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"Object or effect?

Judicious thoughts on classic themes"

By Judge Ian Forrester[1]

To speak to such an audience in such a setting is a special honour for anyone who respects the history of our profession. This hall must be one of the oldest buildings on earth which has been in continuous use to support the professional life of the lawyer – collegiate, academic, disputatious, gastronomic, educational and often noisy. I am a foreign lawyer. The Middle Temple embraced me as a member of the English bar in 1996 despite my never having studied English Law. I was then the oldest of a promising crop of fresh faced bright young things. Now I am the most junior and the most elderly member of the General Court.

Those with grey hair can often remember the old days with sharp precision, while being vague about last week. That might serve as a metaphor for my theme this evening. I wish more precisely to examine the longstanding tension/harmony/complementarity between "object" and "effect" in European competition with particular reference to IP rights.

We know clearly what were the rules and procedures from the 1970's and 1980's, even if we knew their weaknesses: everything doubtful was notionally caught by a prohibition, and conventional wisdom was that exemptions were available to put minds at rest. Today, we scratch our heads to be confident in describing the law in the fields of object and effect. I suggest that my fuzziness as to by object and by effect is not exclusively due to my age and decrepitude, but may also be attributable to the trickiness of the raw material. My fellow judges in public academic speeches, most recently Marc van der Woude, have noted some disparities in the case law.

[1] Master of the Bench, Middle Temple. I acknowledge the generous help in preparing this lecture of Pascal Berghe LLM, from Liège, now my colleague in Luxembourg. My remarks are of course entirely personal and academic, and deserve no special weight by virtue of my current position

Context

Let us begin at the beginning. Fifty four years ago, the interpreters of Reg. 17/62, the rule by which the competition articles of the EC Treaty were to be applied, faced some fundamental choices.

The Commission was a young institution whose powers, rather like the medieval papacy, were far reaching in theory but in practice uncertain. Its concerns by no means matched the priorities of national courts or agencies or governments. Its early choices of enforcement priorities, its interpretation of the relevant Treaty articles and its pursuit of certain targets reflected its situation. At the time they were adopted, the competition rules of the Treaty, like so many other of its provisions, were very radical. They called on the businesses of the Community, their legal advisers, and the legal systems of the Member States to apply an entirely new system of legal rules for economic conduct. These rules called for fundamental, indeed revolutionary, changes in centuries old habits of thought and patterns of conduct.

The new competition rules in the Treaty of Rome were expressed as broad statements of principle, drawn with that monumental brevity which is characteristic of constitutional provisions. One question was whether the prohibition of Article 85(1) should catch agreements which had pro-competitive and anti-competitive features but which were on balance benign? Or should it catch only offensively restrictive agreements? The predictable affirmative, conservative answer was understandable for new officials enforcing a new law, with no confidence in the sympathies of lawyers, judges, national officials or companies. The structure of Art. 85 was to be founded on a basic prohibition, broadly interpreted, relieved by the availability of an exemption. The temptation for the Commission was strong to adopt a clear and uncompromising approach. Reasonableness/pro competitiveness/acceptability would be determined almost exclusively under paragraph (3). The Commission would be the sole custodian of paragraph (3). Businessmen and their legal advisers would not be allowed to develop loopholes in the law, or defences based on purported good faith in the application of an equivalent of the American rule of reason.

The concept of illegality in the absence of approval (and the importance, as a corollary, of how a practice was labelled by the enforcer) was an extremely important element in the enforcement regime. This approach ensured a maximum of disclosure – an important consideration for an enforcement agency which needed both

experience and a maximum selection of cases to serve as vehicles for making new law. It preserved the Community's competition rules from the potential ravages of what was feared to be the uninstructed and even hostile judiciaries of the member states. Finally, this approach seemed to hold out the prospect of giving legal certainty when it was asked for; a businessman who wanted to know where he stood could ask for and obtain an exemption. [2]

This phenomenon had major theoretical and practical consequences. Notifications were submitted on the basis that huge fines might be imposed upon parties to agreements which contained (technically speaking) restrictions on competition (as these were conceived by DG IV's early theorists), but which would have had a fair chance of receiving the Commission's formal or informal blessing if they had been notified. However, as life developed, the best reason for notifying was not to avoid fines, but to obtain a tactical advantage in the event that the other contracting party chose to try to evade its contractual obligations by arguing that EC competition law prohibited the deal. Thus, filing a notification which provoked no hostile reaction from DG IV was a means of attaining the higher moral ground in the event that a controversy arose. Most who notified did not hope to receive an exemption, and indeed probably hoped not to receive an exemption, as this would only be accorded after commercially painful concessions. The sagacious notified in the hope that they would receive no reaction whatever. Thus notification was a means of protecting agreements from challenges, rather than a means for the ultra-scrupulous of obtaining legal certainty.

