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The Concept of restriction of competition "by object": An endless debate

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Would it seem justifiable that a concept of European competition law, which has its origins in the very birth of this law, should continue, more than 60 years later, to arouse debate and raise doubts? Whatever your answer is, which will inevitably be an argument from one side of the issue, it is nonetheless a reality that European courts and competition authorities are facing.

Indeed, the distinction between the concept of restriction of competition "by object" and restriction of competition "by effect", continues to be debated[1]. This debate is continuing but is not crystallizing and leaves us with a few more good years ahead to hope for a full clarification of these concepts.

It is worth recalling that this dichotomy initially stems from Article 85 of the Treaty establishing the European Economic Community of 1957, which already referred to the wording that we first knew as Article 81 of the Treaty establishing the European Community of 1992 and today, Article 101 of the Treaty on the Functioning of the European Union (TFEU):

"*The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have* ***as their object or effect*** *the prevention, restriction or distortion of competition within the internal market* […]"[2].

While the terms "internal market" and "common market" have been reworded, this is certainly not the case with the statement "which have as their object or effect".

So, as early as the Treaty of Rome, the concept of restriction by object and restriction by effect were born without knowing the pitfall into which these concepts might lead the debates.

As early as 1966, an infernal spiral of successive decisions modifying the conception of these two notions began. To such an extent that, in our view, the Court has sometimes lost its way in its own reasoning.

If, for a time, the aim was to broaden the conception of the anti-competitive object, it was above all with a view to a procedural simplification. Indeed, the more the concept could encompass offences that could be

[1] See: Lazar Focsaneanu, "Pour objet ou pour effet", *Revue du Marché Commun*, 1966, pp. 862 to 870 ; Walter Van Gerven, *Principes du Droit des Ententes de la Communauté Économique Européenne*, Bruylant, Brussels, 1966, pp. 67 and following

[2] Article 101 of TFEU in the current version transcribed into French law with Article L 420-1 of the Commercial Code

punished under the concept of restriction by object, the more this resulted in predictability and easing the burden of proof for the authorities and courts.

Far from the very foundations of antitrust law and its analytical philosophy, this broadening was tantamount to condemning activities by their very nature, *per se*, and thus failing to take account of the general scheme of the operation and the context in which the agreement evolves. This subsequently led to a change of vision regarding these concepts.

If today this problem is no longer the main one, it is nevertheless essential to understand the development of these concepts in order to come to an understanding of their current form. The current form is not any clearer than before and has not really changed the cumbersome procedures of the authorities.

Many inconsistencies still persist today, which is why we will try here to give a conceptual and practical range of the current conception of these concepts in the light of their evolution. Despite the fact that the distinction and clarification of the notions is still not there at the present time.

This distinction seems essential because it is the one that will be able to delimit the burden of proof, the analyses to be carried out, with the final aim of simplifying the procedural aspect. The initial objective of easing the burden of proof is now, in our view, reflected in a difficulty of clarifying the concepts. The aim initially pursued had concealed the need for concordance and articulation of the concepts, whereas today the need for clarification is now detrimental to the initial aim of simplifying the procedure.

This is why we feel it is useful, in an attempt to understand where we are today with regard to these concepts, to refer to the initial phase of understanding (**I**). In the end, the specific aim of these concepts was to simplify the work of the courts and competition authorities by an extensive approach of the notion (**II**), which had to be restricted in order to strike a balance between simplification and non-excessiveness (**III**).

I - On the attempt to apprehend the criteria of the concept of restriction by object

As mentioned above, the debate about the concept of restriction by object started very early. The proof of this is that the L.T.M. case of 1966[3] was already beginning to reveal the inconsistency and misunderstanding of the letter of Article 101 TFEU. The first clarifications, brought by this decision, made it possible to clarify somewhat the possibilities of using this concept.

First of all, the decision states that in order to qualify as a restriction by object, it is necessary to take into account the economic context, which is based on several elements[4]. These elements will be found in most subsequent decisions that come to refer to the concept of restriction by object. The idea being, but we will come back to it, not to assess a practice that would therefore be anti-competitive in itself, by its very nature, but by taking into account the context in which the practice arose. It can therefore be deduced, as early as 1966, that this concept of restriction

[3] ECJ, 30 June 1966, Case 56-65, Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61965CJ0056

