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Anticompetitive object/effect

Anticompetitive object/effect: An overview of EU and national case law

ANTICOMPETITIVE PRACTICES, AGREEMENT (NOTION), CARTEL, ALL BUSINESS SECTORS, FOREWORD, EFFECT ON COMPETITION, ANTICOMPETITIVE OBJECT / EFFECT

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1. Introduction

Anticompetitive object is a key notion of EU competition law and is being remolded. This paper presents the trajectory of this process and its impact and demonstrates how this impaired the consistency and predictability of competition analysis.

In *Allianz* [*1*], the CJEU established a new doctrine of anti-competition object, which was spelled out in subsequent judgments. This case involved an arrangement that came under none of the then existing categories of anti-competitive object. Although the Court could have considered adding a new one to the existing categories, instead, it simply condemned the arrangement on the basis of the general conception of anti-competitive object. This suggested that anti-competitive object is no longer a category-building principle used for "judicial rule-making" but can and should be applied directly to flesh-and-blood agreements on a case-by-case basis. The Court also held that before deciding whether an agreement is anti-competitive by object or not, an abridged effects-analysis has to be carried out. It was hoped that *Allianz* would remain an isolated judgment that was triggered by an odd fact pattern and a salient regulatory error. Nonetheless, these hopes proved to be vain: the CJEU revisited the conceptual question of anti-competitive object in a series of cases and even though it noted that the *Allianz* doctrine has to be applied with deliberation, it clearly confirmed its validity.

This paper presents the doctrine set out in *Allianz* and its post-judgment trajectory in the CJEU's case-law. Section 2 gives a concise presentation of an idealized form of the pre-*Allianz* concept. Section 3 examines the new doctrine's emergence in *Allianz*. This is followed by a presentation of its ephemeral marginalization in *Cartes bancaires, MasterCard* and *„Maxima Latvija"* (Section 4), where the Court interpreted this doctrine very restrictively and suggested that it may be used on very rare occasions, and its surge in *Hoffmann-La Roche & Novartis* (Section 5), where the Court failed to resists the siren song of anti-competitive object and showed how the doctrine may erode the pre-existing categories. Section 6 takes stock of the damages caused by the *Allianz* doctrine to consistency in object-analysis.

2. The pre-*Allianz* conception of anti-competitive object: paradise lost

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Before the CJEU's ruling in *Allianz*, EU competition law followed an approach that analogized US antitrust law's distinction between *per se* illegality and rule of reason, with the important difference that in Europe this characterization does not inform the whole competition analysis but relates solely to Article 101(1) TFEU. [*2*] Put it simply, the thinking was that the notion of anti-competitive object is meant to be used to create categories of agreements that are condemned automatically (automatic condemnation) and are not given the chance to offer justifications under Article 101(1) TFEU (no defense). [*3*] That is, these agreements are outright prohibited under Article 101(1) TFEU and have an insignificant (rather theoretical) chance to obtain an individual exemption under Article 101(3) TFEU. [*4*] In other words, anti-competitive object was a principle of "judicial rule-making" but was not considered to be judiciable in itself. Using this principle, courts have developed various categories (boxes) of anticompetitive agreements, such as horizontal price-fixing, market-division, restriction of output, exchange of commercially sensitive information as a recent development, vertical resale price fixing and absolute territorial protection. Of course, given that this was judicial rule-making, these categories were established with retrospective effect. This implied that anti-competitive object was used to build categories of agreements but was not used for case-by-case assessment. Although it was standing behind all categories of agreements anti-competitive by object, it was not used to judge flesh-and-blood agreements directly. The function of the notion of ant-competitive object was not to subject real agreements to a comprehensive assessment but to create a relatively clear list of restrictions that qualify as automatically condemned and are offered no chance for justification. In this sense, the conception of anti-competitive object operated indirectly: it was used to set out categories of automatically condemned restrictions and, subsequently, it was these categories that were applied to real matters. Hence, the relevant question was not whether the arrangement is anti-competitive by object; the relevant question was whether it comes under one of the categories of anti-competitive object.

Accordingly, this strand of competition analysis remained chiefly textual. The relevance of the agreement's context was limited to understanding of the economic function and logic in the relevant market. The idea was that no effects-analysis may be carried out, this being reserved for "effect-type" agreements. When it was about anti-competitive object, in most cases, the lawyer could remain within the four angles of the contract. The economic context was not used to ascertain the actual or potential effects but to comprehend the arrangement put together by the parties. This was a tremendous merit of anti-competitive object. The question whether the agreement had an anti-competitive object or not could be assessed even with a rudimentary understanding of economics. While, at times, the examination of the legal and economic context could not be saved, this was relevant only to the extent necessary for understanding the agreement's economic logic, mechanism and function. The *Guidelines on Horizontal Cooperation Agreements* put this very clearly: "[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." [*5*]

It has to be noted that in competition law certain circumstances, such as market power, are used as surrogates of effect. While the competition authority and the plaintiff may prove the agreement's actual effects, this is quite often unfeasible or extremely costly. Nonetheless, alternatively, they may demonstrate that the agreement has a high potential of trade restriction and the parties had market power, thus, these restrictive effects very likely worked out. In other word, the principle that it is needless to examine the actual and potential effects implies that it is needless to examine the effects and their surrogates (i.e. market circumstances).

