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The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?

Csongor István Nagy*

The article analyses the distinction between object and effect in competition analysis in the context of the CJEU's recent ruling in Allianz. *First, it examines the rationale and traditional notion of anti-competitive object. Secondly, it provides an outlook to the structure of antitrust analysis in US law and compares it with EU competition law. Thirdly, it gives an overview and assessment on the* Allianz *ruling as to the grasp of 'object type' agreements. The article criticizes the CJEU's ruling and submits proposals.*

Motto

Professor: Please give a detailed criminal law analysis of the following case! Person 'A' detrudes the victim, with the intention to kill him, from the fourth floor. On the second floor, person 'B' shoots through the window for amusement and, by accident, the bullet kills the victim before he hits the ground. Person 'C' finds the dead body on the street and, in the belief that the victim is still alive, stabs the victim in the heart.

Student: Mr Professor, I think such things should be punished.[1]

1 INTRODUCTION

The distinction between agreements which are anti-competitive by object and by effect lies at the heart of EU competition law. It is a truism that 'object-type' agreements violate Article 101(1) TFEU per se (automatic condemnation), and it is unlikely that they can meet the requirements of individual exemption, while

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[1] I would like to thank Professor Tibor Várady, university professor at the Central European University in Budapest/New York and professor emeritus at the Emory University in Atlanta, for sharing the above anecdote with me.

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'effect-type' agreements necessitate the analysis of the arrangement's market effects. Likewise, it is also a commonplace that the list of agreements anti-competitive by object can be drawn with some degree of certainty, albeit the judicial practice can develop this enumeration and include new types of agreements in the roster. Agreements that do not appear on this list can be condemned only and exclusively if they have anti-competitive effects. There are only a few clear-cut and firm rules in competition law; the concept of 'object-type' agreements is one of these.

The merits of per se condemnation are clear: legal counsel, competition authority officers and judges need not to inspect the intricacies of the market; it suffices if they read the agreement and check whether it is blacklisted or not. Of course, an inquiry into the market context is sometimes inevitable to understand what the agreement means in economic terms. However, the relevant market needs not to be defined, market shares need not to be calculated and price trends need not to be examined. If legal counsels, competition officers, and judges had to look beyond the four angles of the contract, the virtues of anti-competitive object would be completely lost, irrespective of whether the effects-analysis to be conducted is summary or not.

This rationale parallels US antitrust law's grasp of per se illegal agreements, with the difference that on the other side of the Atlantic these agreements are not only automatically but also utterly condemned; namely, in EU competition law, 'object-type' agreements might benefit from an individual exemption under Article 101(3) TFEU; it is to be stressed, though, that this is a rather theoretical possibility; hence, as a matter of practice, the differences between US antitrust law's per se illegality and EU competition law's anti-competitive object are miniscule.[2]

It appears that the solidity of this core concept, i.e., distinction between object and effect, started decrepitating. Although the list of agreements anti-competitive by object has never been closed, the CJEU's ruling in *Allianz* suggests that it has to be established on a case-by-case basis whether the agreement is anti-competitive by object or not. What is more, the assessment necessitates the analysis of circumstances like market position, market structure, market effects, etc.; circumstances the disregard of which is the chief merit of the concept of anti-competitive object.

This article criticizes the above developments and submits proposals. First, it analyses the rationale and traditional notion of anti-competitive object and provides an outlook to the structure of antitrust analysis in US law and compares it with EU competition law. Second, it gives an overview and assessment on the *Allianz* ruling as to the grasp of 'object-type' agreements. The article ends with the final remarks.

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[2] See Csongor István Nagy, EU and US Competition Law: Divided in Unity? 125 (2013).

2 THE BACKBONE OF EU COMPETITION LAW ANALYSIS: THE DISTINCTION BETWEEN OBJECT AND EFFECT

2.1 THE STATE OF EU LAW BEFORE *ALLIANZ*

EU competition law prohibits agreements that have an anti-competitive object or effect. If an agreement is anti-competitive by object, there is no need to examine its effects but it can be condemned simply on its face;[3] there is no need to examine the market position of the parties, the structure of the market, entry barriers, etc.[4] 'Restrictions of competition by object are those that by their very nature have the potential to restrict competition within the meaning of Article 101(1). It is not necessary to examine the actual or potential effects of an agreement on the market once its anti-competitive object has been established.'[5] On the contrary, if an agreement is not anti-competitive by object, its effects are to be scrutinized, i.e., the market consequences of the arrangement are to be analysed. Effects may be actual or potential, direct or indirect; however, they always require the analysis of the market the agreement operates in.[6]

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[3] See Mario Filipponi, Luc Peeperkorn et al., *Chapter 9: Vertical Agreements*, *in* THE EC LAW OF COMPETITION § 9.40 (Jonathan Faull and Ali Nikpay ed., 2007). Interestingly, the above proposition concerning agreements anti-competitive by object was first pronounced in a vertical case. Joined Cases 56/64 and 58/64 *Consten and Grundig v. Commission* [1964] ECR 299. p. 342 ('[T]here 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.'). Case C-209/07 *Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.*, [2008] ECR I-08637. para. 16. *Cf.* VALENTINE KORAH & DENIS O'SULLIVAN, DISTRIBUTION AGREEMENTS UNDER THE EC COMPETITION RULES 59 (2002) ('The law and practice relating to exclusive distribution was developed in the 1960s before any other aspect of competition law. The Commission's earliest decisions in 1964 related to exclusive distribution systems, most of which included export restraints to prevent poaching in other dealers' territories.'). Case C-209/07 *Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637, para. 16 ('In deciding whether an agreement is prohibited by Article 81(1) EC, there is (…) no need to take account of its actual effects once it appears that its object is to prevent, restrict or distort competition within the common market (…). That examination must be made in the light of the agreement's content and economic context …').

[4] *Cf.* Ali Nikpay, Lars Kjølbye et al., *Chapter 3: Article 81*, *in* THE EC LAW OF COMPETITION 222 and 223 (Jonathan Faull and Ali Nikpay ed., 2007). ('However, no agreement is automatically restrictive by object: agreements must be assessed in their legal and economic context.') (Nevertheless, it cannot be concluded that 'an extensive analysis of actual or likely effects of an agreement is necessary for it to be restrictive by object.'); *Guidelines on Article 81(3)*, para. 22.

[5] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements. Official Journal C11, 14.1.2011, p. 1, para. 24. See Case C-209/07 *Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.*, [2008] ECR I-08637. para. 16. ('In deciding whether an agreement is prohibited by Article 81(1) EC, there is (…) no need to take account of its actual effects once it appears that its object is to prevent, restrict or distort competition within the common market'.)