[4] The LTM decision specifies: "*Therefore, in order to decide whether an agreement containing a clause ' granting an exclusive right of sale ' is to be considered as prohibited by reason of its object or of its effect, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionnaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation*" p. 250 ; See also: Catherine Prieto, Stéphane Hautbourg, Francesco Rosati and Antoine Choffel, "La notion de "restriction de concurrence par objet" après l'arrêt cartes bancaires", Déjeuner Droit & Économie organisé par Concurrences en partenariat avec Gide Loyrette Nouel et RBB Economics, Paris, 14 oct. 2014

by object, which could have been conceived as almost automatically punishing infringements of Article 85 of the EEC Treaty, could not have been developed without taking into account more extensive research than the practice itself. In the present case, concerning a clause granting an exclusive right of sale agreement it was necessary to take into account the inherent characteristics of this type of practice (the nature and quantity of the products in question, the position of the transferee on the market, *etc.*).

This initial analysis leads us to believe that it is therefore difficult to maintain a distinct line between the concept of restriction of competition "by object" and restriction of competition "by effect". It is not specified which research should be carried out for one as for the other, in fact it is not clear whether this need for context analysis applies to both restrictions and is sufficient or whether the restriction by effect will have to benefit from an even more thorough analysis. A sensible line of reasoning would suggest that it does, but it would have been nice to have had more detail. This will come to be clarified later, but as things stand, it is easy to perceive the countless questions that this concept raises. Many decisions will follow in this direction until the 2000s[5], sometimes without taking into account the necessary analysis of the context mentioned above[6].

The second element specified in this first decision tends to explain the problem previously mentioned, which is that of the juxtaposition of these two notions. How, in the end, will they be able to coexist, are they exclusive of each other or complementary?

Without really answering all these questions, however, the L.T.M. case clarifies what is meant by the conjunction "or" in the letter of Article 85(1) of the EEC Treaty. The decision then states that "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" and that "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" (*pt. 249*). If this is the type of formulation that will be found repeatedly in subsequent decisions, it is important to note two contributions.

The first is that the conjunction "or" in the letter of the text should be considered not as an exclusion, but as an alternative. Thus, if the restriction by object is difficult to demonstrate, it will be quite possible to tend to put forward a restriction by effect.

The second contribution is that, finally, in order to recognise a restriction by object, in addition to taking into account the economic context, it is necessary to demonstrate that the practice, in this case the agreement, that the effect on competition is sufficiently deleterious, failing which, it will be necessary to go through an analysis of a restriction of competition "by effect".

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[5] ECJ, 13 July 1966, Joined Cases 56 and 58/64, Consten and Grundig v Commission, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964CJ0056:EN:PDF ; ECJ, 10 July 1980, Case 99/79, SA Lancôme and Cosparfrance Nederland BV v Etos BV and Albert Heyn Supermart BV, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61979CJ0099 ; ECJ, 11 July 1985, Case 42/84, Remia BV and others v Commission of the European Communities, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61984CJ0042 ; ECJ, 8 July 1999, Case C-49/92 P, Commission of the European Communities v Anic Partecipazioni SpA., https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61992CJ0049&from=EN

[6] ECJ, 24 Oct. 1995, Case C-70/93, Bayerische Motorenwerke AG v ALD Auto-Leasing D GmbH, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61993CJ0070&rid=1

The evolution of questions and understanding of the concept will continue until the beginning of the 21st century, which will be marked by important developments.

First of all, in the early 2000s, the Commission considered it wise, after several years of debate, to draw up a notice focusing on the application of Article 81(3) of the Treaty, entitled "Guidelines on the application of Article 81(3) of the Treaty"[7], which clarifies what is needed to be understood by restriction of competition by object. Article 21 of this Notice defines them as "Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules (…)". It can thus be deduced that these agreements are so deleterious that further research into their effects is unnecessary. This criterion of deleteriousness was already present in 1966. Previously, we spoke of a sufficient degree of deleteriousness to competition, but today, we speak of "a high potential of negative effects on competition".

The communication completes this by recalling that "It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market" (*pt. 22*). Thus, we find the previously mentioned criterion of taking the context into account, although it would seem that it is put forward in a less strict manner. Therefore, this implies some research, at the very least, to determine whether a restriction of competition by object can be characterised. The Commission even goes so far as to cite examples of restrictions by object[8], the reading of which it sometimes subordinates to exemption regulations.

Failing this, it will therefore be necessary to opt for a search for a restriction of competition by effect, as the Commission points out in Article 24 of its communication. Therefore, the latter contains a definition of the restriction of competition by effect and states that "it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability". On this reading it is therefore clear that the effects can be potential, but very likely, harmful, appreciable and not insignificant. We seem to perceive some distinction between these two concepts[9].

