16, para 45.
[174] *See T-Mobile*, *supra* note 164, para 31. *See* KING, *supra* note 19, p.294; WHISH, *supra* note 27, p.117-118; NAGY, *supra* note 18, p.554.
[175] ODUDU, *The Boundaries of EC Competition Law: The Scope of Article 81*, Oxford University Press, 2006, p.115.

3.1.3 No *de minimis*

> "[A]n agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition. This is so regardless of the size and market share of the undertakings involved in the agreement"[176] (ECJ in *Expedia*)

So far in this Chapter it has been established that an object restriction is conclusively presumed to be harmful. The traditional approach to Article 101(1) requires that such harm be appreciable and not negligible. In its *De Minimis* Notice[177], the Commission quantifies the appreciability requirement as a function of market shares. A "safe harbour" is established where the parties to the agreement do not exceed certain market share thresholds.[178] The Commission excludes the benefit of the "safe harbour" to hardcore restrictions[179], which are typically the ones found in the object box. This exclusion does not lead to placing hardcore restrictions in a "*dangerous"* harbour[180]. In other words, parties to an agreement that contains a hardcore restriction can still claim before the courts that the restriction of competition is not appreciable. This view finds support in the case-law. The European Courts accepted on several occasions that object restrictions, in particular when in vertical agreements, were *de minimis.* In the early *Völk v Vervaecke*, the ECJ ruled that an ATP granted to an exclusive dealer "*falls outside the prohibition in article [101] when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question*".[181] In the recent *Pedro IV Servicios*, the ECJ stated that an RPM provision would only infringe Article 101 if it "*perceptibly*" restricted competition.[182] Hence, until recently it was settled case-law that *de minimis* arguments were available to object restrictions.

A recent development seems to have set aside the traditional approach. *Expedia* concerned a horizontal collaboration established by means of a joint venture between SNCF, the French railway company, and Expedia, an online travel agency company. Expedia benefited from a preferential treatment, namely a privileged access to SNCF's online booking system. The French competition authority found that this practice had as object to

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[176] *Supra* note 17, para 37.
[177] Commission Notice of 3 September 1986, on agreements of minor importance which do not appreciably restrict competition under Article [101(1)] of the Treaty, [1986] O.J. C 231/2 (hereinafter the "*De Minimis* Notice").
[178] *Ibidem,* para 7.
[179] *Ibidem*, para 11.
[180] WHISH, *supra* note 27, p.141.
[181] Case 5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295, para 6-7.
[182] Case C-260/07 *Pedro IV Servicios* [2009] ECR I-2437, para 68.

exclude competition on a downstream market (*i.e.* the market for provision of online travel services), and therefore infringed Article 101. The two parties to the agreement invoked a *de minimis* argument, since their combined market share was below 10%. The ECJ, which was referred the case, ruled that if the agreement had effect on inter-state trade and if it was qualified as an object restrictions, it constituted automatically an appreciable restriction of competition.[183] It appears that this judgment establishes an irrebuttable presumption of appreciable restriction of competition for object offences.[184]

Both lawyers and academics[185] have criticized the judgment for being disconnected with economic theory. *Expedia* would not have been problematic under the assumption that object restrictions were to almost always result in harm and never produce benefits to society. In other words, the irrebuttable presumption of appreciable anti-competitive effects only makes sense when applied to agreements which have no possible redeeming virtues, such as hardcore cartels. Indeed, why make a *de minimis* exception for an agreement which can result in either neutral or negative impact on competition?[186] However, as explained in Chapter 2, the object box appears to contain at least a few restrictions which do have the potential of being benign, such as pay-for-delay arrangements. In that respect, the *Expedia* judgment only seems to exacerbate the problems related to the expansive interpretation of object offences. Even if undertaken by parties with insignificant market power, such practices are deemed anti-competitive. This reasoning is likely to dissuade small market players from engaging in potentially welfare-enhancing practices. Hence, *Expedia* is a regress towards formalism and goes against the aim of the modernisation process to put competition law in line with economics.[187]

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[183] *Expedia*, *supra* note 176, para 37.
[184] *See* Statement of the Commission in public consultations for the revision of the *De Minimis* Notice, available at http://ec.europa.eu/competition/consultations/2013_de_minimis_notice/index_en.html, 24 April 2014: *"The Court has now established that the concept of a non-appreciable impact on competition (de minimis) does not apply when the agreement in question contains a so-called "by object restriction"*".
[185] N. Petit nominated the judgment for the "*worst antitrust development Oscar*" in an article of 18 April 2013 in his blog Chillin' Competition, available at: http://chillingcompetition.com/2013/04/18/law-firms-cartels/, 23 April 2014; *See* AKMAN, "The Court of Justice's Expedia ruling undermines the economic approach by eliminating the 'de minimis' defence in object agreements", available at: http://competitionpolicy.wordpress.com/2013/06/04/the-court-of-justices-expedia-ruling-undermines-the-economic-approach-by-eliminating-the-de-mimimis-defence-in-object-agreements/, 23 April 2014.
[186] *See* NAGY, *supra* note 18.
[187] One way to circumvent *Expedia* would be to apply a broader contextual (legal and economic background) approach to determining object restrictions, so as to account for very small market shares. This way the agreement will not be qualified as "by object" and will not bear the consequences of *Expedia.*