The staff of DG IV were keepers of the cult, fully acquainted with its higher economic mysteries. Only they could decide on difficult questions. They were based in Brussels, they had been formed by years of study and experience, they were incorruptible (and sometimes stern), and they were superior in knowledge to most of the laity. In order to be legally certain, the company must confess: completely, frankly, and in writing as a necessary step on the road to absolution. Having received the

[2] However, as life turned out, the Commission normally did not take formal decisions routinely granting exemptions in specific cases. Many agreements were caught by the prohibition of Article 85(1); many agreements needed exemption to be legally valid; hardly any specific exemptions were issued; and only the Commission could consider a request for an exemption, since only the Commission could grant an exemption. Thus procedurally the Commission's intervention was supposedly indispensable, for thousands of agreements with exclusivity features or territoriality clauses, but practically it was unavailable.

confession, the priests would consider it. This was a lengthy process, because each decision was not merely the answer to an individual notification, but a sign to all the faithful. The business desirous of lightening its heart and disposing of its doubts could discern the lawful way ahead only by making a confession to higher authority, and not by its own examination of its conscience. I thus contended that Brussels was to be regarded as a Catholic, not a Presbyterian jurisdiction.[3]

What is the relevance of this nostalgic review of 20th century competition law practice? I suggest that we are today facing once more the classic tension between competition law doctrine, driven by texts and concepts, as opposed to competition law driven by discernible actual economic effects. Should we condemn because of a concept which may or may not materialise into action and effects? Or because of the pernicious measurable consequences of actual behaviour? This tension arises with particular strength in the context of intellectual property rights, which are routinely invoked to limit competition (competition in the sense that the IP right holder believes himself to be insulated by the IP right against an infringing action by a commercial rival). An IP right gives a limited monopoly to the right holder; and the right is usually defined by national law. EU law looks askance at monopolies and at national economic boundaries.

There have been far fewer EU competition cases than US antitrust cases: public enforcement shaped the law in Europe, much more than private enforcement. Flagship cases moved the law in major jerks, not smoothly. It is also true that some of the celebrated cases of the old days present some difficulties today. *Sirena*[4] is one; and *Roche/Vitamins*[5] might be seen by some as another. Until 2004, at least in theory, the Commission's blessing was indispensable for the validity of thousands of agreements. With self – assessment, we said farewell to the theoretical indispensability of the approval of the public authority. We moved from being a competition religion based

[3] Robert Schuman Center, Annual on European Competition Law 373 (C.D. Ehlermann & L.L. Laudati eds. 1996) [hereinafter Annual on European Competition Law]

[4] Case 40-70, *Sirena S.r.l. v Eda S.r.l. and others*, judgment of the Court of 18 February 1971, Reference for a preliminary ruling: Tribunale civile e penale di Milano - Italy.

[5] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, judgment of the Court of 13 February 1979.

upon the need to confess and obtain approval after making concessions to one where individuals can independently assess the cleanliness of their commercial conduct. Now, as we will see, the re-emergence of "by object" as a legal force to reckon with may resurrect the previous regime where condemnation follows not analysis of effects but merely classification and characterization. The advent of the era of self assessment has not eliminated the old question of whether condemnation was to be based on hypothesis or upon actual impact.

The 2004 revolution also meant opening competition law to economics; looking at substance rather than form; looking at reality rather than text. Commentators have argued that the expansion of "by object" is an attempt to circumvent the difficult economic assessment required after the 2004 reform, thus going back to condemnations based on the language of the agreement alone.

Origin of the distinction

The first discussion of the distinction between object and effect can be found in two seminal cases from 1966, *Société technique minière*[6] and *Consten and Grundig*.[7] One was a reference and one was an appeal. Both were decided by the same judges within a few weeks. In *Société technique minière v Maschinenbau Ulm*, the Court of Justice was asked by the Cour d'appel de Paris to construe the wording of Article 85 of the Treaty in the context of a distribution agreement that had not been notified to the Commission. The agreement granted distributors exclusive territories, but did not explicitly restrict parallel trade. The contract provided for distributing road building equipment. Things did not go well commercially and there was an attempt by the German company to get the deal declared void on the grounds that it contained anticompetitive features. The Paris court referred the matter to the ECJ.

[6] Case 56/1965, Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.), judgment of the Court of 30 June 1966.

[7] Joined cases 56 and 58/64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community, judgment of the Court of 13 July 1966.