While this communication was welcome, it did not have the expected effects, since many uncertainties persisted even after its publication. If we focus on the landmark decisions that have followed, we will see that doubts remain with the national courts, but also some changes in the design of the criteria, in particular the level of harmfulness required.

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[7] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance), OJ C 101, 27 April 2004, p. 97–118, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52004XC0427(07)

[8] From the aforesaid Communication from the Commission: "In the case of horizontal agreements restrictions of competition by object include price fixing, output limitation and sharing of markets and customers. As regards vertical agreements the category of restrictions by object includes, in particular, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales".

[9] See: Laurence Idot," Le retour de l'objet anticoncurrentiel…", Dec. 2009, *Concurrences* N° 4-2009, Art. N° 29202, pp. 1-2 ; Assimakis Komninos, Ioannis Lianos, Francesco Rosati, Philippe Choné, Geoffrey D. Oliver, Florence Ninane, Hendrik Bourgeois, Niamh McCarthy, Johanne Peyre, James Killick," The EU guidance on exclusionary abuses: A step forward or a missed opportunity?", May 2009, *Concurrences* N° 2-2009, Art. N° 25872, pp. 9-39

II - A phase of extension of the conduct that is classified as restrictive by object

Finally, the end of the 2000s was marked by a new emphasis on the concept of restriction of competition by object with a 2008 ECJ decision[10]. This decision, called the "Irish beef case", showed a much more lax vision of the criteria for applying the concept of restriction of competition by object. Following the conclusions of Advocate General Trstenjak, the Court followed a line of reasoning which runs counter to the above-mentioned approaches.

In this case, the question was whether restrictions of competition by object are limited to the most serious infringements, thus contributing to a restrictive interpretation of the concept of restriction of competition by object. However, the Court moves away from the restrictive concept and comes here to recognise a broad assessment of the criteria that contribute to the characterisation of a restriction of competition by object. Beef Industry Development Society argues that the concept must be interpreted restrictively in the sense that "Only agreements as to horizontal price-fixing, or to limit output or share markets, agreements whose anti-competitive effects are so obvious as not to require an economic analysis come within that category" and that "The BIDS arrangements cannot be assimilated to that type of agreement or to other forms of complex cartels" (*pt. 24*).

Without following the company's arguments, the Court will state, in support of Advocate General Trstenjak's conclusions[11], that "the types of agreements covered by Article 81(1)(a) to (e) EC do not constitute an exhaustive list of prohibited collusion". By moving away from the restrictive approach to the concept of restriction of competition by object, the Court in 2008 opens a new concept of this notion which is much more extensive than before. Indeed, this conception makes it possible to affirm that "the anti-competitive object is not limited to hardcore cartels and hardcore restrictions" according to Laurence Idot[12].

Moreover, this decision is all the more illustrated in the debate, because when we look at the facts of the case, we note that in order to characterize the agreement as anti-competitive by object, the Court focuses only on the question of whether "each economic operator must determine independently the policy which it intends to adopt on the common market" and states that "type of arrangement conflicts patently with the concept" (*pt. 34*).

This decision marked a turning point in the broad conception of the restriction by object, some would even say a temporary easing[13] or others would still speak of "blurring the line between the notions of object and effect since, in some cases, demonstrating the restriction of competition by object amounts to a cursory examination of the potential effects of the measures in question"[14].

Following this broadening of the concept's criteria, a number of decisions followed, sticking to the assessment made in the Irish beef case. Notably the 2009 T-Mobile case[15] will follow the same reasoning as the 2008 case and consider that "the exchange of information between competitors is liable to

[10] ECJ, 20 Nov. 2008, Case C-209/07, Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CJ0209

[11] Case C-209/07, Irish beef case, Opinion of the Advocate General Trstenjak, 4 sept 2008, point 48, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62007CC0209

[12] Laurence Idot," Le retour de l'objet anticoncurrentiel…", Dec. 2009, *Concurrences* N° 4-2009, Art. N° 29202, pp. 1-2

[13] *Ibid.*

[14] Stéphane Hautbourg, "Un coup d'arrêt à l'approche extensive de la notion de restriction par objet", *Conference Gide Loyrette Nouel*, 14 Oct. 2014.

[15] ECJ, Case C-8/08, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit, 4 June 2009, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62008CJ0008

be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted" (*pt. 37*). In short, a simple exchange of information may constitute a restriction of competition by object if it reduces or removes the degree of uncertainty as to the operation of the market. We are therefore still in line with an extensive and flexible assessment of the concept. Other decisions will follow in this direction or without really modifying the order established by the 2008 decision[16].