The above *modus operandi* had very important virtues. Competition law is burdened by various uncertainties, which make competition analysis highly unpredictable. Agreements that need to be judged according to their effects are essentially "it depends" agreements, which hinge on economic issues that are both unpredictable and extremely costly to break down. Antitrust law has been living with this above-average uncertainty for more than a century. This is the sacrifice competition law is making to avoid, or at least to minimize, false positives. This made clear-cut rules invaluable. Notably, there are cases where it is absolutely needless to engage in a costly effects-analysis,

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either because the agreement is clearly not restrictive of competition or because it clearly is. Hence, competition law developed various solutions to give certainty to the system without questioning the basic tenet that in case of reasonable doubt a comprehensive effects-analysis needs to be carried out. Safe harbours set out those agreements that are considered to be in accordance with the requirements of competition law. The concept of agreements of minor importance (*de minimis*) is based on the idea that in case the parties' weight in the market is weak, they cannot do any harm to competition, even if they wanted to. Block exemption regulations follow a similar logic and have the same function: they are meant to enable enterprises to assess their agreements' conformity with competition law without engaging in an effects-analysis. Anti-competitive object fulfils the same function: it sets out the capital vices of competition law. These agreements were automatically condemned without looking into their effects. This gives predictability because it makes clear which agreements are outright prohibited and would entail astronomical fines (categories of anti-competitive object) and which would be treated in a more relaxed manner (categories of anti-competitive effect).

The rationale behind this plainness also determines the method of how the various categories of agreements having an anti-competitive object are defined. In competition law (as far as collusion is concerned) those agreements are automatically condemned that have an anti-competitive nature. Anticompetitive "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 context; that is, such agreements restrict competition whatever the market structure is, whether the parties have market power or not etc. [*6*] Put it otherwise, it is the agreement itself that is restrictive of competition and not the agreement as it operates in the given circumstances. This is reinforced by the notion that agreements anti-competitive by object have *per definitionem* perceivable negative effects on competition and are prohibited irrespective of market share; [*7*] although agreements between "weak" enterprises may not be susceptible of harming competition, there is no point in countenancing these as "impossible crimes", since they have no virtue at all. [*8*]

This *modus operandi* is, in principle, in accord 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. An agreement is *per* se illegal if it is always or almost always anti-competitive without any redeeming virtue. [*9*] However, this implies not nearly that the court would scrutinize in each case whether the agreement at stake is always or almost always anti-competitive without any redeeming virtue, since this part of the doctrine is not applied to flesh and blood arrangements, it is merely used to create categories of agreements.

It has to be noted that competition authorities and plaintiffs are always interested in extending the ambit of anti-competitive object object and to widen its scope. However, the doctrine of anti-competitive object is not about helping the plaintiff or disadvantaging the defendant. It is meant to single out arrangements where effects-analysis is indeed needless and superfluous.

3. The rise of the *Allianz* monster

In *Allianz*, the Hungarian Competition Office (HCO) fined two major Hungarian insurance companies, because in the contracts concluded with insurance brokers they set selling targets defined as a percentage of the broker's overall sales. In respect of repair shops, which had a dual role, the scheme contained an additional twist. When repairing damaged cars covered by a collision or comprehensive insurance, repair shops charged the insurance companies. At the same time, they also functioned as licensed brokers. The two Hungarian insurance companies decided to pay higher hourly rates for reparations if the repair shop met the target. However, it has to be emphasized that there was no evidence suggesting any horizontal collusion, hence, these practices were examined solely from a vertical perspective.

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The case was clearly the result of a regulatory failure. Brokers, contrary to insurance agents, are the counsels of the client and have to serve his interests, even if they are paid by the insurance companies in the form of a commission. The above compensatory mechanisms interfered with this and created illegitimate financial incentives for brokers. Due to the financial supervision's failure to put an end to this practice, the HCO launched an investigation and imposed fines. The condemnation was based on the notion that these vertical arrangements had an anti-competitive object. The case was referred to the CJEU in respect of hourly reparation rates (but not in respect of the rest of the target fees). [*10*]

The CJEU set out a new doctrine and held that any agreement may be regarded as anti-competitive by object if, after an abridged effects-analysis, the individual examination leads to such a conclusion. That is, the concept of "anti-competitive object" does not operate through the intermediation of categories but is viable in itself and, hence, agreements have to be investigated individually, on a case-by-case basis under the general concept of anti-competitive object.