[6] Joined Cases 56/64 and 58/64 *Consten and Grundig v. Commission* [1964] ECR 299. p. 342.; Case C-277/87 *Sandoz Prodotti Farmaceutici v. Commission* [1990] ECR I-45.; Case C-219/95 P *Ferriere Nord v. Commission*, [1997] ECR I-4411, paras 14-15; Case C-49/92 *Commission v. Anic Partecipazioni SpA* [1999] ECR I-4125, para. 99; Case C-199/92 *Hüls AG v. Commission* [1999] ECR I-4287, para.

The competition law assessment of agreements having an anti-competitive object is 'legalistic', contrary to effect-analysis, which is a blend of legal and economic considerations. Once it is established that an arrangement has an anti-competitive object, it is condemned per se (automatic condemnation rule); of course, this condemnation is confined to Article 101(1) TFEU, albeit it is highly unlikely that an 'object-type' agreement could fulfil the requirements of individual exemption as embedded in Article 101(3) TFEU.

The analysis according to the automatic condemnation rule is, put it simple, textual and not contextual. Of course, context may be relevant for interpreting the agreement and its economic function. However, in essence, the analysis remains within the four angles of the agreement.

Since the condemnation of agreements anti-competitive by object is automatic, the central question is how to distinguish 'object-type' agreements from the rest, how to separate the wheat from the chaff. This is (or should be) accomplished on the basis of pre-determined categories[7] (and certainly not on the basis of the parties' subjective intentions).[8] There would not be too much point in requiring a case-by-case assessment, since this would suppress the automatic condemnation rule, i.e., if the assessment had to rest on a case-by-case analysis, the condemnation would not be automatic. Hence, in the application of Article 101(1) TFEU, the object box contains a list of particular 'types' of agreements. The requirement to make a general assessment would be blatantly self-contradictory. It would be like advising a stranger to get off the bus at the penultimate stop. If someone does not know the route of the bus, he has to go until the last station to find out which was the penultimate one. Accordingly, it appears to be perverse to contend that the analyser has to proceed to do an effects-analysis (even if an

178; Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services Ltd (ENS) et altera v. Commission* [1998] ECR II-3141, para. 136 ('[I]n assessing an agreement under Article 85(1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned (…), unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets …').

7 The categories of 'object-type' and 'effect-type' agreements may change from time to time. See Richard Whish, Competition law 122 (2009).

8 See Richard Whish, Competition Law 116 (2009). ('There are some types of agreement the anti-competitiveness of which can be determined simply from their object; the word 'object' in this context means not the subjective intention of the parties when entering into the agreement, but the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied.'); Vivien Rose & Peter Roth, *Article 81(1), in* Bellamy & Child's European Community Law of Competition § 2.096 (Peter Roth and Vivien Rose ed., 2008) ('The 'object' of the agreement is to be found by an objective assessment of the aims of the agreement in question, and it is unnecessary to investigate the parties' subjective intentions.'); Jakob Schröter, Kommentar zum Europäischen Wettbewerbsrecht 259 (2003). ('Der Begriff des Bezweckens hat einen objektiven Character. Die subjektiven Vorstellungen der Parteien treten demgegenüber zurück.')

abbreviated one) and if the effects-analysis turns out to have been superfluous, it will be known that it could have been saved. The concept of anti-competitive object is useful because the analyser needs to consider neither the arrangement's actual or potential effects, nor the circumstances that can be used as surrogates of effects (e.g., market power, entry barriers). It would be perverse to expect the analyser to assess the arrangement's actual and potential effects or some of the circumstances that prove the potential of these effects in order to decide whether it is needless to examine these and whether automatic condemnation is justified.

It is to be stressed that the per se character of 'object-type' agreements is limited to Article 101(1) TFEU: no elaborate inquiry is needed to establish that the agreement runs counter to Article 101(1) TFEU. Nevertheless, in principle, all agreements may be a candidate for an Article 101(3) exemption; at least theoretically. In *Matra Hachette SA v. Commission* the General Court held that 'in principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article 101(3) of the Treaty are satisfied'.[9] This proposition was reinforced in *Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd*,[10] where the CJEU encountered a horizontal hardcore agreement (market-sharing and output limitation) in a preliminary reference. The question submitted by the national court was whether such an agreement is anti-competitive by object and thus automatically contrary to Article 101(1) TFEU. Although the CJEU was not express in saying that even a horizontal hardcore agreement may be, at least theoretically, eligible for an exemption under Article 101(3), the language of the judgment suggests this clearly; but it also suggests that this is rather a theoretical possibility. The CJEU refused to consider certain arguments submitted by the Beef Industry Development Society under Article 101(1) TFEU, stating that:

> [i]t is only in connection with [Article 101(3) TFEU] that matters such as those relied upon by BIDS *may, if appropriate,* be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in [Article 101(1) TFEU].[11]

Nonetheless, at another point of the judgment, the Court seems to be rather sceptical about the chance to justify a horizontal hardcore agreement under Article 101(3) TFEU:

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[9] Case T-17/93 *Matra Hachette SA v. Commission* [1994] ECR II-595, para. 85.

[10] Case C-209/07 *Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637.

[11] Paragraph 21. Emphasis added.

> such matters *may, at the most,* be relevant for the purposes of the examination of the four requirements which have to be met under [Article 101(3) TFEU] in order to escape the prohibition laid down in [Article 101(1) TFEU].[12]

It is to be emphasized that the national court's preliminary question addressed solely Article 101(1) TFEU; hence, for procedural reasons, the Court, in principle, had no competence to decide on the applicability of Article 101(3) TFEU to a horizontal hardcore agreement. This circumstance has to be taken into account when interpreting the ruling.[13]

As noted above, the concept of anti-competitive object is based on category-building. Agreements are not afforded a general assessment and it is not examined on a case-by-case basis whether an agreement is anti-competitive by object or not. Instead, the jurisprudence has developed certain categories and the only task of the analyser is to decide whether the arrangement at stake comes under one of these categories. The list of the types of agreements that qualify as anti-competitive by object is not closed and can be completed by the courts, which have to base the assessment on two considerations: the nature of the agreement and the judicial experience gathered.

The starting point is that, in principle, every arrangement is granted a full-blown inquiry (effects-analysis); however, there are certain types of agreements

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[12] Paragraph 39. Emphasis added.