3.2 Presumption of not satisfying Article 101(3) conditions

> "[T]he difficulty in this area is that a strong presumption has been created that such restraints will not satisfy the conditions of Article 101(3), and the modernisation process may have made it more difficult for those seeking to rebut that presumption."[188] (A. Jones)

Since Article 101(1) seems to establish an irrebuttable presumption of appreciable harm for object restrictions, the only provision that separates the EU object approach from the US *per se* illegality approach is Article 101(3). It is the exclusive forum under the EU rules of competition for performing a balancing exercise between competitive harm and redeeming virtues.[189] The argument that efficiencies generated by the agreement offset the restrictive effects is the only possible defence left for undertakings, once the object character of the restriction has been proven.

In normative terms, the availability of Article 101(3) to object restriction is not questioned. The General Court in *Matra Hachette* clearly states that "*no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article 85(3) of the Treaty are satisfied*".[190] However, as argued below, it is the presumption of not satisfying the conditions of Article 101(3), combined with the lack of sufficient guidance as to when the presumption can be rebutted, that makes this provision *de facto* very difficult to rely on in practice in the context of object restrictions.

First, Article 101(3) does not apply in the same way to object restrictions as it does to effects restrictions. In its Article 101(3) Guidelines, the Commission states that "*severe restrictions of competition are unlikely to fulfil the conditions of Article [101(3)]*".[191] It refers to the hardcore restrictions found in different block exemption regulations, which are typically the classic vertical and horizontal agreements in the object box. Such restrictions are, as stated in the Article 101(3) Guidelines, unlikely to satisfy any of the first three of the four cumulative conditions.[192] No such presumption applies with respect to effects restrictions. In accordance with the rules on burden of proof stipulated in Regulation 1/2003, it is up to the alleged infringer to demonstrate that the conditions for Article 101(3) are

[188] JONES, *supra* note 13, p.669.
[189] ITALIANER, *supra* note 30, p.7.
[190] Case T-17/93, *Matra Hachette*, [1994] ECR II-595, para 85.
[191] *Supra* note 25, para 46.
[192] The four cumulative conditions of Article 101(3) are as follows: (i) efficiency gains; (ii) fair share for consumers; (iii) indispensability of the restrictions; (iv) no elimination of competition.

fulfilled.[193] Given the existence of this strong presumption, claiming an exemption for object restrictions looks like an "uphill battle".

Second, in the absence of clear guidance as regards the circumstances in which the presumption can be rebutted, companies are more inclined to abandon their potentially welfare-enhancing business. The unattractive alternative is to fight an "uphill battle", which is very likely to end in damaging consequences, namely the imposition of a large fine. Reports of the "*slow death of Article 101(3*)" since the advent of the modernisation process have become quite common amongst lawyers.[194] In addition, academics have recognized the concerns related to the "*paucity of cases providing guidance*" as well.[195] Such disquietude did not exist under the "old regime", which required notification of potentially restrictive agreements.[196] The Commission, having the exclusive competence to apply Article 101(3), exempted many agreements and provided useful guidance as to why the specific restraints satisfied the four cumulative criteria.

The 2004 modernisation wave brought about two main changes: it abolished the notifications system and gave Article 101(3) direct effect[197]. The outcry related to the absence of guidance to private parties is the result of three main post-modernisation developments. Firstly, the post-notification decisional practice does not contribute to the development of Article 101(3). Although Article 10 of Regulation 1/2003 provides the Commission with the possibility to issue non-infringement, or finding of inapplicability, decisions[198], no such decisions have been issued since 2004. As a consequence, post-notification Commission decisions do not shed light on when agreements merit exemption under Article 101(3). In addition, the increasing preference for commitment decisions raises concerns amongst academics and lawyers about the lack of guidance on novel and non-

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[193] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1 (hereinafter "Regulation 1/2003"), Article 2.

[194] *See* LAMADRID, "The Slow Death of Article 101(3)" in Chillin' Competition blog, 28.11.2011, available at http://chillingcompetition.com/2011/10/28/the-slow-death-of-article-1013/, 24 April 2014; ADKINS, BEIGHTON, "An Object of Interest", (2014) *Competition Law Insight*. Available at http://www.wragge.com/published_articles_11035.asp, 21 April 2014; *Contra* ITALIANER, *supra* note, p.8: "*[R]eports of the death of Article 101(3) for object restrictions have been greatly exaggerated*."