Looking back at the 2008 and 2009 cases, it is clear that the concept of restriction of competition by object encompasses an excessively wide range of situations. From the point of view of undertakings, it is to be feared that a mere exchange of information may be characterised as an infringement without the authority even having to investigate whether it may have had a real impact on competition or hypothetical effects. It is therefore a climate of uncertainty that takes precedence over the need to clarify concepts. From the Commission's point of view, however, it can be seen that this makes it easier to establish the burden of proof in order to characterise the infringement, which is the initial object of the coexistence of the two concepts of restriction by object and by effect.

The idea, in our opinion, would be to find a balance which would allow this procedural simplification of the burden of proof, where this is justifiable, while preserving a contextual analysis for situations where doubt persists in order to avoid a too rapid and primary conviction.

III - Towards a necessary restrictive interpretation of the concept of a restriction of competition by object

One of the first major changes in the concept of restriction by object in competition law comes with the Cartes Bancaires Ruling of September 11, 2014[17]. Although we have seen an expansion of this concept until then, the Court and the Advocate General have decided to adopt the opposite approach.

Without going too far into the facts of the case, this was a dispute between the "Groupement des cartes bancaires", created in France in 1984, and the European Commission over various pricing measures. First in 2007, the Commission, then followed by the General Court of the European Union in 2012, determined that the measures in question were contrary to competition law in that they restricted it by their object. More specifically, the General Court, in dismissing Groupement's appeal, held that the very terms of the agreement in question had an anti-competitive object by limiting their autonomy in the market and required the banks to pay a fee[18].

In the end, the General Court cannot be criticised for its broad approach to the notion of restriction by object, since it merely followed the assessment of the criteria that had been given in previous cases. Yet this is what the Court of Justice of the European Union will do, stating that "the General Court erred in finding (...) that the concept of restriction of competition by 'object' must not be interpreted 'restrictively'" (*pt. 58*).

While this may seem incongruous, it is the Court of Justice, the very Court that had

[16] Court of First Instance, Case T-450/05, Automobiles Peugeot SA and Peugeot Nederland NV v Commission of the European Communities, 9 July 2009, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62005TJ0450 ; EUCJ, Case C-501/06 P, GlaxoSmithKline Services Unlimited v Commission of the European Communities, 6 Oct. 2009, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62006CJ0501 ; EUCJ, Case C-439/09, Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi, 13 Oct. 2011, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62009CJ0439

[17] EUCJ, Case C-67/13 P, Groupement des cartes bancaires (CB) v European Commission, 11 Sept. 2014, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62013CJ0067

[18] David Bosco, "La Cour de justice appelle une interprétation restrictive de la notion de restriction par l'objet", *Contrats Concurrence Consommation* n° 11, Nov. 2014, comm. 250

tended towards extending the concept of restriction by object, that has now criticised the General Court for having followed the trend in case law initiated in 2008. The question that then remains is how the Court can justify this on a legal, as well as conceptual, level.

In our view, the Court was at a dangerous turning point torn between the need to lighten the burden of proof and rebalancing a concept that had become too broad and equivocal. Without really acknowledging this turning point, the Court hopes once and for all to end the heated debate on this concept by restricting its application criteria and clarifying its regime. It does so, moreover, by clearing itself of its successive changes of position and blaming the reasoning of the General Court by stating bluntly that "It must be held that, in so reasoning, the General Court in part failed to have regard to the case-law of the Court of Justice and, therefore, erred in law with regard to the definition of the relevant legal criteria in order to assess whether there was a restriction of competition by 'object' within the meaning of Article 81(1) EC" (*pt. 56*). And recall one of the criteria that had been slightly set aside in recent years, that of sufficient degree of harm: "the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition 'by object' is the finding that such coordination reveals in itself a sufficient degree of harm to competition" (*pt. 57*).

It therefore seems to reaffirm the criterion of harmfulness that was initially advocated until the Court itself softened this requirement. Consequently, only agreements that would have an impact of such harm on the normal competition could be characterised as restricting competition by object. Otherwise, the commutative concept of restriction by effect will have to be used. This narrowing of the scope of use of the concept of restriction by object indicates a step backwards on the part of the Court, which indirectly admits its past errors and recognizes, in a way, that the concept had become too broad, even though the initial approach of lightening the burden of proof was commendable.