[13] Nonetheless, it is to be emphasized that there may be exceptions; it could be argued that some agreements did meet the conditions of Article 101(3) TFEU, notwithstanding the fact that they were considered as anti-competitive by object. It seems that the position that even 'object' restrictions have a realistic, though very exceptional, chance to fulfil the requirements of Article 101(3) TFEU is getting stronger. See RICHARD WHISH, COMPETITION LAW 150-151 (2009); Guidelines on Vertical Restraints. Official Journal C 130, 19.05.2010, p. 1 (*Guidelines on Vertical Restrains*), para. 47 (Emphasizing that although hardcore agreements are presumptively caught by Article 101(1) TFEU and unlikely to fulfil the conditions of Article 101(3) TFEU, this is a rebuttable presumption.). At the same time, it is dubious whether the cases that could be raised as examples for the exemption of 'object-type' agreements involved genuine naked restrains and, hence, real anti-competitive object. In these cases the Commission was normally not explicit about the anti-competitive object of the arrangement but condemned it under Article 101(1) TFEU after some with-held effects-analysis without specifying whether these agreements were anti-competitive by object or by effect; at the same moment, notwithstanding the obscure language, the analysis under Article 101(1) TFEU was rather summary. In *Société Air France/Alitalia Linee Aeree Italiane SpA*, the cooperation was spiced with some ancillarity. 2004/841/EC *Société Air France/Alitalia Linee Aeree Italiane SpA*, Commission decision of 7 April 2004, not published in the OJ. In *Reims II*, the Commission did not establish that the agreement had an anti-competitive object but it simply jumped across this question, and after a brief explanation it reached Article 101(3) TFEU. 1999/695/EC OJ [1999] L 275/17, paras 63 and 65. The *Visa International – Multilateral Interchange Fee* decision declares that „the Commission does not consider the MIF agreement to be a restriction of competition by object.' 2002/914/EC OJ [2002] L 318/17, para. 69. The multilateral interchange fee (MIF) is the amount the acquiring banks pay to the issuing banks. In *MasterCard*, the Commission was less definite about the characterization of MIF but stated that it is needless to take a clear position, as the agreement, due to the parties' market power, was certainly anti-competitive by effect. Case No COMP/34.579 – *MasterCard*, COMP/36.518 – *EuroCommerce*, COMP/38.580 – *Commercial Cards* (19.12.2009), not published in the OJ, para. 407. Interestingly, in the US the 11th Circuit refused to condemn MIF as *per se* illegal. *National Bancard Corporation (NaBANCO) v. VISA U.S.A., Inc.*, 596 F.Supp. 1231 (1984).

that are so pernicious that it is justified to single them out and to condemn them outright. In other words, these types of agreements are regarded as being always or almost always anti-competitive (i.e., the balance of anti-competitive and procompetitive effects is always or almost always negative).

The *Guidelines on Article 81(3)*[14] provide that:

> 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.[15]

Accordingly, the relevant question is whether a particular type of agreement has a 'high potential of negative effects on competition'. As noted above, the assessment has two facets: the nature of the agreement and the judicial experience gathered. An agreement has an anti-competitive nature if the restriction of competition accrues directly from the agreement itself and not from the joint effect of the agreement and the market circumstances. Of course, the extent of the anti-competitive effects does hinge on the market circumstances; however, if an agreement has an anti-competitive nature, it will very likely trigger anti-competitive repercussions irrespective of the market it operates in. Consequently, a particular type of agreement should qualify as anti-competitive by object if it has a 'high potential of negative effects on competition' irrespective of the parties' market power, the market shares of the competitors, the structure of the market, etc.

The concept of anti-competitive object has several merits, all of which accrue from the automatic condemnation rule and the principle that in case of anti-competitive object it is needless to inquire the market circumstances.

The concept of anti-competitive object establishes clear-cut rules and sends clear messages to the society. It helps legal counsels to ascertain whether the agreement at stake is prohibited or its legal fate depends on the market circumstances. This implies, on the one hand, that they have a list of agreements they should beware of. On the other hand, it is also a guarantee that if an agreement is not on the list, it can be condemned only after an effects-analysis.

Furthermore, automatic condemnation enables competition authorities and courts to save an enormous amount of resources and to spend it on agreements where the analysis of the market circumstances is really warranted. The application

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[14] Guidelines on the application of Article 81(3) of the Treaty. OJ [2004] C 101/97 (*Guidelines on Article 81(3)*).

[15] *Guidelines on Article 81(3)*, para. 21.

of the law to agreements that are anti-competitive by object is cheap and the careful selection of the agreements can ensure that the automatic condemnation rule applies to arrangements where a detailed analysis would be truly superfluous. Nonetheless, anti-competitive object should be used as a tool to condemn arrangements that are always or almost always anti-competitive and should not be used to make the competition authority's or the plaintiff's life more comfortable by excluding the effects-analysis of agreements which are suspect though, not completely void of the perspective of procompetitive merits.

All the virtues of anti-competitive object accrue from the rigid rule that such agreements are automatically condemned and make the examination of the market circumstances unnecessary. If there is an exception to this rigid rule, it is in favour of the defendant: the undertaking has an improbable chance to defend the arrangement under Article 101(3) TFEU. However, the merits of anti-competitive object would evaporate if the exception were applied the other way around: that is, if it made it possible to condemned 'effect-type' agreements automatically in cases where they have an apparently pernicious character.

2.2 The per se rule of US antitrust law

In essence, US antitrust law adopts a very similar approach as to restraints having a high anti-competitive potential. Agreements that embrace the very evils of antitrust are per se illegal; there is no chance to plead the effects and the context of the arrangement. The jurisprudence of the Supreme Court worked out certain categories of per se illegality. Here, the defendant's only chance is to argue that the agreement at stake cannot be brought under the alleged per se heading;[16] the per se analysis was supplemented by the concept of quick look.[17] If the agreement's ship does not wreck on the rock of per se illegality, its context is to be analysed, i.e., market power, effects, etc.[18]

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[16] *Cf.* Donald L. Beschle, *What, Never? Well, Hardly Ever': Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality*, 38 Hastings Law Journal 471, 472-473 (1987) ('[The *per se*] rule condemning all acts belonging to a certain class does not eliminate the need for analysis. It merely shifts the crucial point in the analysis to the decision whether the specific act in question belongs to the illegal class.'); *ibid.* at 477 ('The proposition that horizontal price fixing is *per se* illegal remains the law. But our understanding of that statement has undergone serious change in the last decade. It is now more clear than ever that the process of categorizing conduct as price fixing may allow defendants to raise arguments which cannot be raised to justify a practice already characterized as price fixing.')

[17] See Csongor István Nagy, EU and US Competition Law: Divided in Unity? 112-121 (2013).