The Court of Justice held that the words "object" and "effect" contained in then-Article 85(1) of the Treaty should be read disjunctively (judgement of 30 June 1966, LTM, 56/65, Rec, EU:C:1966:38).

> "The fact that these are not cumulative but alternative requirements, indicated by the conjunction 'or ', leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. This interference with competition referred to in Article 85(1) must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent." (p. 249)

Thus, from the outset, the practical implications of the distinction between object and effect for competition enforcers and for companies were made clear. It is only if the assessment of an agreement does not reveal an anticompetitive object that its effects need to be examined. If it has a restrictive object, then the prohibition is applicable. There was no thoughtful definition of what sort of competition was being pursued (might Grundig radios compete in France more effectively with Philips radios if the Grundig distributor in France were immunised from competition?).

One month later, in July 1966, the Court decided *Consten and Grundig* (judgement of 13 July 1966, Consten and Grundig v Commission, 56/64 and 58/64, Rec, EU:C:1966:41). This venerable decision involved the first challenge by the Commission to obstacles to parallel trade between Member States. Could a distribution agreement for electrical goods in one Member State impose a ban on exports to other Member States, so-called absolute territorial protection? Should competition law help "free riders" or should it help the holders of valuable trademarks to prevent encroachment by free riders into their territory ? The Commission found the practice constituted an infringement "by object" under Article 85. But it did not assess the concrete effects of the practice and, in particular, did not assess whether the restriction of intrabrand competition would be or could be compensated by interbrand competition. In its appeal, the manufacturer – supported by Germany – argued that the Commission should have based itself upon the "rule of reason". On this theory, it should have considered the economic effects of the disputed contract before declaring Article 85(1) to be applicable. Perhaps grey market

trade in radios would not save consumers money, perhaps it would restrain the robust sales efforts of the official distributor, who would lack motivation unless privileged by enjoying local exclusivity. If the official distribution channels were to be protected, French trademarks could be invoked against the sale in France of genuine merchandise bearing the same marks from other countries.

These arguments were rejected. The Court of Justice held that:

> "for the purpose of applying Article 85(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" (p.342).

This seminal case helped launch European competition law's celebrated preoccupation with parallel trade, but it also dented EC veneration for the sanctity of trademarks, copyrights and patents and other IP rights. These were rights, respected of course, but having no special priority over higher norms such as free movement.

These two first cases made it clear that now-Article 101(1) catches two types of restrictions. Almost exactly 50 years after these cases, we are still arguing about what an infringement by object is. And we are considering how to apply the concept of "object" infringements to new factual circumstances in the digital age.

Why bother? What turns on the distinction?

Theory in EU law has a big impact on enforcement and the outcome of individual controversies. The "object infringement" category provides a valuable evidentiary shortcut for enforcers. In principle, in order to assess whether an agreement restricts competition under Article 101(1) of the Treaty, account should be taken of the actual conditions of the deal, 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 (European Night Services[8]). Under this approach, concrete negative effects should be established before the prohibition would apply.

However, such a thorough assessment is not necessary for "by object" infringements. Only if it is not clear that the goal of the agreement is to harm competition, is it necessary to consider whether it might have the effect of doing so. It

[8] Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, European Night Services and Others v Commission, Judgment of the Court of First Instance (Second Chamber) of 15 September 1998.

is not necessary to prove that the agreement produces negative effects either. The words, the law and the concepts seem to suffice.

"By object" infringements are I suggest not the same theoretically as "per se" infringements in US law. Both types are infringements by "doctrine". Neither requires proving anticompetitive effects. However, per se infringements are absolute. They are illegal and can never be justified. By contrast, labelling a practice as a restriction by object means that it falls within the scope of Article 101(1): it can still be saved under Article 101(3), at least in theory.

The possible availability of an exemption

Justifying a restriction by object under Article 101(3) under its four cumulative conditions is not easy but not entirely impossible. For instance, the Commission indicated in its vertical guidelines that some forms of resale price maintenance (RPM) could be justified under specific circumstances despite RPM being generally considered as a restriction by object. But proving that a restriction by object satisfies the four cumulative conditions of paragraph (3) is very difficult, at least in the eyes of the Commission (national courts might be more relaxed, perhaps). It would be especially difficult for a company to argue that a restriction by object is indispensable. And usually there would be a less restrictive method of pursuing the goal of the agreement.

Moreover, since by object infringements are deemed to threaten competition and to have potential negative effects, the fact that these negative effects are uncertain will not make the practice legal.

The special problem of IP rights – What sort of competition?

