The enforcement of Article 101 TFEU – what has happened to the effects analysis?

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Abstract

This paper critically examines the European Commission’s commitment to employing a more ‘effects-based’ approach to enforcing Article 101 TFEU. It finds that, while the Commission has developed an impressive theoretical framework for assessing the effects of agreements on competition, there has in fact been very little effects analysis in its decisional practice since 2004. In the overwhelming majority of cases, the anticompetitive effects of prohibited agreements have instead been presumed on the basis of the ‘object rule’. This paper explores possible reasons for this development, and examines whether alternative forms of enforcement are addressing the void that the focus on object restrictions has left. It concludes that Article 101 TFEU is currently not being enforced effectively against restrictions of competition by effect.

Introduction

Effects-based analysis has been an enduring buzzword of EU competition law and policy for the past twenty-odd years. It has dominated academic publications,1

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policy documents and public consultations on the future of EU competition policy, and the European Court of Justice’s recent judgment in *Intel* is only bound to rekindle what has at times been a surprisingly heated and emotional debate in the usually rational world of competition lawyers.

Most significantly in practice, in the late 1990s, the European Union’s main enforcement body, the European Commission, embraced the idea of reducing what had long been criticised as an overreliance on form-based presumptions of illegality in favour of more detailed assessments of the investigated conduct’s actual effects. Over a period of nearly ten years, it invested a great deal of time and resources into developing a coherent theoretical framework for assessing the effects of business conduct in an economically sound manner under all three prohibition provisions of EU competition law: Articles 101 and 102 TFEU, and the EU Merger Regulation.

This contribution focuses on the Commission’s approach to Article 101, which outlaws anticompetitive agreements. For this provision alone, the Commission issued four sets of guidelines that explain to the business community and the national competition authorities how the Commission intends to assess the effects of agreements on competition and consumer welfare. The aim of this paper is to examine how the effects-based approach to Article 101 has played out in practice. In particular, it aims to

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3 eg Comments on the public consultation on discussion paper on the application of Article 82 to exclusionary abuses (March 2006), available at ec.europa.eu/competition/antitrust/art82/contributions.html, in the context of Article 102 TFEU.

4 ‘Court of Justice’ in the following.

5 Case C-413/14 P *Intel v European Commission* ECLI:EU:C:2017:632.


7 ‘Commission’ in the following.

8 Treaty on the Functioning of the European Union (TFEU). Unless otherwise specified, Articles cited in this text shall refer to the provisions of the TFEU.


establish whether the Commission nowadays really routinely assesses the actual effects of agreements under Article 101 before prohibiting them as anticompetitive.

As a background for this analysis, the following first briefly retraces the key features of the process that led the Commission to endorse a more effects-based approach to EU competition law generally and Article 101 in particular. It then recaps the relevant legal concepts of Article 101 as interpreted in the case law of the European Court of Justice and the Commission’s guidelines on Article 101. The next part examines the Commission’s actual enforcement practice since the introduction of the effects-based approach. It shows that, contrary to what one may have expected in view of the public rhetoric and the substantial effort that went into developing a coherent theoretical framework for assessing the effects of agreements, there has been next to no effects analysis in the Commission’s decisional practice on Article 101 since the last set of Article 101 guidelines was published in 2004. In the overwhelming majority of cases, the Commissions has instead presumed the anticompetitive effects of prohibited agreements on the basis of the so-called ‘object rule’. The following section explores possible explanations for this counterintuitive finding. Amongst others, it looks at the role that the decentralisation of the enforcement process in 2004 may have played in this development and the implications of the Commission adopting a welfare-based interpretation of Article 101 around the same point in time. The paper concludes by exploring whether these findings give cause for concern. In particular, it asks whether other forms of competition law enforcement, in particular enforcement at the national level, commitments decisions and private enforcement, are effectively dealing with the effects cases that the Commission has not been pursuing for the past few years, and whether the Commission’s current approach in fact not merely amounts to sensible priority setting.