[18] In the early days of antitrust, the theory of '*per se* v rule of reason' dichotomy had a very significant competitor. The dichotomy of naked and ancillary restraints was also a strong candidate for being the law of the land. See *U.S. v. Addyston Pipe & Steel Co.*, 85 F. 271 (1898). Finally, the Supreme

A brief outlook to the status of the per se rule in US antitrust law demonstrates that in the oldest antitrust system of the globe the above method of operation is backed by a more than century-old experience; and it is widely admitted that '[t]he life of the law has not been logic; it has been experience'.[19] In US antitrust law, per se illegality is based on category-building: the case law has established various types (categories) of agreements that are afforded a per se treatment; automatic condemnation is justified if a certain type of agreement is always or almost always anti-competitive, without any redeeming virtue. Contrary to EU competition law, where – at least theoretically – 'object-type' agreements might still benefit from an exemption under Article 101(3) TFEU, per se treatment is categorical; however, under the concept of quick look, certain seemingly per se illegal restraints can be afforded a truncated substantive analysis.[20]

After a short wavering in *Trans-Missouri Freight Ass'n*[21] and *Joint-Traffic Ass'n,*[22] the Supreme Court established in *Standard Oil*[23] that the term 'restraint' actually implies 'undue or unreasonable restraints'[24] and the general principle is the rule of reason.[25] Nevertheless, the Court also sowed the seed of per se illegality in the

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Court, in *Standard Oil*, adopted the rule of reason standard. Nevertheless, the conceptual dichotomy of naked/ancillary restraints still has a considerable role in antitrust analysis, the two theories being to some extent parallel anyway.

19 Oliver Wendell Holmes, Jr., The Common Law I. 1 (Boston: Little, Brown and Company 1881).

20 See Csongor István Nagy, EU and US Competition Law: Divided in Unity? 112-121 (2013).

21 *U.S. v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 327-341 (1897).

22 *U.S. v. Joint-Traffic Ass'n*, 171 U.S. 505 (1898).

23 *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1 (1911).

24 In *Standard Oil*, the Supreme Court refused to give a literal meaning to the term 'restraint of trade'. The government argued 'that the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language.' However, the Court dismissed this position, holding that 'to hold to the contrary would require the conclusion either that every contract, act, or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree combine in any respect whatever as to subjects embraced in interstate trade or commerce, or, if this conclusion were not reached, then the contention would require it to be held that, as the statute did not define the things to which it related, and excluded resort to the only means by which the acts to which it relates could be ascertained,-the light of reason,-the enforcement of the statute was impossible because of its uncertainty.' *Ibid*. at 63.

25 'The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference,-that is, an undue restraint. (…) Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.' *Ibid*. at 60. See *Northern Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 5 (1958) ('Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition.')

ground of antitrust[26] when distinguishing and endorsing *Trans-Missouri Freight Ass'n* and *Joint-Traffic Ass'n*, holding that the 'nature and character' of the agreement may create a 'conclusive presumption' of illegality.[27]

Proceeding from these roots, the jurisprudence of the federal courts worked out the concepts of per se illegality and rule of reason. However, the two concepts are the two weapons of the very same antitrust warrior:[28] both of them target unreasonable restraints of trade, albeit in case of an agreement belonging to one of the per se categories the 'unreasonably restrictive' character is presumed conclusively:[29]

> *Per se* rules are invoked when surrounding circumstances make the likelihood of anti-competitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same-whether or not the challenged restraint enhances competition.[30]

Courts have treated certain types of agreements since the early days of the Sherman Act not only facially anti-competitive but they refused to hear any justification brought up by the defendant (price fixing,[31] division of markets,[32] group boycotts,[33] tying arrangements[34]). The per se illegality approach had, however, not been conceptualized for a long time.[35] Perhaps, one of the first comprehensive explanations is the Supreme Court's reasoning in *Northern Pacific*:[36]

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[26] *See U.S. v. Trenton Potteries Co.*, 273 U.S. 392, 399 (1927) ('That the opinions in the *Standard Oil* and *Tobacco* Cases were not intended to affect this view of the illegality of price-fixing agreements affirmatively appears from the opinion in the *Standard Oil* Case'.) The term '*per se*' was first used in 1940 in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). See Donald L. Beschle, *What, Never? Well, Hardly Ever': Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality*, 38 Hastings Law Journal 471, 477 (1987).

[27] '[T]he cases but decided that the nature and character of the contracts, creating, as they did, a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.' *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 65 (1911).

[28] *Cf.* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 University of Illinois Law Review 77, 93 (2003) ('While courts refer to this second step as a Rule of Reason analysis, both steps of the process attempt to answer the question put by Standard Oil, viz., is a restraint 'unreasonably restrictive of competitive conditions.").

[29] On *per se* and rule of reason agreements see Csongor István Nagy, EU and US Competition Law: Divided in Unity? 94-99 (2013).

[30] *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 103-104 (1984).

[31] *U.S. v. Trenton Potteries Co.*, 273 U.S. 392, 400 (1927), *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

[32] *U.S. v. Addyston Pipe & Steel Co.*, 175 U.S. 211 (1899).

[33] *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457 (1941).

[34] *International Salt Co. v. U.S.*, 332 U.S. 392 (1947).

[35] Csongor István Nagy, EU and US Competition Law: Divided in Unity? 97-98 (2013).

[36] *Northern Pac. Ry. Co. v. U.S.*, 356 U.S. 1 (1958).

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable – an inquiry so often wholly fruitless when undertaken.[37]

The per se approach is exceptional[38] and 'there is a presumption in favour of a rule of reason standard; departure from that standard must be justified by demonstrable economic effect (…) rather than formalistic distinctions'.[39] While clear-cut rules have their inherent merits (e.g., legal certainty, judicial convenience, deterrence), these obvious benefits do not justify the extensive use of the per se approach. Per se illegality is not a question of trade-off between the judicial costs of the rule of reason analysis and the chances that agreements of a particular kind may escape section 1 scrutiny based on reasonable arguments. The only reason to pronounce a particular group of arrangements to be per se illegal is that they have manifest anti-competitive effects with no or negligible chance for any procompetitive value.[40] This was made clear by the Supreme Court, *inter alia*, in *Sylvania*:

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[37] *Ibid*. at 5. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979) ('[I]n characterizing (…) [a] conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect (…), the purpose of the practice are to threaten the proper operation of our predominantly free-market economy – that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.") *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 103-104 (1984) ('*Per se* rules are invoked when surrounding circumstances make the likelihood of anti-competitive conduct so great as to render unjustified further examination of the challenged conduct.')

[38] See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289-291 (1985); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723-724 (1988); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-459 (1986) ('[W]e have been slow to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious'); *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 103-104 (1984) ('*Per se* rules are invoked when surrounding circumstances make the likelihood of anti-competitive conduct so great as to render unjustified further examination of the challenged conduct'); *National Soc. of Professional Engineers v. U.S.*, 435 U.S. 679, 692 (1978) ('There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality-they are 'illegal *per se*.").

[39] *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988).