[195] JONES, *supra* note 13, p.668-670.

[196] Council Regulation 17 [1959–62] OJ Spec Ed 87, Article 9(1).

[197] NCAs and national judges could from then on apply Article 101(3), *see* Regulation 1/2003, *supra* note 193, Articles 5 and 6.

[198] Recital 14 of the Preamble to Regulation 1/2003 further explains that the insertion of Article 10 is "*with a view to clarifying the law and ensuring its consistent application throughout the [Union], in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice*".

obvious infringements.[199] Secondly, the recent *Tele2Polska* judgment of the ECJ, prohibiting NCAs from issuing non-infringement decisions[200], may reduce the prospects of useful guidance coming from Member States. Finally, the Article 101(3) Guidelines are denounced as being too general and complex.[201] They were adopted in 2004 with a view to providing private parties with guidance on how to perform a self-assessment exercise and to ensuring that national courts and NCAs apply the provision in a uniform way. Albeit not completely unhelpful, they cannot fully compensate for the industry-specific analysis performed by the Commission under the "old regime".[202] Furthermore, since they are based on the pre-modernisation decisional practice and case-law, the Article 101(3) Guidelines do not contain any guidance on how to apply this provision to some of the new types of object restrictions, such as pay-for-delay arrangements.

As opposed to Article 101(1), which does not seem to allow undertakings any possibility of defence once an object restriction is established, Article 101(3) is not a "fully closed door". However, in practice, the strong presumption of not complying with the required criteria coupled with the lack of guidance on how to rebut the presumption in specific cases, dissuades parties from entering into potentially welfare-enhancing agreements.[203] The more the object box expands, so as to include agreements with the capacity of having redeeming virtue, the greater the need for a revival of Article 101(3).

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[199] However, commitment decisions may serve as a source of informal guidance. *See* Commission commitment decision of 23.05.2013, Case COMP/AT.39595, *Continental/United/Lufthansa/Air Canada*, [2013] C(2013) 2836 final (hereinafter "*Star Alliance*"), paras 56-86, where the Commission explained how it applies Article 101(3) to certain forms of cooperation between airline alliances.

[200] Case C-375/09, *Prezes Urz ̨edu Ochrony Konkurencji i Konsumento w v Tele2 Polska sp. z o.o.*, [2011] ECR I-3055, para 30. While an NCA may find that "*there are no grounds for action on their part*", only the Commission can find that Articles 101 and 102 are inapplicable to a particular practice. It seems that after *Tele2Poslka* the power of NCAs to apply Article 101(3) is limited to infringements decisions. *See* MACGREGOR, GECIC, "EU Antitrust Proceedings and National Competition Authorities: A Leap in the Wrong Direction", [2012] *International Trade Law & Regulation*, p.1-9.

[201] See GERARD, *supra* note 13, p.36.

[202] *Ibidem*.

[203] ADKINS, BEIGHTON, "An Object of Interest", (2014) *Competition Law Insight*. Available at http://www.wragge.com/published_articles_11035.asp, 21 April 2014

Conclusion

This paper has demonstrated that since the advent of the modernisation EU competition law has broadened the concept of object restrictions in two ways.[204] On the one hand, after *Allianz Hungária* it seems acceptable to classify practices, typically falling outside of the object box, as object restrictions by means of an abridged competitive assessment. The far-reaching claws of this assessment risk reducing legal certainty and blurring the distinction between effect and object. On the other hand, new types of infringements, such as pay-for-delay arrangements and certain types of "pure" information exchanges, have enlarged the size of the object box. The addition of new practices to the list of object restrictions is not by and of itself objectionable, since the object category is a not static, but a dynamic concept. However, every new inclusion should be accompanied by a "bulletproof" theory of harm.[205] Furthermore, it is recommended that, the first cases before the insertion of a practice into the object box be given a full-blown economic analysis.

To avoid errors of over-enforcement, the broad view of the EU system towards a finding of an object restriction should be accompanied by a broad view of the available defences under both Article 101(1) and 101(3). This paper has argued that EU competition law appears to evolve in the opposite direction. The expansion of the object box is combined with a significant limitation of the possibilities to demonstrate that the practices are legal. The perverse effects of expanding the object box are that, in addition to the application of a presumption of harm, which is not on all occasions warranted on grounds of economics, the defendant is precluded from arguing that the expected restriction of competition did not materialize or that, if it did, it was negligible. What is more, the defendant faces a strong presumption, that the agreement does not merit exemption under Article 101(3). As a result of the absence of sufficient guidance on how to rebut the presumption, parties often prefer giving up their potentially welfare-enhancing practices to risking a hefty fine.