IPR rights are in essence a lawfully conferred monopoly accorded along national lines. They are intended to restrict some forms of competition, especially short term price competition (of course in order to deliver longer term benefits to society). If a competition authority were to focus exclusively on the restriction of that price competition instead of looking at competition overall, it would quite hard for defendants to justify their practice under 101(3).

Of the four tests proving that the practice is indispensable will not be easy. It will be a challenge to prove that the benefits of long term dynamic competition (my

limited exclusive right inspires me and others to invest in new technology and reap the deserved fruits of my IP right) can outweigh the restriction in short term price competition (why should consumers in France not have access to the identical non spurious product which is priced more cheaply in Germany?). How can a company convincingly show that the profit it made as a consequence of eliminating a competitor through enforcing its IPR is indispensable to secure long term investments in R&D? In my previous incarnation as a litigator, I tried to show that competition would be healthier due to the imposition of a contractual hindrance on parallel exports of patented medicines from one Member State to another. Establishing such a causal link is an uphill battle. It is impossible to show a precise link between the extra revenues which limiting parallel exports might deliver and the purchase of an extra piece of laboratory equipment. The patentee will make more money, but how can we be sure the patentee will spend the money on research and not on Turkish carpets or executive limousines?

I am not arguing that there should be no "by object" infringements in the field of IP rights. (I would regard a patent licence going beyond the scope of the patent as one such). I am arguing that it is wise not lightly to create lightly new by object infringements.

What about a *de minimis* "object" infringement?

The need for restraint has become even clearer following the case of *Expedia*. In that case, the Court of Justice stated that the *de minimis* notice does not apply to restrictions by object. Thus in addition to being an evidentiary shortcut as regards effects on competition, by object infringements are to be deemed to be "appreciable" (judgement of 13 December 2012, Expedia, C-226/11, Rec, EU:C:2012:795, para 37).

The case concerned a contractual partnership between SNCF and Expedia for the online sale of train tickets. The French Competition Authority found that the partnership was caught by Article 81 EC, the object (and effect) of which was to promote their joint subsidiary in the market for travel agency services provided for leisure travel, to the detriment of competitors. The authority imposed financial penalties on Expedia and on SNCF. On appeal before the French courts, the characterisation of the practice as an infringement by object was not disputed. The key question was instead whether the market share of the partnership was so limited

that the practice would fall below the *de minimis* threshold and, if so, whether this would shield the practice from being fined. In response to a preliminary reference, the Court of Justice replied that:

> "It must therefore be held that an 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" (§27)

In other words, the fact that an infringement by object concerned a trivial part of the market is no defence. Its effects are irrebuttably presumed to be appreciable. If that statement is good law, then we must be very careful. Mortal sin turns the soul like a bottle of milk instantly black, according to Catholic Sunday School doctrine. Similarly, the by object infringement even if it has no real effect in the market, is unlawful. However, some room for debate remains as to what is meant by competition and as to the threshold for a restriction of competition to become a restriction by object.

What (restriction of) competition means

In *Glaxosmithkline*, the Commission considered a notification in about 1998 by a leading pharmaceutical company which engaged in what was often called dual pricing. GSK set a "normal" "price" to traders who could resell the medicines anywhere in the EU. However, as to sales destined for Spanish patients in Spain covered by the Spanish social security regime, GSK would sell the products at the lower State-imposed price. It insisted that the product would be dispensed to those covered by Spanish law in Spain. The Spanish state set prices for drugs much lower than other Member States, a public policy choice which it was fully entitled to exercise. The argument was that Spanish controls on pharmaceutical prices were not intended to prescribe prices in other Member States. Therefore, it was said, deliveries destined for countries where other pricing regimes applied should not be procured at the Spanish price. GSK argued that such practice could not constitute a restriction of competition because end consumers did not benefit from parallel trade (as medicines are normally paid out of public funds), and because the effects on its business of large volumes of opportunistic exports were deleterious and disruptive. GSK's research efforts, it argued, depended on its receiving the higher prices prevailing in Germany or Sweden

for prescriptions delivered to patients there. The notification was rejected in a harshly worded decision which GSK appealed.

The General Court agreed. It held that the Commission should not have found that there was a by object infringement without having first assessed in detail the context. The Commission had not fairly considered the arguments advanced by GSK, and had not therefore properly handled the notification.

The Court of Justice partly upheld and partly reversed. It held that, "Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price. It follows that, by requiring proof that the agreement entails disadvantages for final consumers as a prerequisite for a finding of anti-competitive object and by not finding that that agreement had such an object, the Court of First Instance committed an error of law" (judgement of 6 October 2009, GlaxoSmithKline Services and Others v Commission and Others, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, Rec, EU:C:2009:610, para 64).