It recalls all the more that this finding is always subject to consideration of the economic context in which the agreement operates and the aim pursued by the agreement, the nature of the goods or services affected and the actual conditions of the functioning and structure of the market or markets in question (*pt. 53*). One could ironically say "Back to Basics" when one sees to what extent the Court backtracked and put precepts that were already those of 1966 back on the agenda.

In the light of the context, this means that the General Court could not infer a restriction of competition by object given that the market was a two-sided one[19] and that the deductions made in the General Court's analysis could only lead to the fact that the pricing measures imposed a fee on banks which was indicative of "an acquisition activity significantly lower than that of issuing and which benefited from the efforts made by the others to develop the CB card acceptance network"[20]. This, in all likelihood and according to the Court, is not enough to characterise the "sufficient degree of harmfulness" required to establish a restriction of competition by object.

The position adopted by the Court is, as is often the case, similar to that of Advocate General Nilhs Wahl on this decision, even if the latter will acknowledge, subtly and indirectly, that the case law on these concepts has indeed been divergent: "the distinction between the two types of restrictions envisaged by Article 81(1) EC could, to a certain extent, be a source of differing interpretations and even of confusion. Certain rulings seem to have made it difficult to draw the necessary distinction between the examination of the anticompetitive object

[19] See: Jean-Charles Rochet, Jean Tirole, "Two-sided markets: a progress report", *The RAND Journal of Economics,* vol. 37, no 3, 2006, p. 645 à 667

[20] Stéphane Hautbourg, "Un coup d'arrêt à l'approche extensive de la notion de restriction par objet", *Conference Gide Loyrette Nouel*, 14 Oct. 2014.

and the analysis of the effects on competition of agreements between undertakings"[21], but again comes to recognise it directly "despite the apparent extension of the conduct that is classified as restrictive by object" (*pt. 61*). This leads him to reason like practitioners and companies by stating that "the case-law (...) does not always clearly answer the question whether or not the concept of restriction by object must be given a strict interpretation, even though certain Advocates General have supported one approach or the other".

Thus, by this decision, as Advocate General Wahl says, "The advantage in terms of predictability and easing the burden of proof" is no longer so flexible and extensible. It is therefore presumable that in 2014 we are currently taking a restrictive approach to the concept of restriction of competition by object.

However, this does not answer all the questions and many doubts remain. In particular, what is the concrete assessment of the criterion of "having a degree of seriousness or harm such that their negative impact on competition seems highly likely" or of "by their very nature, harmful to the proper functioning of normal competition". Finally, is it not necessary to do more than a minimal examination in order to assess the harmfulness of an agreement? Isn't the individual and concrete examination referred to in the Pierre Fabre case[22] already part of the analysis of the characterisation of a restriction of competition by its effect[23]?

The Advocate General replied in this decision that "In my view, it is only when experience based on economic analysis shows that a restriction is constantly prohibited that it seems reasonable to penalise it directly for the sake of procedural economy". But this leads to the same question, what is meant by "experience based" or "constantly prohibited", should it be considered that it is only when it has been almost ""customary" to establish the infringement and that the harmfulness of the agreement itself is known before any analysis of the merits? Or can recent experience with reasonable doubt also help to characterise a restriction of competition by object?

But in this decision, the Court seems to make a still cautious distinction between the effects to be sought in order to characterise a restriction of competition by object and those necessary for a restriction by effect. Indeed, the Court criticises the General Court which had argued that the pricing measures could lead to preventing the arrival of new entrants to characterise the restriction by object for having gone too far[24]. According to the Court "such a finding falls within the examination of the effects of those measures on competition and not of their object". The question then arises as to where the boundary lies between the analysis of the summary effects of the restriction by object and that of the restriction by effect. In this regard, Martine Behar-Touchais proposes a distinction between potential effects, on the one hand "only a potential effect with a degree of probability very close to certainty should be taken into account to qualify the offence as an offence by object" and on the other hand "other potential effects, but not certain ones, should be taken into account when examining the effects"[25]. This is yet another issue that remains to be decided.

Once again, several decisions will follow without any real contribution or clarification[26]. And yet 2020 will have been marked, other than by the global pandemic,

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[21] Case C-67/13 P, Groupement des cartes bancaires case, Opinion of the Advocate General Wahl, 27 March 2014, point 46, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62013CC0067

[22] *cf.* to footnote 15

[23] Martine Behar-Touchais, Stéphane Gervasoni, Marta Giner-Asins, "Restriction par objet, restriction par effet quelle portée encore accorder à cette distinction?", *Séminaire procédure et concurrence Norton Rose Fulbright*, 17 April 2015

[24] *Ibid.*

[25] *Ibid.*

[26] EUCJ, Case C-172/14, ING Pensii, Societate de Administrare a unui Fond de Pensii Administrat Privat SA v Consiliul Concurenței, 16 July 2015, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62014CJ0172 ; See on

by two important decisions that once again bring back to the fore the hope of a clarification of the concept of restriction of competition by object. However, this euphoria will not have lasted very long, for while these decisions are noteworthy for their precision on one part of the concept regime, they do not answer all the questions that remain.