I. Effects-based analysis as a leitmotiv of recent EU competition policy

In the late 1990s, the Commission embarked on an extensive journey of rethinking and revising its approach to assessing business conduct under all three pillars of EU competition law, beginning with Article 101, moving on to EU merger control, and concluding with Article 102.\textsuperscript{11} A key aim of this substantive modernisation process, which was self-initiated and primarily carried out by means of legally non-

binding Communications and individual decisions, was to bring European competition law more into line with contemporary economic theory.\textsuperscript{12} EU and US competition law experts alike had long accused the Commission of operating a competition policy that was too legalistic and insufficiently grounded in economics.\textsuperscript{13} In addition to finding fault with the legal objective of EU competition law and the ensuing concept of competitive harm, both of which were deemed too broad, commentators criticised the Commission for relying too heavily on form-based presumptions of legality and illegality in its assessments under Articles 101 and 102.\textsuperscript{14}

Undeniably, a number of contractual restraints have traditionally been presumed to have anticompetitive effects under Article 101, in particular horizontal price fixing,\textsuperscript{15} output reduction,\textsuperscript{16} and customer allocation,\textsuperscript{17} but also resale price maintenance,\textsuperscript{18} absolute territorial protection\textsuperscript{19} and agreements designed to restrict parallel trade between EU Member States.\textsuperscript{20} Likewise, certain types of unilateral conduct on the part of dominant undertakings had, in the past at least, been presumed to be abusive within

\textsuperscript{16} Case C-209/07 Beef Industry Development Society (BIDS) ECLI:EU:C:2008:643, para 40.
\textsuperscript{17} eg Case T-47/10 Akzo Nobel v Commission ECLI:EU:T:2015:506, para 230.
\textsuperscript{18} Case 243/83 Binon v Agence et messageries de la presse ECLI:EU:C:1985:284, para 44; Case 161/84 Pronuptia de Paris ECLI:EU:C:1986:41, paras 23-25.
\textsuperscript{19} eg Joined cases 56 and 58/64 Consten and Grundig ECLI:EU:C:1966:41, p. 340.
\textsuperscript{20} Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline and Others v Commission ECLI:EU:C:2009:610, para 61.
the meaning of Article 102, thus obviating the need for an in-depth assessment of their actual effects on competition.21 The shortcomings of such legal presumptions are not difficult to see. While they are attractive to enforcers because they are relatively easy and cheap to apply, they are relatively blunt and cannot accurately measure the actual effects in the individual case. The danger therefore is that such legal presumptions result in banning business conduct that is not actually dangerous to competition (in the worst-case scenario, it is even beneficial), and fail to catch agreements that are truly harmful.22 While commentators were less critical of the Commission’s assessments under the EU Merger Regulation on this particular point,23 they took the view that the Commission too readily inferred the effects of business conduct from its form under Articles 101 and 102, and regularly pitted this approach against the more in-depth economic analyses that US courts had been carrying out under the equivalent provision of US antitrust law since the 1980s.24

It is before this background that the Commission initiated a broad review process in the late 1990s, during which it comprehensively re-evaluated key legal concepts of EU competition law. This was a major undertaking that took up the better part of 10 years.25 The Commission retained independent legal and economic experts to

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21 According to conventional wisdom, the abusive character of exclusivity arrangements on the part of a dominant undertaking had traditionally been presumed under Article 102 (eg Case 85/76 Hoffman-La Roche v Commission ECLI:EU:C:1979:36, para 89 or Case T-83/91 Tetra Pak International v Commission ECLI:EU:C:1979:36, para 137). However, the Court of Justice’s recent judgment in Case C-413/14 P Intel v European Commission ECLI:EU:C:2017:632, paras 138, 139, which reverses the General Court’s ruling on this point (Case T-286/09 Intel v European Commission ECLI:EU:T:2014:547, para 72), calls this understanding into question.

22 Economists often refer to these constellations as ‘Type I’ errors (or false positives), where a test finds the presence of an effect that does not really exist, and ‘Type II’ errors (or false negatives), which occurs when the test fails to detect an effect that really exists (see eg EAGCP, ‘An Economic Approach to Article 82’, July 2005, p. 7).

23 However, the Commission was commonly criticised for not assessing the ‘correct’ effects (i.e. the effects on consumer welfare) and for according too much weight to market shares and other structural factors (see eg W Kolasky, ‘Conglomerate Mergers and Range Effects: It’s a Long Way from Chicago to Brussels’ (2002) 10 George Mason Law Review 533).