> "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*". [*11*]

The above excerpt's first sentence simply repeated the Court's settled case-law, however, the second sentence went further and listed completely new factors, providing that under the label of "context" a truncated effects-analysis has to be carried out to establish whether the agreement is anti-competitive by object or not. The relevant factors are the following: nature of the goods (services), "the real conditions of the functioning" of the market and the structure of the market.

As noted above, effects-analysis is costly and complicated, hence, it often uses proxies, such as market power and market structure. It is not rare for competition authorities and plaintiffs to demonstrate the agreement's anticompetitive potential and the parties' market power instead of actual impact. The reason for the use of proxies may be that the effects have not materialized yet but there is a high likelihood that they would emerge (potential effects). In other cases, the effects have occurred but no accurate market data is available or it would be unduly costly to collect them (indirect proof of actual effects). [*12*]

Paragraph 48 of the ruling repeats the above principle and 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' market power, presumably including absolute and relative market shares and the examination of alternative distribution channels.

> "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.*" [*13*]

4. The apparent marginalization of the Allianz doctrine: the CJEU's judgments in *Cartes bancaires, MasterCard* and *„Maxima Latvija"*

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Allianz was followed by a series of cases, which endorsed the doctrine but disapproved the designation as anti-competitive by object in the given case. These could create the impression that even if *Allianz* was not the single occasion where summary condemnation could be used outside the categories of anticompetitive object, such cases are intensely rare.

In *Cartes bancaires*, [*14*] with the purpose of ensuring the interoperability of the members' systems for card payment and cash withdrawals, French banks established an economic interest grouping. In 2002, the grouping adopted various measures to encourage members' engagement in acquiring activities, which could be explained as maintaining the system's balance and handling external economic effects. Banks who were less active in acquisition activities than in issuing paid a contribution to compensate those who were not. New members had to pay a fee per active cards if they tripled the number of cards by the end of the sixth year as compared to the number of cards in stock at the end of the third year. A "dormant member 'wake-up'" fee was introduced for members who were not sufficiently active before the entry into force of the new measures.

The CJEU conceived anti-competitive object restrictively and underlined that in competition analysis this concept is the exception and not the rule, hence, it extents only to the most serious mischiefs that are, "by their very nature", "harmful to the proper functioning of normal competition" [*15*] and highly dangerous.

> "The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects". [*16*]

Although in *Cartes bancaires* the CJEU found that the above arrangement calls for a full-blown effects-analysis, the Court endorsed *Allianz* as the bedrock of object-analysis and confirmed the tenet that anti-competitive object can be established after an abridged inquiry into the effects.

> "When determining that context, it is also necessary 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*" [*17*] [Emphasis added]

In *MasterCard,* [*18*] the CJEU found that the multilateral interchange fee (MIF) used in the bankcard system, which is paid by the bank operating the payment terminal (acquiring bank) to the bank which issued the bankcard (issuing bank) and was set on a multilateral basis, is not anti-competitive by object. It held, with reference to *Allianz*, [*19*] that in this context "mere suppositions or assertions that the anti-competitive effects (…) are 'obvious' cannot (…) be relied upon." [*20*] Although the question of object was not a pivotal issue in the case, given that the MIF was assessed according to its effects and found restrictive, [*21*] the judgment makes it clear that automatic condemnation should be restricted to arrangements whose restrictive effects are unequivocal.

In *„Maxima Latvija"*, [*22*] the Latvian Supreme Court asked the CJEU if a vertical non-compete clause is anti-competitive by object. Maxima Latvija rented commercial spaces in large malls and shopping centers and in some of the lease contracts it was granted the rights, as "anchor tenant", to approve "the lessor['s] letting to third parties commercial premises not let to Maxima Latvija." [*23*] This was probably a question that should have been clearly answered in the negative and in the pre-*Allianz* era one would have been surprised at why a national court submits such a preliminary question. Nonetheless, in the post-*Allianz* era virtually any agreement may be considered anti-competitive by object.