It is regularly said that European competition law should protect consumers, not competitors. Indeed, the Commission states in its 81(3) guidelines that the objective of article 101 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. However, in the *GSK* judgment, the Court considered that competition law also protected the "structure" of competition as such. There is a hint of ordoliberalism in that judgment. Ordoliberalism might be regarded as a theory of political economy rather than a competition law doctrine: concentrated market power is undesirable, and powerful firms should be prudent not to damage smaller players and should not argue that economic efficiency trumps all other considerations.

The *GSK* case illustrates one of the difficulties in competition law. If we do not know what normal competition is, it is difficult to define what constitutes a restriction of competition or a restriction of competition by object. The Commission saw the conduct as a flagrant interference with parallel trade. The patentee saw it as a rational means to avoid losing a lot of money to free riders who were exploiting differences in

government policies. The two courts described what was happening in a variety of different ways.

Putting it differently, it was not disputed that the purpose of the pricing scheme was to hinder free riding exports; nor could it be disputed that research (which is why patents are granted) would not be done by the free riders, and would be done by the patentee. How to make that balancing? Which kind of competition is to be favoured?

IP rights almost by definition lower short term competition by price to foster long term competition by innovation. But if "competition" is reduced to "price competition", we have not gone very far and the cheaper will always prevail. If competition means something wider, then the rationale for IP rights becomes relevant, and further enquiry can be made.

The threshold

The notion of "infringement by object" is understandably appealing to competition enforcers, but its scope is not easy to delineate. Anticompetitive intent may be alleged on the basis of the parties' emails. But there is no requirement to prove that the individual intention of the parties was to restrict competition.

What I think should be more relevant is the aim of the agreement, distilled from an objective and textual assessment of the agreement. What matters is not the black heart of the witch, but the fact that the apple proved to be poisonous after analysis.

First test: "Sufficiently deleterious" to competition

The Court had given some hint as to the definition of infringements by object in *Société Technique Minière*. In that case, it held that "where an analysis of the clauses does not reveal the effect on competition to be sufficiently deleterious", for Article 85(1) to apply it should be shown that "competition has in fact been prevented or restricted or distorted".

In other words, the difference between infringements by object and infringements by effect is a question of degree of harm to competition. Infringements by object are more serious than infringements by effects, since it is not enough for a practice to have anticompetitive effects in order to be caught: these effects should be "sufficiently deleterious" to competition for the practice to be characterised as an

infringement by object. The apple should not simply be soft, unappetising, bruised or partly rotten: it has to be really poisonous.

Second test: "obvious restrictions" of competition?

In *ENS*, the Court held that restrictions by object should be limited to "obvious restrictions of competition" and it gave the classic examples of price-fixing or market-sharing (judgement of 15 September 1998, European Night Services and Others v Commission, T-374/94, T-375/94, T-384/94 and T-388/94, Rec, EU:T:1998:198, para 136).

The "obvious" test used in *ENS* is not equivalent to the "sufficiently deleterious effects" test used in *Société technique minière*. But at least both tests make it clear that there is a quantitative difference between infringements by object and infringements by effect. If a restriction is not sufficiently clear or does not appear sufficiently serious after a first assessment of the provisions of an agreement, a full blown analysis is required.

Third test: by nature, injurious

The expansion of the by object infringement category might have been fuelled by the third version of the test that appeared following *Irish Beef* and *T-Mobile*. According to the Court of Justice, the distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, "by their very nature, as being injurious to the proper functioning of normal competition" (Case C-209/07 Beef Industry Development Society and Barry Brothers [2008] ECR I-8637, paragraph 17, and Case C-8/08 T-Mobile Netherlands and Others [2009] ECR I-4529, paragraph 29).

This third test is maybe less felicitous than the previous two which establish a qualitative and quantitative difference between infringements by object and infringements by effect; and in addition the concept that infringements by object must be construed narrowly does not appear so explicitly. Now, I submit this third test does not overrule the previous two. All depends on how we interpret "by their very nature". I suggest, tentatively, that this formulation implies some form of seriousness as regards effects to competition or even some form of obviousness.

Amanita phalloides or death cap is a mushroom with a pale or yellowish cap of 5 to 15 cm. Eating half a cap of this mushroom is likely to kill a human. It is poisonous "by its very nature". Truffle is not. Someone, poor soul, may be allergic to truffle. Truffle might be toxic for that person. But truffle is not poisonous "by its very nature". Nor is it obviously poisonous either. And if the only effect is that the unfortunate eater feels digestively challenged, we cannot say that the effects are sufficiently deleterious. You would need a full blown analysis.[9]

Defining verbally what is harmful on the basis of a very few cases is necessarily an imprecise aspiration. We can rely on "magnitude" or "obvious" or "by nature" (the last being maybe not so easy). I would suggest that the test is not "magnitude plus obviousness"; rather it should be magnitude.