Although the EU "object box" is clearly larger than the US "*per se* box", as the former includes practices, such as RPM, ATP, some information exchanges and some pay-for-delay arrangements, there is not much that separates the consequences stemming from an object restriction from the ones stemming from a *per se* infringement. The EU combination of a broad object box with limited defence options is more likely to condemn an "innocent" man than to save a "guilty" one.

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[204] For a schematic overview, *see* Annex.

[205] It was argued in this paper that, on account of economic theory, it is justified to include in the object box exchanges related to future intentions and the three examples of pay-for-delay arrangements given on page 26.

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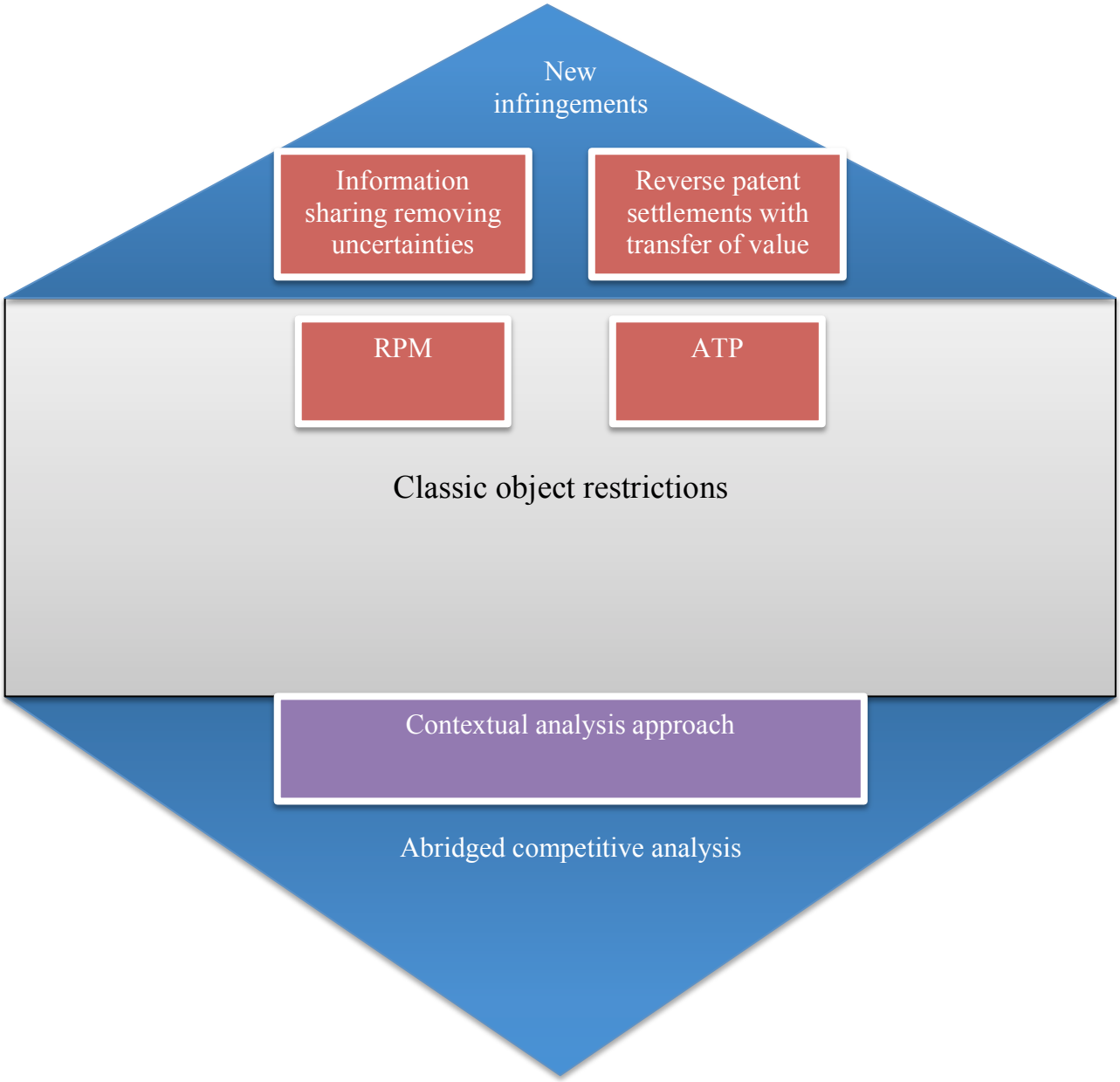
ANNEX: Expanding the Object Box

Per se illegality



Effects Analysis

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