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Not surprisingly, the CJEU confirmed that vertical non-compete agreements are not anti-competitive by object and call for an effects-analysis. [*24*] Nonetheless, surprisingly, it came to this conclusion with a textbook summary of the pre-*Allianz* conception of anti-competitive object. First, it underlined that the characterization of the agreement as anti-competitive by object should be based on its “content”, that is, the analysis should remain within the four corners of the contract. [*25*] Second, condemnation as anticompetitive by object is limited to cases where the agreement “reveals *in itself* a sufficient degree of harm to competition.” [*26*] Even if it is shown that the agreement “could potentially have the effect of restricting” competition, this does not imply that it will always have such effects “by [its] very nature”, that is, irrespective of the context. [*27*] Third, the court defines categories of agreements that are anti-competitive by object (“certain collusive behaviour”) on the basis of experience and not theoretical argumentation. [*28*]

5. The monster strikes again: the CJEU’s ruling in *Novartis/Roche*

After *Allianz* and *Cartes bancaires*, the general understanding was that the new doctrine has no impact on the established and entrenched categories of agreements having an anti-competitive object (price-fixing, market division etc.) but simply extends anticompetitive object beyond these categories. This could be conceptualized as turning the closed (but judicially changeable) list to an open list with the addition of the category of agreements that may be declared automatically anticompetitive on a case-by-case basis. However, it was taken as granted that the substance and effectiveness of the pre-existing set of prohibited categories remained intact. Unfortunately, these hopes proved to be vain.

For almost five years, the CJEU refrained from using the *Allianz* doctrine to condemn an arrangement that falls outside the traditional categories of anti-competitive object. [*29*] Nonetheless, in *Hoffmann-La Roche & Novartis*, [*30*] *the Allianz* monster struck again: the Court condemned, on the basis of the general doctrine of anticompetitive object, a horizontal conspiracy to divide the market by means of scare-mongering. Instead of treating this dodgy market-sharing arrangement as market-sharing, the Court engaged in an obscure demonstration about the agreement’s anticompetitive nature. While it is difficult to disagree with the final conclusion that the arrangement was anticompetitive by object, with its unsophisticated approach, the Court dealt a major blow to the remnants of consistency and transparency: instead of interpreting the concept of market-division in the context of the facts, it provided a truistic reasoning that suggests that any agreement to engage in a communication distorting customers’ transactional decisions may be caught in the net of Article 101 TFEU (and this may apply, by analogy, to the unilateral acts of dominant undertakings).

Hoffmann-La Roche and Novartis were marketing two competing drugs (Avastin and Lucentis) that had virtually the same ingredients. Both drugs were developed by the Roche group but Novartis was entrusted with the commercial exploitation of Lucentis by means of a license agreement. Hoffmann-La Roche was granted marketing authorization (MA) concerning Avastin for oncological purposes, while Novartis acquired MA concerning Lucentis for ophthalmological purposes, such as macular degeneration and glaucoma. Nonetheless, Avastin was widely used off-label, for ophthalmological purposes, given that Avastin was ten times cheaper than Lucentis. [*31*] Although the two drugs were the same in all relevant aspects, to put an end to this, Hoffmann-La Roche and Novartis engaged in a communication campaign asserting that Avastin raises safety risks if used for ophthalmological purposes. This aimed to create an artificial differentiation between the two products and to reduce their substitutability in the eyes of physicians and patients.

The CJEU held that the above agreement was anti-competitive by object, because “it is likely that the dissemination of such information will encourage doctors to refrain from prescribing that product, thus resulting in the expected reduction in demand for that type of use” [*32*] and “an arrangement that pursues the objectives (…) of

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[misleading both the regulators and the general public] must be regarded as being sufficiently harmful to competition to render an examination of its effects superfluous." [*33*]

Although the ruling designates the cooperation as a "cartel agreement," [*34*] neither the Court nor AG Saugmandsgaard Øe tried to subsume it under one of the existing categories and both of them judged it under the general concept of anti-competitive object. This makes it highly difficult to ascertain the ruling's message. Does it imply that any misleading communication carried out by two or more undertakings (under Article 101 TFEU) or a dominant undertaking (under 102 TFEU) violates competition rules, provided it is capable of distorting the competitive process? This would be a highly odd development and lead to extremely far-reaching consequences, especially because EU law already has a comprehensive regime for such cases: the Unfair Commercial Practices Directive [*35*] prohibits misleading business communication affecting consumers' transactional decisions. If the Directive pursues something, it is these kinds of deceptions. What role may antitrust law have taking this into account? It is out of question that customers' informed decisions are key to the sound operation of the competitive process and, hence, misleading communication clearly impacts on competition. The question is whether this is what antitrust law, which has generally been regarded as addressing market power, is really dealing with.