Indeed, I submit that infringements by object should be limited to the most egregious infringements of competition law, those which we can presume on the basis of experience and theory to be sufficiently deleterious to competition. Otherwise, the default setting should be a careful review of all the legal and factual circumstances under the "by effect" standard. If a serious mushroom hunter would say "That is deadly", then the enquiry can stop. But otherwise the only lawfully satisfactory way is to test it.

New growth of by object cases

The "by object" infringement category is not strictly limited to the classic hardcore infringements. The real question is – under what conditions can a new object infringement be added? We can observe under Article 101 a blossoming of new by-object infringements. *Allianz Hungary*,[10] *Expedia*[11] and the slightly different case of *Pierre Fabre*[12] seem to endorse quite far reaching competition law principles under Article 101.

[9] Peanut allergies are a less luxurious genuine hazard which can be fatal to some while deliciously tempting.

[10] Case C-32/11 Allianz Hungária Biztosító Zrt and Others, EU:C:2013:160 .

[11] Case C-226/11 Expedia Inc v Autorité de la concurrence and Others, EU:C:2012:795 .

[12] Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence [2011] ECR I-9419.

In *Allianz*, the question was whether it was anticompetitive for a car repair shop to be accorded a higher hourly rate by an insurer for carrying out repairs covered by insurance if the repair shop had sold insurance policies issued by the same insurer. The merits in competition law were evidently unsure: the Hungarian court was sufficiently unsure that it made a reference. The Advocate General found there to be no breach of the competition rules; the European Commission felt the contrary. The *Allianz* judgment confidently condemned the arrangements as a 'by-object' infringement, on the basis that, among other things, it was a means for the insurers to increase market share. In *Pierre Fabre*, a not-very-large skin-care company was told that it could not forbid its resellers to make internet sales. In both cases, I respectfully suggest that it is not evident why such severe, indeed absolute, new infringements were being created.

One can argue that, as a matter of consumer welfare, a car repairer should be paid the same price for replacing a dented bumper, whether or not the repairer sells insurance policies for the insurer who is going to pay the bill for the repair. One can argue that internet selling is the modern way, and that it is old-fashioned and restrictive to prohibit resellers from using that method. But I would be rather sceptical about the proposition that in either case there is a gross infringement of the competition rules, so profound that it is not necessary to check whether there is any effect in the marketplace.

Back to Basics? Cartes Bancaires: "by their very nature, harmful"

The Court may have signaled the end of the confident expansion of the notion of infringements by object or, at least, reaffirmed the existence of clear boundaries.

The judgment in *Cartes Bancaires* (judgement of 11 September 2014, CB v Commission, C-67/13 P, Rec, EU:C:2014:2204) comes as a reminder that the object category should remain the exception compared to by effect infringements. AG Wahl wanted to retain the notion of obviousness laid down in European Night Services:

> "Only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary

restrictive effects necessary for the pursuit of a main objective which does not restrict competition." (§56),

"Because of these consequences, classification as an agreement which is restrictive by object must necessarily be circumscribed and ultimately apply only to an agreement which inherently presents a degree of harm. This concept should relate only to agreements which inherently, that is to say without the need to evaluate their actual or potential effects, have a degree of seriousness or harm such that their negative impact on competition seems highly likely. Notwithstanding the open nature of the list of conduct which can be regarded as restrictive by virtue of its object, I propose that a relatively cautious attitude should be maintained in determining a restriction of competition by object." "(§58)

The Court was not quite so conservative. It stated (§58 of the judgement):

"the General Court erred in finding, in paragraph 124 of the judgment under appeal, and then in paragraph 146 of that judgment, that the concept of restriction of competition by 'object' must (not) be interpreted 'restrictively'. The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition. The fact that the types of agreements covered by Article 81(1) EC do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant."

So, yes, there can be new object infringements, but competition authorities must be careful before creating a new one. I would submit that there should be a higher bar, a clearer quantitative threshold, before a restriction of competition may be categorised as a restriction by object.

In *Cartes Bancaires*, it would appear that the Court has tried to put together all previous versions of the test to distinguish infringements by object and infringements by effects. It reaffirmed that object infringements are those that "can be regarded, by

their very nature, as being harmful to the proper functioning of normal competition" (§50), repeating the third version of the test. However, it explicitly linked it to the first version laid down in *Société technique minière,* according to which infringements by object are limited to those that have "sufficiently deleterious" effects on competition. The Court explained that "by its nature" means practices that are "so likely to have negative effects" (§51), on the basis of "experience" (§51). An object infringement should thus "reveal in itself a sufficient degree of harm to competition" (§57). In other words, the Court clarified that the distinction between infringements by object and infringements by effects is a question of degree. On this theory only the most egregious restrictions to competition should be treated as restrictions by object.