Concerning the first decision[27], it was useful to mention it for the sake of completeness, but we will not dwell on it as the decision that follows, chronologically, evokes all the points dealt with and more.

Still without going into too much detail, but focusing on the real practical and theoretical contributions of the decisions, the second decision was handed down on 2 April 2020 by the CJEU[28], which again concerned a two-sided market where agreements had been made to fixing the level of interchange fees. This decision can, of course, easily be contrasted with the 2014 decision, since the complexity of the context to be taken into account is almost identical to that of the previous decision. In addition, to the factual technical specificities of the decision that you will find in many notes[29], we will dwell on the clarifications that the decision brings us. Although it does not manage to fully clarify the concept, it nevertheless makes an effort to try to clarify the points raised by the national court.

First of all, it should be noted that the condition of sufficient harmfulness remains relevant[30], synonymous here, with an unchanged view of wanting to keep the notion of restriction by object as restrictive in order to avoid the pitfalls of the past. This is, moreover, firmly recalled by the Advocate General Bobek in his conclusions: "As the Court has emphasised in recent case-law, the concept of a restriction of competition 'by object' must be interpreted restrictively, and can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition and for which it is thus unnecessary to examine their effects"[31].

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this judgment: Alain Ronzano, Notion de restriction par objet: L'Avocat général Nils Wahl invite la Cour de Justice de l'Union Européenne à appliquer sa grille de lecture reposant sur le degré suffisant de nocivité à l'égard de la concurrence pour qualifier un accord de répartition de clientèle de restriction de concurrence par objet (ING Pensii Societate de Administrare a unui Fond de Pensii Administrat Privat), 23 avril 2015, Concurrences N° 3-2015, Art. N° 75303 ; EUCJ, Case C-179/16, F. Hoffmann-La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato, 23 Jan. 2018, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62016CJ0179 ; See on this judgment: David Bosco, "L'antitrust, les "fake news" et le secteur pharmaceutique", Contrats Concurrence Consommation n° 4, Avril 2018, comm. 72

[27] EUCJ, Case C-307/18, Generics (UK) Ltd and Others v Competition and Markets Authority, 30 jan. 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0307&qid=1611749655027 ; See on this décision: David Bosco, "La Cour de justice précise le régime des accords de règlement amiable et la notion de restriction par l'objet dans un arrêt important", Contrats Concurrence Consommation n° 4, Avril 2020, comm. 71

[28] EUCJ, Case C-228/18, Gazdasági Versenyhivatal v Budapest Bank Nyrt. e.a., 2 april 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0228&qid=1611740026309

[29] See: David Bosco, "Restriction "par l'objet": une histoire sans fin", Contrats Concurrence Consommation n° 6, June 2020, comm. 103 ; Michel Debroux," Restriction par objet: La Cour de justice de l'Union européenne tente à nouveau de clarifier le concept de restriction de concurrence par objet (et n'y parvient pas totalement) et fournit une méthodologie pratique pour identifier un tel objet (et n'échoue pas entièrement) (Gazdasági Versenyhivatal / Budapest Bank Nyrt)", 2 april 2020, Concurrences N° 3-2020, Art. N° 95918, pp. 88-90 ; David Bosco, "À propos de la notion de restriction par l'objet (encore…)", Contrats Concurrence Consommation n° 11, Nov. 2019, comm. 183 ; Michel Debroux, Restriction par objet: L'Avocat Général Bobek propose à la Cour de justice de l'Union européenne, saisie d'une question préjudicielle par la Cour suprême hongroise, une méthode d'analyse visant à déterminer si une pratique anticoncurrentielle peut être qualifiée de restriction par objet ou si l'examen de ses effets est nécessaire (Gazdasági Versenyhivatal / Budapest Bank), 5 sep. 2019, Concurrences N° 4-2019, Art. N° 92206, pp. 87-89

[30] *Ibid*, point 54 of the decision.