Hoffmann-La Roche & Novartis has some important similarities to *Allianz*. Both involved a highly dislikable business practice which the Court could not "let go" and both cases involved practices that impaired the informed decision-making of consumers. In *Allianz*, illegitimate financial incentives were used to make brokers, who were expected to act as the client's neutral and objective counsel, provide unbalanced advice. In *Hoffmann-La Roche & Novartis*, a misleading communication campaign was used. Furthermore, both cases reacted to a regulatory error: the practices were either not banned or the regulator and its sanctions were too weak. Taking these into account, the *Hoffmann-La Roche & Novartis – Allianz* tandem raises far-reaching questions. Does this open a new chapter in EU competition law where undertaking will be liable for misleading consumers? Does this imply that as a general principle competition law prohibits all collusive and, in case of dominance, unilateral practices that impair consumers' chance to make informed decisions, given that such practices distort the competitive process?

It seems that instead of these far-reaching conclusions the ruling in *Hoffmann-La Roche & Novartis* should be treated as an awkwardly reasoned condemnation of a horizontal market-division. In fact, the ruling is the object-lesson of how the unsophisticated *Allianz* doctrine impairs pre-existing categories of anti-competitive object. The CJEU could not see the forest for the trees: the collusion was a peculiar market-division, which is a traditional and settled category of anti-competitive object. Although the Court was not explicit about the horizontal relationship between the parties, it did regard them, notwithstanding the licensing agreement, as competitors in relation to the post-license joint communication. Although one may argue that this relationship was vertical, what is of relevance here is that the Court conceived it as horizontal in nature. It considered the arrangement not to be ancillary to the licensing agreement [*36*] and the reason why it condemned it was that that it was put in place between "two undertakings marketing two competing products" [*37*] in order to reduce the substitutability of these competing products and to diminish demand for Avastin in favor of Lucentis. [*38*]

The category of market-division also embraces arrangements short of an absolute ban. While the overwhelming majority of such schemes are based on members' promises not to sell outside the territory (or consumer group) allotted to them, in fact, it also covers functional equivalents that diminish the substitutability of two undertakings' products by means of disadvantaging outward sales or making inward orders from outside the allotted territory more difficult, for instance, by making them costlier or increasing customers' search costs. It amounts to market-division if two competitors, while not banning cross-supplies, agree to compensate each other via a fee for

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deliveries to the other undertaking's home country or they inform each other if they get an order from an out-of-state customer and give time to the other undertaking to intervene. In the same vein, the promise not to make out-of-state advertisements (active sales), though not an absolute ban, would equally qualify as market-division.

A quick look at the antitrust case-law on the other side of the Atlantic provides an array of examples of market-sharing arrangements that are short of an absolute ban. In *United States v. Sealy, Inc.* [*39*] and *US v. Topco Associates*, [*40*] the parties were allowed to sell outside the territory allotted to them, the only restriction was that they could not use the Topco trade mark. In *US v. Cooperative Theatres*, [*41*] the parties agreed to abstain "from actively soliciting each other's customers." The US Court of Appeals of the Sixth Circuit held that "the so-called 'no-solicitation' agreement alleged in this case is undeniably a type of customer allocation scheme which courts have often condemned in the past as a *per se* violation of the Sherman Act." The Court found "it unnecessary to engage in the 'incredibly complicated and prolonged economic investigation' under the rule of reason standard where, as here, the alleged agreement is a 'naked restraint' with no possible pro-competitive justification." In *Blackburn and Green v. Sweeney and Pfeifer*, [*42*] two personal injury law firms agreed not to advertise in the other's territory, although their right to practice law was not restricted. The US Court of Appeals of the Seventh Circuit considered the restriction of advertising to be *per se* illegal market-division and held that "[t]o fit under the *per se* rule an agreement need not foreclose all possible avenues of competition."

From an economic perspective, there seems to be no difference between these arrangements and the joint campaign of two competitors to reduce the interchangeability of two competing products. In fact, this was very likely the only means to isolate the two markets from each other. It is most unfortunate that the CJEU, instead of elaborating the definition of market-sharing and its functional equivalents, summarily condemned the communication campaign and, thus, further diminished the consistency and predictability of object-analysis. The ruling is an object-lesson of how *Allianz*'s oversimplified approach, void of the subtlety needed by the complexity of antitrust matters, blocks the development of well-established and entrenched categories of anticompetitive object and undermines competition law analysis.

6. The victims of the *Allianz* doctrine

One of the first victims of *Allianz* was the Commission's Notice on agreements of minor importance (*de minimis*). The Commission's earlier, pre-*Allianz* De Minimis Notice [*43*] (old De Minimis Notice) followed a simple pattern made up of market share caps (10% for horizontal restraints and 15% for non-horizontal ones) [*44*] and a list specifically defined categories of agreements that could not benefit from the safe harbour of *de minimis.* [*45*] The exhaustive list of hard-core agreements set out in the old De Minimis Notice created a clear negative check-list. If the legal counsel went through this check list and concluded that the agreement comes under none of these categories, he could rest assured that the agreement would definitely benefit from the safe harbour, provided, of course, the relevant market share cap was not exceeded. *Allianz* eliminated this predictability. This finds reflection in the new De Minimis Notice, which turned the earlier Notice's exhaustive enumeration to an illustrative list. [*46*] Although the Commission adopted a guidance on the interpretation of anti-competitive object [*47*] for the purpose of the application of the De Minimis Notice, this contains, likewise, only an illustrative list. [*48*] It seems that agreements of minor importance no longer benefit from a safe harbour; they have to content themselves with a "simple" harbour. [*49*]