The Court did not limit object infringements to those that are "easily identifiable". In so doing, the Court is arguably broadening the concept compared to the European Night Services standard that object infringements should be "obvious". However, the key learning from *Cartes Bancaires* maybe the clear, explicit, unmistakable reaffirmation that the concept of restriction of competition by object must be interpreted "restrictively".

The principles laid down in *Cartes Bancaires* were applied in *Maxima Latvija* (judgement of 26 November 2015, Maxima Latvija, C-345/14, Rec, EU:C:2015:784).

The case concerned an agreement between a supermarket chain and the landlord of a shopping mall. The lease gave the supermarket chain a contractual veto right over commercial premises in the commercial centre being rented to another retailer. In other words, an exclusivity clause. It is easy to imagine the case for and against. The supermarket says that it will promote competition between shopping malls if there is only one big retailer in the mall. It is paying a lot of rent to the landlord. Why can it not demand exclusivity? The critic says that competition between supermarkets will be enhanced if they are physically located in the same mall. Customers will benefit from closely located competitors.

The Court held that this was not a restriction by object. It stated that

> "the agreements at issue in the main proceedings are not among the agreements which it is accepted may be considered, by their very nature, to be harmful to the proper functioning of competition. » (§21).

While the Court acknowledged that the agreement may have the effect of restricting competition, the agreement did not reach the threshold that could justify classifying it as a by object infringement.

> "Taking account of the economic context in which agreements, such as those at issue in the main proceedings are to be applied, the analysis of the content of those agreements would not, in the light of the information provided by the referring court, show, clearly, a degree of harm with regard to competition sufficient for those agreements to be considered to constitute a restriction of competition 'by object' within the meaning of Article 101(1) TFEU (§23)."

I think this is the first judicial pronouncement since *Cartes Bancaires* on object/effect. The Court used the economic context as a mitigating circumstance, following AG Wahl. It considered that the exclusivity clause could not on the relevant market lead to a sufficient degree of harm to competition; the whole circumstances need to be considered.

In other words, the context is to be used to identify the type of competition that is restricted by the agreement. The by object condemnation should not be deployed where after a quick look the answer is not obvious. The search for context should not be used to discover behaviour which once analysed is deemed on balance to be restrictive and therefore an infringement by object.

<u>Relevance of the debate for IPR</u>

The debate is particularly relevant for the new e-economy because trademarks, patents or copyrights are omnipresent in the digital industry. The e-economy is understandably the focus of competition enforcement. IPR rights are intended to prohibit or limit certain form of competition in order to foster other types of competition. For all these reasons, it is probably the area where new infringements and new infringements by object are more likely to be found or at least alleged.

It is true that, in recent years, the regular clashes between competition law and IPR have mainly occurred in the 102 sphere. Among others, I can cite the refusals to license saga (in what circumstances may a dominant player be obliged to share its monopoly with rivals?), the FRAND cases (how to discover a reasonable royalty where the right holder has a contractual duty to grant a licence?) the SEP cases (what

constraints exist on the procedural aggressiveness of patentees seeking royalties from those using Standard Essential Patents?).

A number of cases present the question of what terms are legitimate in the settlement of patent cases in the pharmaceutical sector. Much turns on how one shakes the factual kaleidoscope. Successful drugs enjoy an effective commercial monopoly for a limited period, maybe seven years. Success attracts imitation by generic producers who seek grounds to claim the product patent is invalid or to make the product by using a process different than the patented process. This is perfectly classic and commendable, exactly how the patent system should function, by rewarding innovators and encouraging rivals to test the boundaries of their rights. Patent litigation is very costly and there is no single Europe-wide court; therefore multiple outcomes in different courts are possible. The patentee is enjoying a lucrative phase of being the only source of a new successful medicine. The generic rival is looking for weaknesses in the patent protection of different drugs. Litigation is launched on validity or infringement or both.