[31] Case C-228/18, Budapest Bank case, Opinion of the Advocate General Bobek, 5 sept. 2019, point 25, http://curia.europa.eu/juris/document/document.jsf?text=&docid=217497&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2162901

However, the referring court is bringing up again a debate which, in our view, has long since died out, on the articulation of the two concepts of restriction of competition by object and restriction of competition by effect. The problematic point put forward by the referring court was whether an agreement can be simultaneously a restriction by object and a restriction of competition by effect. On this point there is no need for a long debate, the Advocate General will refer to the answer that had already been given more than 50 years ago in the L.T.M. decision[32]. This is where the expression "back to basics" again takes on its full meaning, because it can be seen that the further one advances in time, the more the Court is keen to focus on the foundations and initial understanding of the concepts. This is illustrated here by the fact that "(...) a competition authority should first consider the object of an agreement. Where, however, an examination of the object of the agreement 'does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered" (*pt. 25*). This brings us back to the original reasoning where the conjunction "or" is intended to be complementary and thus evokes the fact that an agreement can be analysed as a restriction by object and effect.

However, a few clarifications are made, such as the fact that "there can be a restriction of competition by object only, or by effect only, or by object and effect". But it seems to us that this is an admission of inefficiency and incomprehension of the distinction between concepts. If we look at all the decisions handed down on the basis of these concepts, there are very few decisions that use only the concept of restriction of competition by effect. In fact, all decisions, before using this option, always first use the concept of restriction by object. However, the reverse is not true: when a restriction by object can be characterised, the restriction by effect is not used. This is understandable from the point of view of procedural relief.

Notwithstanding, it seems inconsistent to us to put forward such a possibility, because if it were really permissible from a practical procedural point of view, then agreements which, *prima facie* and by experience, cannot be characterised as a restriction of competition by object, should not fall within the scope of this analysis. Thus the authorities and courts should be able to directly analyse the restriction of competition with an effects-based analysis. In practice, however, this is never the case[33]. How can this be explained?

In our view, there is a real problem with the burden of proof of a procedural nature. Where the initial initiative was to simplify the procedure by lightening the burden of proof through the concept of restriction of competition by object, the authorities find themselves having to analyse this restriction before any analysis of the effects, even though a restriction by object would seem implausible. The procedural simplification is now reflected by a heaviness of the burden of proof, which manifests itself in two stages.

Firstly, by the cumbersome nature of the necessary analysis by the object, even though it has no chance of succeeding, before being able to begin to consider an analysis by the effects.

Secondly, by the back-pedalling carried out by the Court since 2014, which tends to reduce the scope and field of application of the notion of restriction by object, which in our view is welcome, but makes the initial usefulness of the concept disappear.

It is therefore regrettable that the Advocate General and the Court has not decided to establish a real hierarchy of concepts with a much more linear layout that would allow the authorities and courts, in practice, to clarify the distinction and ensure greater procedural fluidity.

[32] *cf.* to footnote 2

[33] See: David Bailey, Laura Elizabeth John, *Bellamy & Child — European Union Law of Competition*, 8th ed., Oxford University Press, Oxford, p. 164.

It may also be noted that the degree of harm to competition of the agreement and its restriction of competition by object are closely linked to the "sufficiently reliable and robust experience" (*pt. 76*), but a number of questions therefore arise, which we have already mentioned above. We raised the problem of a still nascent and uncertain experience to ask whether it could be sufficient. Perhaps it would be wise to clarify this. But one may also wonder whether it is not a little too limiting this time. For it excludes, *a fortiori*, all new offences that could have been restrictions by object, but are not, by experience, treated as such, because they are new. Is there an extensive margin of appreciation for this experience? Can the experience be viewed from a forward-looking perspective? For, if experience exists today, it is because there has been a precedent, and if that precedent exists, it is because there has been a beginning. There is a beginning to everything, could this fit with the notion of experience? Taken in the Court's terms, it seems to us that it does not, but perhaps in the future this problem will resolve itself when new offences, which have never been reprimanded, are of such importance that the fact of experience will no longer be taken into account in the assessment of a restriction by object.

The other contribution of this decision is methodological. In order to clarify the doubts of the referring court, the Advocate General, in his view, has somewhat clarified the methodological steps to be taken for the analysis.

Firstly, according to him, "the authority focuses mainly on the content of the provisions of the agreement and its objectives" (*pt. 42 of the opinion*). In his view, this will make it possible to verify, particularly in the light of experience, whether the harmful nature of the agreement is such that it can be considered harmful enough in order to characterise it as a restriction of competition by object. And finally, once again, the context and the type of good or service should be taken into account, as has been mentioned since the concept was first introduced. We therefore remain on this famous summary analysis of effects and counterfactuals method which is not so summary after all and which, as we have mentioned, can ultimately contribute to creating procedural burdens that are sometimes unnecessary.