The second major victim is joint selling arrangements and consortia. Although the Italian Regional Administrative Court of First Instance [*50*] and the Paris Court of Appeal [*51*] refused to treat these arrangements anticompetitive by object, recently both the Danish [*52*] and the Norwegian Competition Authority [*53*] pronounced consortia anticompetitive by object. The Norwegian case, *Ski Taxi and others,* also reached the EFTA Court, [*54*] which,

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surprisingly, concluded that it depends on the circumstances whether a consortium is anticompetitive by object or not and, hence, it has to be assessed on a case-by-case basis whether it can benefit from a detailed examination. The Court held that a consortium and a joint bid involving the combination of assets may be considered anticompetitive by object if it "reveals a sufficient degree of harm" taking into account "the substance of the cooperation, its objectives and the economic and legal context of which it forms part." [*55*] As a corollary of the case-by-case assessment, the Court regarded anticompetitive object a factual issue to be decided by the national court. [*56*]

This means that even though they have been traditionally considered to be an effect-type agreement, the competition law risks attached to joint selling and consortia sky-rocketed, given that the borderline between consortia anticompetitive by object and consortia that deserve an effects-analysis got painfully blurred. While this uncertainty is inherent in effects-analysis, it is the very function of anti-competitive object to avoid it. Furthermore, the choice between object and effect will be made after a quick look into the circumstances where all aspects need to be taken into consideration but merely in a summary manner. These are actually the same circumstances that pertain to effects-analysis with the difference that they are not subjected to a detailed analysis. With this, the inquiry confuses the two sides of competition analysis: the input side, which is about the choice between the object-analysis and effects-analysis, and the output side, which delivers the result of this analysis. If an effects-test needs to be carried out and proves to be positive, this means that the agreement is anticompetitive by effect. It cannot mean that the effects-analysis should not have been carried out and the agreement should have been treated as anticompetitive by object.

The EFTA Court's ruling in *Ski Taxi and others* opens the floor to national competition authorities to pronounce otherwise legitimate mechanisms of cooperation as anticompetitive by object, if, after a quick look, they find them uncongenial. It has to be highlighted that joint selling arrangements and consortia have been considered legitimate and, depending on the market circumstances, pro-competitive, given that they often enable firms to combine their assets, make use of synergies and benefit from economies of scale and scope. Quite often, these arrangements enable small companies to combine and make offers that are capable of competing with big companies. Of course, joint selling arrangements and consortia may also be detrimental to competition; however, this can be ascertained only if looking into the market circumstances.

The third victim is the concept of horizontal market-division as an entrenched category of anticompetitive object. As explicated above, in *Hoffmann-La Roche & Novartis,* the CJEU failed to identify an atypical market-division agreement and, instead, condemned it under the general concept of anticompetitive object. The ruling is an object-lesson of how *Allianz*'s unsophisticated approach blocks the development of well-established and entrenched categories of anticompetitive object and impairs competition law analysis.

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

[*1*] Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal*,

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ECLI:EU:C:2013:160. For a detailed note on the Hungarian procedure *see* Katalin J. Cseres & Pál Szilágyi, "The Hungarian Car Insurance Cartel Saga" in Barry Rodger (ed.), *Landmark Cases in Competition Law – Around the World in Fourteen Stories* (Kluwer Law International 2013), 145-166.

[*2*] Richard Whish & David Bailey, Competition Law 128-129 (8th ed., Oxford University Press, 2015).

[*3*] Csongor István Nagy, EU and US Competition Law: Divided in Unity? 123 (Ashgate, 2013).

[*4*] Csongor István Nagy, EU and US Competition Law: Divided in Unity? 44 (Ashgate, 2013).

[*5*] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, 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*] See Csongor István Nagy, The Distinction between Anti-Competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?, 36(4) World Competition: Law and Economics Review 541, 553 (2013).