[40] *Cf*. Lawrence A. Sullivan & Warren S. Grimes, The Law of Antitrust: an Integrated Handbook 203 (2000) ('[F]or an offense like price fixing there is little if any social cost to balance against this enhanced deterrence. As a generalization, price-fixing does not become socially beneficial when power is lacking; it simply becomes ineffective. (…) [E]ven if this leads to

> *Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anti-competitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials (…) but those advantages are not sufficient in themselves to justify the creation of *per se* rules. If it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law.[41]

Antitrust law's commitment in favour of the rule of reason entails that the creation of a category of per se illegality requires long-standing judicial experience. The mechanism is the following. Courts should not make quick judgments regarding particular types of restraints but they are expected to carry out a detailed analysis without begrudging the judicial resources. Nevertheless, if the multitude of benevolent antitrust analyses of a particular type of arrangement coherently leads to condemnation, such an experience may justify the judicial reflex of outright prohibition.[42] 'Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.'[43] Accordingly, the Supreme Court is 'slow (…) to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious'.[44]

There are certain arrangements that always or almost always entail anti-competitive results[45] without any reasonable chance for redeeming virtue.

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overenforcement (…), the 'overenforcement' would not inhibit any socially valuable conduct; it merely inhibits ineffective attempts to do something both harmful and unlawful.').

41 *Continental T. V, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 fn 16 (1977). *See also Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 344 (1982) ('Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a full-blown inquiry might have proved to be reasonable.'); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705, 2718 (2007) (Emphasizing that administrative convenience is, in itself, not sufficient to justify the creation of a *per se* rule.).

42 Csongor István Nagy, EU and US Competition Law: Divided in Unity? 98-99 (2013).

43 *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 344 fn 14 (1982).

44 *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-459 (1986).

45 See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

Procedural convenience[46] and legal certainty justify that such agreements should not be analysed in detail each time they come up but they can be condemned automatically based on past experience.[47] Nevertheless, the standard approach is rule of reason analysis,[48] and the doctrine of per se illegality applies only to arrangements that were specifically classified as such.[49] Furthermore, per se illegality should not serve the purpose of mere ease but it covers only agreements the anti-competitive nature of which is evident. 'Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive.'[50] In the per se 'category are agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality – they are "illegal per se."'[51]

2.3 Interim conclusions

In this article the following theses have been argued and will be applied to the state of EU competition law after *Allianz*.

First, an agreement is anti-competitive by object if it has an anti-competitive nature. Anti-competitive 'by nature' means that the serious anti-competitive potential originates from the agreement's characteristics and not from the conjunct effect of the agreement and the market circumstances it operates in; that is, such agreements restrict competition whatever the market structure is, whether the parties have market power or not, etc. This parallels US antitrust law's notion that those agreements are regarded as per se illegal that are 'always or almost always'

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46 *U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 609-610 (1972); *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 343-344 (1982); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985); *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 343 (1982).

47 Oliver Black, *Per Se Rules and Rules of Reason: What Are They?*, 18(3) European Competition Law Review 145, 151-152 (1997) (Summarizing the arguments for *per se* rules as follows: first, 'efficiency of administration, litigation and adjudication', reducing 'the need for continuous supervision of business practices and the need for courts to make economic judgments'; second, 'certainty, clarity and simplicity'; third, predictability and deterrence; fourth, 'if *per se* rules are in place, enforcement of section 1 is less likely to be arbitrary, irrational, erroneous, prejudiced or unfair; *per se* rules thus promote the rule of law'; fifth, 'they prevent any bias towards defendants in judgments under section 1'; sixth, 'they are dynamically stabilising in the sense that, even if at first their application produces some undesirable decisions in borderline cases, people learn to adjust their behaviour to avoid such results.').

48 In *Sylvania*, the Supreme Court, with reference to *Standard Oil*, held that „since the early years of this century a judicial gloss on this statutory language has established the 'rule of reason' as the prevailing standard of analysis.' *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

49 *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289 (1985).

50 *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977).

51 *National Soc. of Professional Engineers v. U. S.*, 435 U.S. 679, 692 (1978).

anti-competitive. It follows that if the arrangement's competitive assessment hinges on whether the undertaking's market share is high or low, the arrangement cannot be anti-competitive by nature.

This is reinforced by the *Expedia* ruling where it was established that agreements anti-competitive by object have *per definitionem* perceivable negative effects on competition. Here, the CJEU held that in case of 'object-type' agreements the *de minimis* doctrine (in terms of effects on competition but not in terms of effects on interstate trade) has no relevance: if an agreement is anti-competitive by object, it is irrebuttably presumed that it has perceivable negative effects on competition.

The rationale behind this automatic and watertight condemnation is the following. There are, indeed, certain cases where the arrangement, notwithstanding its anti-competitive object, is not susceptible of doing any harm to competition; by way of example, the parties' market share is trivial, so the fixing of the prices causes more harm to the cartelists (in form of lost customers) than to competition in the market. Still, there is no point in countenancing these intended mischiefs simply because they qualify as 'impossible crimes'; whereas price-fixing covering a small portion of the market is not susceptible of raising prices, such agreements have no virtue at all, hence, there is no point in complicating the application of the law with countenancing these 'impossible crimes'.

Second, the merit of anti-competitive object is, as the Guidelines on Horizontal Cooperation Agreements put it, that '[i]t is not necessary to examine the actual or potential effects of an agreement on the market once its anti-competitive object has been established'.[52] It is to be noted that competition authorities and courts quite often examine certain circumstances (e.g., market power, market structure) as surrogates of effect, because they consider that they carry a strong potential of anti-competitive effects. So the notion that it is needless to examine actual and potential effects implies that it is needless to examine the effects and their surrogates (i.e., market circumstances). This merit would be lost if market circumstances had to be scrutinized in order to decide whether the agreement has an anti-competitive effect or not. What would be the point in saying that the merit of anti-competitive object is that it lifts the need to examine the effects, while a decision on whether the agreement is anti-competitive by

[52] *Guidelines on Horizontal Cooperation Agreements*, para. 24. See Case C-209/07 *Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.*, [2008] ECR I-08637. para. 16. ('In deciding whether an agreement is prohibited by Article 81(1) EC, there is (…) no need to take account of its actual effects once it appears that its object is to prevent, restrict or distort competition within the common market'.)

object ornot can be made only after an inquiry into the effects; an inquiry that was to be saved.

Third, it should be a fundamental requirement that, in principle, even a legal counsel with a rudimentary understanding of economics should be able to assess whether the agreement is anti-competitive or not, without the need to consider circumstances beyond the four angles of the contract. Of course, the examination of the legal and economic context sometimes cannot be saved but this is relevant only to the extent it is necessary to permit the understanding of the agreement's economic logic, mechanism and function. Context helps to 'understand' the agreement, but this is the most function it may have.