It is on this point that the referring court expressed some uncertainty. Clearly, it cannot be criticised for highlighting the borderline between the analyses of the various concepts, which is difficult to perceive. Advocate General Bobek hears and understands these difficulties in his Opinion and try to clarify this distinction between the analyses, in particular by beginning by justifying the analysis necessary to characterise a restriction by its object: "The reason is that a purely formal assessment of an agreement, completely detached from reality, could lead to condemning innocuous or procompetitive agreements" (*pt. 45 of the opinion*). While this seems logical enough to us, it is not without putting it into perspective with the procedural inconsistency that it may induce.

According to the Advocate General, the analysis would then be summary in comparison with that of the analysis of the restriction by effect, but to demonstrate this, the Advocate General confines himself to recalling the methodological elements already mentioned above, without really leading to a concrete differentiation of the analyses. He himself will admit this, stating that "It is impossible to (or at least I am unable to) draw, in abstract terms, a bright line between (the second step of) an object analysis and an effects analysis", which he justifies by the difference in situations that the cases may reflect.

We will then stick to that, that is to say, very little. Where the conception that emerges is that it is finally a "difference between the two is more one of degree than of kind". The assessment will then be made on a case-by-case basis, according to the degree of harmfulness of the agreement, which is itself subject to a summary but detailed analysis of

the context in which the agreement is placed. This seems both paradoxical and equivocal, and it is a real difficulty for the Advocate General and the Court to really clarify these concepts.

For example, in the case in point, the degree of harm to competition reported following this analysis seemed insufficient in the eyes of the Advocate General and the Court to characterise a restriction of competition by object. What the Advocate General determines in three steps to find out whether the MIF Agreement as a restriction by object:

- Was the alleged infringement clearly identified and explained?

- Is there a reliable and robust wealth of experience regarding agreements such as the one at issue?

- Does the legal and economic context of the MIF Agreement call into question its presumed anticompetitive nature?

From a practical point of view, it will therefore be necessary to be able to answer these questions and justify it in order to hope that the restriction by object can succeed before the Court.

Still of a practical and methodological nature, the decision clarifies the conduct to be adopted when courts are faced with agreements that have several objectives. Objectives that must be taken into account when analysing the restriction by object of an agreement. In such a situation, the referring court will have to "determine which objective or objectives are actually established" (*pt. 69*). Leaving it up to the court to decide which objective established would be most likely to support its demonstration. It should be noted that it may be prejudicial if the Court subsequently criticises the courts for not really having based themselves on the main objective that would result from the general scheme of the agreement[34]. We will see this in future decisions.

It is also worth noting that, as was already stated in the 2008 Decision, and subsequently, the "legitimate objective" criterion can be taken into account in the characterisation of the infringement. However, this would, if argued by the parties or the court, exclude a possible finding of restriction by object, because as Advocate General Bobek stated, "Accordingly, any time an agreement appears to have ambivalent effects on the market, an effects analysis is required. In other words, when a possible procompetitive economic rationale for an agreement cannot be ruled out without looking at the actual effects on the market, that agreement cannot be classified as restrictive 'by object'" (*pt. 81 of the opinion*). Thus, possible positive effects, or legitimate objectives pursued by the agreement at issue would require further analysis and would therefore depart from the analysis of a restriction by object[35]. In this regard, as David Bosco rightly pointed out[36], this may seem a little confusing, since the very analysis of a restriction by object requires going through the analysis of the objective pursued by the agreement, and as far as we know, even if the objective pursued may be pro-competitive, it remains an objective. The paradox then crystallises in the necessary search for an objective for a restriction by object, but if one of the objectives is harmless, i.e. positive for competition, the restriction by object is no longer relevant.

[34] See on this debate: Ibáñez Colomo, P., and Lamadrid, A., "On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know", in Gerard, D., Merola, M., and Meyring, B., (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe*, Bruylant, Brussels, 2017, pp. 336 to 339.

[35] See: EUCJ, Case C-307/18, Generics (UK) Ltd and Others v Competition and Markets Authority, 30 jan. 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0307&qid=1611749655027

[36] David Bosco, "Restriction "par l'objet": une histoire sans fin", *Contrats Concurrence Consommation* n° 6, June 2020, comm. 103

There are still many inconsistencies and misunderstandings, which are certainly a sign that these concepts have not finished being talked about.

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