[*7*] See Case C-226/11 Expedia Inc. v. Autorité de la concurrence and Others, ECLI:EU:C:2012:795. See ***Pinar Akman****, The EU Court of Justice rules that a national competition authority is not precluded from applying Article 101(1) TFEU to an agreement situated below the threshold specified by de minimis notice (Expedia), 13 December 2012, e-Competitions Bulletin December 2012, Art. N° 54965* ; ***Vini Singh****, The EU Court of Justice rules that if there is an appreciable restriction of competition, national competition authorities may apply Art. 101(1) TFEU even if de minimisthreshold is not reached (Expedia), 13 December 2012, e-Competitions Bulletin December 2012, Art. N° 50282.*

[*8*] Csongor István Nagy, The New Concept of Anti-Competitive Object: A Loose Cannon in EU Competition Law, 36(4) European Competition Law Review 154, 155 (2015).

[*9*] Northern Pac. Ry. Co. v U.S., 356 U.S. 1, 5 (1958).

[*10*] Although the case was tried solely on the basis of Hungarian competition law, the Supreme Court considered Section 11 of the Hungarian Competition Act to be the equivalent of Article 101(1) TFEU and the legislative intent to follow the rules and principles of EU competition law could be established. The ECJ found that the preliminary question was admissible.

[*11*] Para 36 (emphasis added).

[*12*] Csongor István Nagy, The Distinction between Anti-Competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?, 36(4) World Competition: Law and Economics Review 541, 559 (2013).

[*13*] Para 48 (Emphasis added).

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[***14***] Case C‑67/13 *Groupement des cartes bancaires (CB) v European Commission*, ECLI:EU:C:2014:2204. For an analysis, see ***Matthew O'Regan***, *The EU Court of Justice provides further clarity on when an agreement has the object of restricting competition (Groupement des cartes bancaires), 11 September 2014, e-Competitions Bulletin September 2014, Art. N° 69491* ; ***Pablo Ibáñez Colomo, Alfonso Lamadrid De Pablo***, *The EU Court of Justice interprets restriction of competition by object (Groupement des Cartes Bancaires), 11 September 2014, e-Competitions Bulletin September 2014, Art. N° 73606* ; ***Richard Burton***, *The EU General Court issues judgment on tariff arrangement within payment card cartel (Groupement des Cartes Bancaires), 29 November 2012, e-Competitions Bulletin November 2012, Art. N° 58212*.

[***15***] Para 50.

[***16***] Para 58. See also para 49.

[***17***] Para 53.

[***18***] Case C‑382/12 *MasterCard Inc. and Others v European Commission*, ECLI:EU:C:2014:2201. For an analysis, see ***Giovanni Scoccini***, *The EU Court of Justice confirms the ruling of the General Court on multilateral interchange fees (MasterCard), 11 September 2014, e-Competitions Bulletin September 2014, Art. N° 70049* ; ***Irene Fraile***, *The EU Court of Justice dismisses the final appeal in a case regarding inter-bank card fees (MasterCard), 11 September 2014, e-Competitions Bulletin September 2014, Art. N° 68929*.

[***19***] Para 185.

[***20***] Para 187.

[***21***] Para 186.

[***22***] Case C-345/14 SIA *„Maxima Latvija" v Konkurences padome*, ECLI:EU:C:2015:784. For an analysis, see ***Simon Troch, Cecilia Sbrolli***, *The EU Court of Justice rules on limited exclusivity restriction in lease agreements and concludes that it is not a restriction by object (Maxima Latvija), 26 November 2015, e-Competitions Bulletin November 2015, Art. N° 78000* ; ***Peter Broadhurst***, *The EU Court of Justice provides guidance on the notion of restriction by object in the context of commercial lease contracts (Maxima Latvija), 26 November 2015, e-Competitions Bulletin November 2015, Art. N° 76933* ; ***Andrzej Kmiecik***, *The EU Court of Justice finds limited exclusivity restriction in lease agreements not to be a restriction by object (Maxima Latvija), 26 November 2015, e-Competitions Bulletin November 2015, Art. N° 77179*.

[***23***] Para 5.

[***24***] Paras 21 & 23-24.

[***25***] Para 17 ("*Where, however, an analysis of the content of the agreement does not reveal a sufficient degree of harm to competition, the effects of the agreement should then be considered* and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.") (emphasis added).

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[**26**] Para 20 (emphasis added) ("In the light of the case-law which has just been cited, the essential legal criterion for ascertaining whether an agreement involves a restriction of competition 'by object' is therefore the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not appropriate to assess its effects.").

[**27**] Para 22.

[**28**] Para 19 ("It is established, in that regard, that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered by their nature as likely to have negative effects, in particular on the price, quantity or quality of the goods and services, so that it may be considered redundant, for the purposes of applying Article 101(1) TFEU, to prove that they have actual effects on the market (...). Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.").

[**29**] The *Allianz* ruling was adopted on 14 March 2013, while the ruling in *Hoffmann-La Roche & Novartis* was adopted on 23 January 2018.