Fourth, as far as its application is concerned, the notion of agreements anti-competitive by object should be a category-building concept and not a directly applicable general doctrine necessitating a case-by-case analysis. Practising lawyers know: in the realm of law, case-by-case analysis implies the lowest level of predictability law can afford. The principal merit of anti-competitive object is predictability and certainty. The relevant question is not whether the arrangement at stake meets the conditions set by the notion of anti-competitive object; the relevant question is whether one of the categories (type of agreement) worked out on the basis of the notion of anti-competitive object subsumes the arrangement.

This *modus operandi* is in line with US antitrust law's concept of per se illegality, with the qualification that under EU competition law per se condemnation is formally confined to Article 101(1) TFEU, albeit it is to be noted that as a matter of practice if it is highly unlikely that an 'object-type' agreement could meet the conditions of Article 101(3) TFEU. Per se illegality is reserved for agreements that are always or almost always anti-competitive, without the perspective of any redeeming virtue. The court does not make a comprehensive assessment as to whether the agreement at stake has such characteristics (i.e., whether it is always or almost always anti-competitive); on the contrary, there are certain categories of agreements that fall into the per se box and the role of the court is to decide whether the arrangement at stake comes under one of these categories.

The competition authority is always tempted to push the practice towards automatic condemnation. However, anti-competitive object is not meant to make the life of competition authorities more comfortable. It is meant to single out arrangements where the effects-analysis is indeed superfluous.

3 THE STATE OF EU LAW AFTER *ALLIANZ*

3.1 THE *ALLIANZ* RULING: MAKING THE SWORD OF DAMOCLES FROM A CLEAR-CUT RULE?

In *Allianz*,[53] the CJEU encountered a very idiopathic matter and had to decide whether an arrangement, which clearly does not appear on any list on 'object-type' agreements, had an anti-competitive object or not.

It is to be noted that the decision on characterization, from a practical perspective, had a pivotal relevance in this case. Normally, the fact that the agreement is not anti-competitive by object does not entail that it can avoid competition law condemnation; quite the contrary, the lack of anti-competitive object simply means that effects have to be examined. Hence, with a declaration that the agreement is not anti-competitive by object, the undertaking wins a battle but not the war. However, in *Allianz*, the stakes in respect of categorization were exceptionally high. The Hungarian Competition Office (HCO) based the administrative decision[54] exclusively on the agreement's anti-competitive object and, accordingly, refused to inquire into the effects. A ruling that the agreement is not anti-competitive by object but is to be assessed according to its effects would have entailed that the HCO is sent back to the drawing-board and the administrative and judicial efforts of the last eight years have been futile.

In *Allianz*, two leading Hungarian insurance companies concluded contracts with insurance brokers setting selling targets determined in the percentage of the broker's sales. There was no evidence suggesting that the insurers engaged in concerted practice, hence, these contracts were examined from a vertical perspective.

Under Hungarian insurance law, contrary to insurance agents, brokers are the professional advisers of the client: they are required to give impartial and professional advice to clients and have civil liability in case they breach this duty.[55] Nonetheless, it is normal industry practice that the broker is paid by the insurance company and not by the client: if the client concludes the insurance contract as recommended by the broker, the insurance company pays a fee to the broker. Although this financing method may entail a conflict of interest, it has been tolerated by the Hungarian Financial Supervisory Authority. The defendant Hungarian insurers topped this method with the introduction of target bonuses: if

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53 For a detailed note on the Hungarian procedure *see* Katalin J. Cseres & Pál Szilágyi, *The Hungarian Car Insurance Cartel Saga*, *in* LANDMARK CASES IN COMPETITION LAW – AROUND THE WORLD IN FOURTEEN STORIES 145-166 (Barry Rodger ed., 2013).

54 Case *Vj-51/2005/184*.

55 See Sections 42 and 46 of Act Nr LX of 2003on insurers and insurance activity.

a certain percentage of the sales the broker executed were made up of the insurance company's products, the broker was entitled to a higher fee.

In respect of repair shops, the scheme contained an additional twist. The function of these enterprises is twofold. On the one hand, they provide reparation services; and since a substantial part of reparations are covered by insurance, they often charge the insurance companies. On the other hand, most of them are also licensed brokers, intermediating between clients and insurers. The insurance companies agreed with numerous repair shops that if the repair shop reaches the sales target, it will be entitled to charge a higher hourly rate for the reparation services covered by the company's insurance. Accordingly, in this case the target fee was wrapped in the hourly rate.

The only horizontal aspect of the case concerned the setting of the hourly repair charges by the repair shops. The Hungarian Association of Automobile Dealers (GÉMOSZ), many of the repair shops were member of, was requested by the dealers to negotiate with the insurance companies and to conclude annual frameworks agreements as to hourly repair charges.

The HCO considered the above contracts to be anti-competitive by object and condemned them automatically on the basis of section 11 of the Hungarian Competition Act[56] (HCA). It held that the target fees interfered with the brokers' possibility to give impartial and professional advice and protected the market shares of the insurance companies. The practice concerning hourly reparation rates was considered to be particularly pernicious, since it inflated reparation prices in general, that is, also as to reparation services covered by other insurance companies and as to reparation services not covered by insurance.

The Budapest Court affirmed the decision as to the horizontal fixing of the hourly reparation charges by the Hungarian Association of Automobile Dealers and the inclusion of a target fee into the hourly reparation rates but remanded the part dealing with target fees not connected to these due to the lack of sufficient reasoning. However, the Budapest Court of Appeal reversed the latter aspect of the judgment and affirmed the entire administrative decision.[57] It held that both target-fee-setting arrangements had an anti-competitive object and, as such, were outright prohibited. The Supreme Court considered that section 11 of the HCA is the equivalent of Article 101(1) TFEU and the legislative intent to adopt the rules and principles of EU competition law can be established, and submitted a preliminary question to the CJEU in respect of the practice concerning the hourly reparation rates (but not as to the rest of the target fees). As noted above, the legal dispute hinged on whether such arrangements have an anti-competitive object;

[56] Act Nr LVII of 1996 on the prohibition of unfair market practices and of the restriction of competition.

[57] Case *2. Kf. 27. 129/2009/14.*

since virtually no effects-analysis was accomplished by the HCO (not even a truncated one), the lack of anti-competitive object would have implied that the HCO has to go back to the drawing-board.

In the ruling, the CJEU reiterated the well-established formula, holding that 'infringements by object' accrue from the experience that 'certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition'.[58] It is noteworthy that the text refers to 'certain forms of collusion', i.e., categories, and not to individual agreements. However, when enumerating the factors that are to be taken into consideration as to whether a restriction by object exists, the Court went beyond the usual language of the case law:

> In order to determine whether an agreement involves a restriction of competition 'by object', regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part (…). *When determining that context, it is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see Expedia, paragraph 21 and the case-law cited).*[59] (emphasis added)

The first sentence of the above excerpt contains the usual mantra: anti-competitive object has to be identified on the basis of the agreement's content, objective and the economic and legal context.[60] The first two aspects remain within the four angles of the contract, while the latter helps the analyser to understand the economic function and real meaning of the agreement. By way of example, an agreement to exchange past commercial data is not anti-competitive by object, if the data is historical;[61] the exchange of current commercial data is similarly not anti-competitive by object if it is aggregated statistical data;[62] an inquiry into the economic and legal context helps to understand whether the data is historical and

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58 Paragraph 35.