25 The first set of guidelines spelling out a revised approach to Article 101 dates from 2000 (Guidelines on Vertical Restraints [2000] OJ C291/1). The review process was concluded with the publication of the revised enforcement priorities for Article 102 (Guidance on the Commission’s enforcement priorities in
examine and advise on policy options, and involved a broad range of stakeholders, practitioners and academics to participate in this process through public consultations and oral hearings. The review yielded a significant number of interpretative guidelines and other soft law instruments spelling out a ‘more economic’ approach to the substantively unaltered prohibition provisions.

In addition to the question of the proper legal objective and concept of competitive harm, the issue of legal presumptions versus individual assessments figured prominently throughout this process. Commentators pressed the Commission to scale back the use of form-based presumptions in favour of more individual assessments in line with contemporary US antitrust law. The Commission appeared to embrace this idea. Since the late 1990s, many of the documents preparing, resulting from or looking back on the review process emphasise the Commission’s commitment to a more effects-based approach. Likewise, speeches and publication by high-ranking members of DG

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28 ec.europa.eu/competition/antitrust/art82/contributions.html.


Competition time and again highlighted that the Commission had overhauled its former legalistic and form-based approach and had replaced it with more effects-based approach to EU competition law.\textsuperscript{32} Before exploring the Commission’s guidelines on Article 101, which spell out its revised approach to this provision, the following first briefly identifies and reviews the main legal principles of Article 101 that are relevant to this analysis.

\section*{II. Effects v form in Article 101}

Article 101(1) prohibits agreements or other forms of cooperation between undertakings that have the object or effect of restricting competition insofar as they are capable of affecting trade between Member States. The Court of Justice interprets “object or effect of restricting competition” within the meaning of this provision as referring to two distinct concepts. According to longstanding case law, agreements that have the object of restricting competition are presumed to have anticompetitive effects.\textsuperscript{33} Consequently there is no need to establish and prove such agreements’ actual effects on competition in an in-depth analysis of the individual circumstances. Whether an agreement has the object of restricting competition must be determined by examining its content, purpose and the economic context in which it is to be applied.\textsuperscript{34} According to the Court, the concept of an object restriction refers to contractual restrictions that are so likely to have negative effects on competition that it would be redundant to prove their actual effects.\textsuperscript{35} This reasoning is very similar to that used by the US Supreme Court to justify the use of \textit{per se} rules of illegality under section 1 of the Sherman Act.\textsuperscript{36} However, there is one important theoretical difference between the \textit{per se} rule and the object rule under Article 101(1). While an agreement that is found to be \textit{per se} illegal under section 1 of the Sherman Act is irrefutably deemed anticompetitive, agreements


\footnotesize{\textsuperscript{33} Joined cases 56 and 58-64 \textit{Consten and Grundig v Commission} ECLI:EU:C:1966:41, p. 342.}

\footnotesize{\textsuperscript{34} eg Cases C-209/07 \textit{Competition Authority v Beef Industry Development Society and Barry Brothers} ECLI:EU:C:2008:643, para 15; C-501/06 \textit{P GlaxoSmithKline v Commission} ECLI:EU:C:2009:610, para 55.}

\footnotesize{\textsuperscript{35} C-67/13 \textit{P Groupement des cartes bancaires} ECLI:EU:C:2014:2204, para 51.}

\footnotesize{\textsuperscript{36} See eg \textit{Northern Pacific R Co v United States}, 356 US 1, 5 (1958).}
that have the object of restricting competition can, in theory at least, still be saved under Article 101(3). The object rule of Article 101(1) merely presumes the anticompetitive effect, but does not pronounce itself on whether the agreement has pro-competitive effects. That assessment must be carried out additionally under Article 101(3). In practice, however, no Article 101(3) defence has been successful since the Commission adopted a welfare-based approach to EU competition law in the mid-2000s and reinterpreted the provision as referring to economic efficiency effects only.37 One can only speculate about the reasons for this development. One likely factor is that the Commission applies a high standard of proof for the efficiency defence. It further operates on the presumption that restrictions that are blacklisted in Block Exemption Regulations are unlikely to fulfil the conditions of Article 101(3).38 All the mainstream object restrictions tend to be blacklisted. The theoretical difference between per se restraints and object restrictions has therefore not been overly significant in practice in recent years.