[**30**] Case C 179/16 *Hoffmann-La Roche Ltd, Roche SpA, Novartis AG, Novartis Farma SpA v Autorità Garante della Concorrenza e del Mercato,* ECLI:EU:C:2018:25. For an analysis, see ***Floriane Aufaure, Ombline Ancelin****, The EU Court of Justice rules that the dissemination of misleading information is a restriction by object and excludes exemption under Article 101 §3 TFEU (Roche / Novartis), 23 January 2018, e-Competitions Bulletin January 2018, Art. N° 86139* ; ***Enzo Marasà, Eugenio Foco****, The EU Court of Justice holds that colluding to disseminate information constitute a restriction of competition "by object" (Roche / Novartis), 23 January 2018, e-Competitions Bulletin January 2018, Art. N° 90104*.

[**31**] Para 46.

[**32**] Para 93.

[**33**] Para 94.

[**34**] Para 80.

[**35**] Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L 149/22.

[**36**] Para 75.

[**37**] Paras 77 & 95.

[**38**] Para 93.

[**39**] *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

[**40**] *United States v. Topco Associates,* 405 U.S. 596 (1972).

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[*41*] *United States v. Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367 (6th Cir.1988).

[*42*] *Thomas Blackburn and Raymond T. Green v. Charles Sweeney, Jr. and Daniel H. Pfeifer*, 53 F.3d 825 (1995).

[*43*] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) [2001] OJ C 368/13.

[*44*] Para 8.

[*45*] Para 2. See *Expedia*, where the CJEU confirmed that hard-core restrictions are prohibited irrespective of market share. Case C-226/11 *Expedia Inc. v. Autorité de la concurrence and Others*, ECLI:EU:C:2012:795. See ***Pinar Akman***, *The EU Court of Justice rules that a national competition authority is not precluded from applying Article 101(1) TFEU to an agreement situated below the threshold specified by de minimis notice (Expedia), 13 December 2012, e-Competitions Bulletin December 2012, Art. N° 54965* ; ***Vini Singh***, *The EU Court of Justice rules that if there is an appreciable restriction of competition, national competition authorities may apply Art. 101(1) TFEU even if de minimisthreshold is not reached (Expedia), 13 December 2012, e-Competitions Bulletin December 2012, Art. N° 50282*.

[*46*] "13. In view of the clarification of the Court of Justice referred to in point 2, this Notice does not cover agreements which have as their object the prevention, restriction or distortion of competition within the internal market. The Commission will thus not apply the safe harbour created by the market share thresholds set out in points 8, 9, 10 and 11 to such agreements. *For instance*, as regards agreements between competitors, the Commission will not apply the principles set out in this Notice to, *in particular*, agreements containing restrictions which, directly or indirectly, have as their object: a) the fixing of prices when selling products to third parties; b) the limitation of output or sales; or c) the allocation of markets or customers. *Likewise*, the Commission will not apply the safe harbour created by those market share thresholds to agreements containing any of the restrictions that are listed as hardcore restrictions in any current or future Commission block exemption regulation, which are considered by the Commission to generally constitute restrictions by object." (Emphasis added)

[*47*] Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice. SWD(2014) 198 final.

[*48*] Ibid at p. 5.

[*49*] Csongor István Nagy, The New Concept of Anti-Competitive Object: A Loose Cannon in EU Competition Law, 36(4) European Competition Law Review 154, 158 (2015).

[*50*] See ***Carlo Edoardo Cazzato***, *The Italian Regional Administrative Court of First Instance partially annuls the decision of the Competition Authority in a public procurement case (2iGas Infrastruttura, E.ON Rete, Linea Distribuzione), 7 May 2013, e-Competitions Bulletin May 2013, Art. N° 54772*.

[*51*] See ***Lolita Berthol-Balladur, Yann Anselin***, *The Paris Court of appeal partially annuls the Competition Authority's decision in the packaged flour case due to the lack of by object infringement in its national component (France Farine, Bach Müle), 20 November 2014, e-Competitions Bulletin November 2014, Art. N° 72338*.

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[*52*] See ***Michael Klöcker***, *The Danish Competition Council holds that a consortium which won a public tender was anti-competitive by object (LKF - Eurostar), 24 June 2015, e-Competitions Bulletin June 2015, Art. N° 74801.*

[*53*] See ***Simen Klevstrand***, *A Norwegian Court of Appeals upholds that a joint bid submitted under a public tender constituted an anti-competitive agreement by object (Ski Taxi, Follo Taxisentral, Ski Follo Taxidrift), 17 March 2015, e-Competitions Bulletin March 2015, Art. N° 72314.*

[*54*] Case E-3/16 *Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS and The Norwegian Government*, [2016] EFTA Ct. Rep. 1002.

[*55*] Para 101.

[*56*] Para 95.

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