59 Paragraph 36.

60 See, e.g. C-501/06 P, C-513/06 P, C-516/06 P and C-519/06 P *GlaxoSmithKline Services and Others v. Commission and Others* [2009] ECR I-9291. para. 58 ('According to settled case-law, in order to assess the anti-competitive nature of an agreement, regard must be had *inter alia* to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part (…). In addition, although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the Commission or the Community judicature from taking that aspect into account (…).'); Case C-209/07 *Beef Industry Development Society and Barry Brothers ('BIDS')* [2008] ECR I-8637. para. 17 ('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. 21. In fact, to determine whether an agreement comes within the prohibition laid down in Article 81(1) EC, close regard must be paid to the wording of its provisions and to the objectives which it is intended to attain.').

61 *Guidelines on Horizontal Cooperation Agreements*, para. 90. See also Commission Decision 92/157/EC *UK Agricultural Tractor Registration Exchange* OJ [1992] L 68/19, para. 16.

62 *Guidelines on Horizontal Cooperation Agreements*, para. 89.

whether it is aggregated (and not individual). Likewise, genuine agency agreements are exempt from most prohibitions applicable to vertical restraints; since this quality hinges on the risks borne by the agent,[63] the examination of the legal and economic context is inevitable for the agreement's assessment.

Nonetheless, the second sentence goes further and adds aspects that have been unknown in the realm of anti-competitive object; it establishes that the term 'context' implies some kind of an effects-analysis, even if a truncated one. It lists the following factors: nature of the goods (services), 'the real conditions of the functioning' of the market and the structure of the market. Unfortunately, these are factors that are examined under the effects-analysis afforded to 'effect-type' agreements. Paragraph 48 of the ruling reinforces this, providing that the 'court should in particular take into consideration the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned'.

It is to be noted that effects-analysis is quite often limited to the examination of proxies (e.g., market power, market structure), which have a high potential of entailing negative effects on competition. Sometimes, the reason for this is that the effects have not materialized yet and it needs to be ascertained whether they may potentially emerge (potential effects); sometimes, the effects have already occurred but certain circumstances are used as surrogates of anti-competitive consequences due to the lack of proper market data (indirect proof of actual effects).

This grasp of the term 'context' in connection to the legal test of anti-competitive object is novel. Although the CJEU referred to paragraph 21 of the ruling in *Expedia,*[64] this does not address restrictions by object specifically but addresses restrictions of competition at large. Paragraph 21 of *Expedia* has to be interpreted in conjunction with paragraph 20. Paragraph 20 refers to 'agreement[s] [that] perceptibly restrict (…) competition within the common market', and in fact paragraph 21 refers back to 'agreements perceptibly restricting competition'; the ruling provides in this context that '[t]he Court has held that the existence of such a restriction must be assessed by reference to the actual circumstances of such an agreement' (emphasis added). The further sentences of paragraph 21 have to be interpreted in this context, including the last sentence, which provides that '[i]t is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question'. Accordingly, the foregoing circumstances have to be scrutinized when determining whether the restriction of competition is perceivable or not; that is, whether a perceivable restriction exists or not.

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63 *Guidelines on Vertical Restraints*, paras 12-21.

64 Case C-226/11, *Expedia Inc. v. Autorité de la concurrence and Others*.

It is to be noted that the above last sentence of paragraph 21 of *Expedia* (as indicated in the ruling) was taken from paragraph 49 of the CJEU's judgment in *Asnef-Equifax and Administración del Estado*,[65] which, however, deals solely with 'the appraisal of the effects of agreements' and does not address anti-competitive object.[66]

It is noteworthy that AG Villalón's Opinion contains the customary enumeration of circumstances (the usual mantra) and makes no mention of the circumstances listed in the second sentence of paragraph 21 of the CJEU's judgment, i.e., nature of the goods, the real conditions of the functioning of the market and the structure of the market.[67]

The CJEU's reference to paragraph 21 of *Expedia* is not only irreconcilable with the language of this ruling but it is also irreconcilable with the propositions laid down in this judgment. In *Expedia*, the CJEU held that the notion that agreements having a trivial effect on competition (*de minimis* doctrine) do not violate Article 101(1) TFEU does not apply to agreements that have an anti-competitive object, provided the agreement has a perceivable effect on trade between the Member States (namely failing this EU competition law does not apply).[68] It would be self-contradictory to contend that the existence of anti-competitive object depends on the real conditions of the functioning of the market and on market structure, while holding that agreements anti-competitive by object are prohibited irrespective of the real conditions of the functioning and the structure of the market.

The CJEU distinguished between two instances where the agreements between the insurers and the brokers setting sales targets may amount to a restriction anti-competitive by object,[69] leaving the final decision to the national court whether the case at stake meets the conditions of one of these:

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65 C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125.

66 Paragraph 49 ('In that regard, it should be emphasised that the appraisal of the effects of agreements or practices in the light of Article 81 EC entails the need to take into consideration the actual context to which they belong, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question'.).

67 Paragraph 66 ('According to settled case-law, in order to assess whether an agreement has an anti-competitive object, regard must be had *inter alia* to the content of its provisions, its objectives and the economic and legal context of which it forms a part. Although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing to prevent the Commission or the Community judicature from taking that factor into account.'). See also the analysis in paras 68-99, which is confined to '[t]he content and objectives' and to 'the economic and legal context of the agreements at issue'.

68 Paragraph 37 ('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.').

69 Paragraph 46.

> 47. That could in particular be the case where, as is claimed by the Hungarian Government, domestic law requires that dealers acting as intermediaries or insurance brokers must be independent from the insurance companies. That government claims, in that regard, that those dealers do not act on behalf of an insurer, but on behalf of the policyholder and it is their job to offer the policyholder the insurance which is the most suitable for him amongst the offers of various insurance companies. It is for the referring court to determine whether, in those circumstances and in light of the expectations of those policyholders, the proper functioning of the car insurance market is likely to be significantly disrupted by the agreements at issue in the main proceedings.[70]
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> 48. Furthermore, those agreements would also amount to a restriction of competition by object in the event that the referring court found that it is likely that, having regard to the economic context, competition on that market would be eliminated or seriously weakened following the conclusion of those agreements. In order to determine the likelihood of such a result, that court should in particular take into consideration the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned.[71]

The case established in paragraph 47 centres around the interference with the broker's financial independence to provide professional advice to the clients. Put it simple, it may amount to a restriction of competition to create financial incentives for the client's adviser to recommend the insurance company's products. The practice that the broker's fee is paid by the insurance company is in conformity with Hungarian insurance law; it is to be noted as well that the fees paid by the insurance companies vary, so the broker does face different financial incentives anyway; the target fees are simply a more intensive version of this. Taking this regulatory background into account, it seems that the HCO's intervention aimed to correct the default of the sectoral supervisory authority; the competition proceeding was launched because the professional rules on broker independence were not enforced.