After months or years of conflict, the two decide to end the litigation, thus depriving the public interest of the possibility that the patent would be judicially upheld (good for the research based patentee and for the state which wishes novel medicines for its citizens) or judicially annulled (good for the generic producer and for the state as payer of most medicines). There is a deal whereby the litigation ends and, as part of the settlement terms, commercial advantages are delivered to the generic infringer. Are these settlement deals which involve the waiving of future claims to be regarded as 'by-object' offences, so inexcusably illegal that there is no need to enquire into their effects in the marketplace, like bribes to a competitor to leave the market? Or are they susceptible to an analysis of the actual circumstances and whether they brought an end to litigation or legitimated the sale of a competing generic product? The FTC and the Commission have argued the former theory; the Supreme Court favoured a rule of reason enquiry (called by some the 'sniff test'), not a blanket condemnation.

We are also now witnessing an attempt by enforcement authorities to transpose the old parallel trade case-law into the digital world. It started in 2010 with the Commission's vertical guidelines which consider that internet sales are generally passive sales (that is, sales which are not solicited by the reseller) and, consequently,

that hindering sales over the internet is often equivalent to hindering parallel trade. I am unsure that this is an obvious conclusion. But in *Pierre Fabre* - which I have already mentioned (judgement of 13 October 2011, Pierre Fabre Dermo-Cosmétique, C-439/09, Rec, EU:C:2011:649) the Court considered that

> « […] in the context of a selective distribution system, requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified." (§47)

The debate is now moving toward geo-blocking, whereby trading sites insist that customers make purchases by reference to their actual place of residence, not where the goods or services are cheapest. How will these clauses be treated post *Cartes Bancaires* and *Maxima Latviya* and the reaffirmation that the object test should be applied sparingly? Restriction of competition or not? Restriction by object or by effect? Will we see a return of the old parallel trade cases reapplied to the new digital world? What will be the influence of the legal and economic context? Allow me to state the questions without offering any answer!

Final remarks

I would like to finish with some final remarks, moving away from current controversies to more philosophical considerations.

Competition law has few absolute rules. Antitrust law evolves not because the rule changes like tax law, which is purely statutory, but because enforcement approaches and priorities change.[13] This fluidity makes judicial correction and

[13] See Damien Géradin and Nicolas Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment', in Massimo Merola and Jacques Derenne, eds, The Role of the Court of Justice of the EU in Competition Law Cases, Bruylant, 2012, 21 et seq, 32: 'While theoretical diversity may be a source of richness, and avoid the pitfalls of relying on one-sided theories, it may also be a source of confusion, and thus of errors, both in terms of competition policy-making, but also in terms of adjudication. Competition authorities will often be confronted with a patchwork of inconsistent theories concocted by clever complainants and defense counsel … This may lead to confused, and thus generally misguided, enforcement.'

supervision the more essential: they discipline an authority which could otherwise act in an arbitrary manner.

Competition law is not a rigid and predictable set of rules. To the contrary, its enforcement varies according to times, fashions and geography. The law changes, getting more severe or less so. Enforcers make choices as to their priority targets and their accusations. They may choose no longer to challenge certain conduct, or to try alternative methods of addressing the supposed problem.

There is a problem in saying that competition is restricted by object where IP is involved if competition is defined as being limited to price competition. Broader notions of competition (short-term, long term, innovation, or not, consumer benefit) are very difficult to apply in a concrete case, as IP is designed to limit certain forms of competition. It would be unfortunate, I suggest, if condemning conduct as "by object" infringing were to become routine or widespread. Robust examination of the facts and their effects should be the modern norm.

There are significant philosophical differences between nations' competition laws: US competition law does not favour 'free riding' via parallel trade (*GTE Sylvania*[14] is the classic case), whereas encouraging market integration via parallel trade used to be the most evident goal pursued by European competition law. A consideration of the number of early European cases which dealt with parallel trade would suggest that challenging private contractual obstacles to cross-border trade in consumer products was the prime enforcement objective of the Commission from 1970 to 1990. It was a feature distinguishing European law from other laws. Economic effects were not necessary, and the texts were enough to prove guilt. More fines were imposed for parallel trade infractions in that period than for any other category of conduct.

Competition law has now permeated deeply into the economic marrow of European commercial life and business practice. Business leaders are conscious of the need to comply, and are preoccupied with compliance. But at the same time, what the law condemns has been evolving and changing. It is not like health and safety rules, where the progression is linear in the direction of becoming stricter; competition law enforcement fluctuates in priorities, becoming stricter in some areas but less strict in

[14] Continental TV, Inc v GTE Sylvania Inc , 433 US 36 (1977).

others. And, as noted above, much can depend on the creativity of complainants, of talented lawyers and intelligible economists, who will contend that a new approach is only a trifle novel.

An expansion of "by object" damnifications risks taking us "back to the future": to a world where labels preempt careful analysis of actual effects. It would be strange to go back to the old days of legality depending upon the blessing of the public authority, in a manner reminiscent of where we were in the age of notification.