Perverted cases normally entail perverted judgments. It is submitted that there is nothing exceptionable in the competition authority's correcting the mistakes made by the sectoral authority, provided, of course, that the mistake interferes with the proper functioning of the market. Nonetheless, this exceptional intervention should not be detrimental to future (normal) competition cases by distorting the conceptual coherence of competition law.

If paragraph 47 can be hardly reconciled with the conceptual structure of EU competition law, paragraph 48 is disastrous. Namely, the latter provides that it is to be assessed on a case-by-case basis whether an anti-competitive object exists and such a decision can be made only after some kind of a market analysis; this analysis is expected to cover, in particular, the structure of the market and the parties'

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[70] Paragraph 47.
[71] Paragraph 48.

market power, presumably including absolute and relative market shares and the examination of alternative distribution channels.

Paragraph 48 appears to be fairly ill-advised. First, this proposition is irreconcilable with *Expedia*, where the CJEU established that a restriction of competition by object falls foul of Article 101(1) TFEU irrespective of market structure and market power and of whatever effects the agreement may have. Second, as noted above, it is the very essence of the concept of 'anti-competitive object', similarly to the notion of per se illegality in US antitrust law, that automatic condemnation does not occur on a case-by-case basis but rests on category-building. The case-by-case analysis introduced by the CJEU lifts the borderline between 'object' and 'effect' cases and eliminates the merits of the notion of 'anti-competitive object': such as legal certainty, predictability, and simplicity.

It is to be noted that *Allianz* is one of the infrequent cases where the ruling diametrically opposes to the AG's Opinion;[72] AG Villalón considered the agreements between the insurance companies and the brokers not to be anti-competitive by object. He contended that the category of 'object-type' agreements 'must be interpreted strictly and must be limited to cases in which a particularly serious inherent capacity for negative effects can be identified'.[73] This is in line with US antitrust law's notion that the rule of reason is the principle and per se illegality is the exception. He opined, as to the agreements' content and objectives, that:

> the capacity of the agreements at issue to restrict competition is not as high as that of the vertical agreements which the case-law has held in the past to be restrictions by object. Furthermore, their capacity to restrict competition also appears to be lower than that of vertical agreements which, in accordance with the case-law, do not constitute restrictions by object, although they might be capable of producing anti-competitive effects.[74]

Likewise, after examining their legal and economic context, he came to the conclusion that the agreements on hourly reparation rates are not anti-competitive by object. His final conclusion was that anti-competitive object can be established by the national court only if some form of a horizontal collusion is proved.[75]

3.2 The evaluation of *Allianz*

In *Allianz*, the CJEU let the genie out of the bottle. The notion that a comprehensive assessment has to be made in order to ascertain whether the agreement is

[72] Opinion of AG Villalón in Case 32/11 *Allianz*, not published yet.
[73] Paragraph 65.
[74] Paragraph 81.
[75] See paras 88 and 100.

(or qualifies as) anti-competitive by object and that the elusive concept of anti-competitive object has to be applied to flesh and blood matters is both conceptually flawed and dangerous. On the contrary, the concept of 'object-type' agreements is meant to help competition authorities and courts to build categories of agreements, which are clear enough to be applied by anyone with even a rudimentary understanding of economics and do not require any market data.

The ruling in *Allianz* has numerous drawbacks.

First, it terminates the certainty related to automatic condemnation, which has been a tool of last resort. Theoretically, any agreement may qualify as anti-competitive by object; contrary to the old case law (and the century-old rule of US antitrust) where the legal counsel could be confident that agreements not on the black list of 'object-type' agreements will receive a full-blown effects-analysis. After *Allianz*, the dualist world of clear-cut prohibitions and 'it depends' agreements seems to have collapsed and to have been replaced with a continuum, where after a quick sorting based on a prima facie impression some agreements are automatically condemned and some are afforded a full-blown inquiry.

Second, the foregoing 'sorting' occurs after a truncated analysis. It is not clear how profound this analysis should be after *Allianz*; however, the consequences of the 'sorting' are tremendous (note that if anti-competitive object is established, the arrangement is automatically condemned under Article 101(1) TFEU) and are certainly not proportionate to the superficiality of the prima facie analysis backing it. So the probability of false positives increases. Under the traditional analytical structure, automatic condemnation was reserved for types of agreements that in the judicial practice had proved to be always or almost always anti-competitive, while arrangements not backed by such judicial experience were afforded a full-blown inquiry. Under the new test, particularly anti-pathetic agreements are automatically condemned, even if this summary treatment is backed neither by market analysis, nor by settled judicial experience.

Third, in competition law, effects-analysis (rule of reason) is the principle and automatic condemnation (per se illegality) is the exception. Accordingly, the term 'anti-competitive object' shall be grasped narrowly and applied exceptionally.[76] Unfortunately, the *Allianz* ruling fails to comply with this requirement.

[76] As AG Villalón noted in para. 65 of his Opinion. ('To my mind, it follows from the foregoing that this category must be interpreted strictly and must be limited to cases in which a particularly serious inherent capacity for negative effects can be identified.').

4 CLOSING REMARKS

All in all, it appears that in *Allianz* the CJEU did not do more than the student in the motto. Given that the insurance companies had a very high market share and they pursued practices that seriously interfered with the professional independence of brokers by creating strong financial incentives frustrating this requirement, it seems to be hardly doubtful that these practices did have a negative impact on competition. However, high court judgments and in particular CJEU rulings overreach the case before the bench.

Perverted cases entail perverted judgments. The controversy in *Allianz* centred around a question of professional regulation and supervision. Still, the HCO felt compelled to intervene due to the sectoral supervisory authority's default. So far so good: no one would expect the competition authority to ignore competition problems simply because they should have been obviated by another authority. However, these are rare cases and should be handled accordingly. Taking into account that preliminary rulings are a tool to interpret EU law in the context of a real case and have implications going beyond the fact pattern before the bench, a more elaborate and careful analysis could have been expected from the CJEU than saying, as the student in the motto, who appears to have been less prepared, that 'such things should be punished'. It is hoped that the purview of this ruling will remain utmost limited.

Author Guide

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