Agreements that do not have the object of restricting competition within the meaning of Article 101(1) need to be assessed as to their actual or likely effects on competition.39 Article 101(1) itself, at least as interpreted by the Court of Justice, therefore contains an inbuilt recognition that certain types of contractual clauses may be presumed to have anticompetitive effects on the basis of their wording, purpose and the broader economic context of the agreement.

III. The Commission’s guidelines on Article 101

The Commission introduced its more economic approach to Article 101 by means of four sets of guidelines,40 which spell out an interpretation of this provision that is “based on the effects on the market”.41 They do not challenge the Court’s concepts of restrictions by object and restrictions by effect, and adhere to the principle

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37 European Commission, Guidelines on the application of Article 81(3) of the Treaty, points 48-74.
38 ibid, point 46.
that there are certain restrictions of competition that have such a high potential for creating anticompetitive effects, i.e. restrictions by object, that it is unnecessary to demonstrate any actual effects on the market. However, their key purpose and actual raison d’être is to spell out a coherent theoretical framework for assessing the effects of agreements that do not have an anticompetitive object. The test they propose consists of two main steps. First, the enforcing body needs to demonstrate that the investigated agreement leads to a restriction of competition either through coordination or foreclosure. In a second step, it needs to prove on the basis of cogent evidence that this restriction of competition has the effect of reducing consumer welfare, for example in the form of higher prices, reduced output, lower quality or diminished levels of innovation. The lion share of the four Commission guidelines is dedicated to elaborating upon these two steps for the most common types of contractual restraints, and to explaining how to assess in practice whether these restraints are likely to result in anticompetitive effects.

IV. The Commission’s enforcement practice since 2004

Fifteen-odd years later, what is the reality? Has the European Commission’s decisional practice really become more effects-based in the sense that it now regularly demonstrates the effects of business conduct on competition and consumer welfare before prohibiting them?

If one looks at the enforcement of Article 102, the latter can be answered in the affirmative. Even before the Commission formally concluded its review of this provision by issuing the Guidance on Article 102, it started establishing the effects of unilateral exclusionary conduct both on competition and consumer welfare in a number

42 eg Guidelines on Article 81(3) [2004] OJ C101/97, points 20, 21, mentioning in particular price fixing and market sharing.
of cases even where it considered that the case law allowed it to infer the effects from the conduct’s form.46

With regard to Article 101, however, the picture is very different. Since the Commission published its last set of guidelines on Article 101 in 2004,47 it has based its prohibition decisions almost exclusively on object restrictions. This is a highly counterintuitive finding in view of the rhetoric, the prominence of the issue during the reform process and the resources that must have gone into developing a coherent and economically sound theoretical framework for assessing the effects of agreements in the four sets of Article 101 guidelines.

It must not be interpreted, however, as meaning that Commission has extended the concept of object restriction to new types of agreements. Unlike the US Supreme Court, which culled many of its form-based presumptions of per se illegality during the US Antitrust Revolution, the Commission did in fact not make major changes to its categorisation of contractual clauses as object and effects restrictions during the substantive review of Article 101. As far as vertical agreements are concerned, it continues to classify export bans, absolute territorial protection, minimum resale price maintenance and fixed resale price maintenance as object restrictions.48 With regard to horizontal agreements, the Commission has also adhered to the former suspects, in particular price fixing, market allocation, output limitation and bid rigging.49

Rather than being the result of a change in interpretation, the lack of actual effects-based analysis in the Commission’s decisional practice since the reform is in

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46 eg Microsoft I (COMP/C-3/37.792) recitals 835-954; AstraZeneca (COMP/A.37.507/F3) recitals 517 – 601; Wanadoo España v Telefónica (COMP/38.784) recitals 223 –277, and 543 – 618; Prokent-Tomra (COMP/E-1/38.113) recitals 281– 85, and 331 – 44; Intel (COMP/C-3/37.990) recitals 837 – 912. However, the Court of Justice recently ruled in Intel that, in the case of exclusivity rebates at least, and where the undertaking concerned submits during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects, the Commission is required to analyse the extent of the undertaking’s dominant position on the relevant market, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount, as well as the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market (Case C-413/14 P Intel v European Commission ECLI:EU:C:2017:632, paras 138 and 139). It reversed the General Court’s ruling on this point, which had held that longstanding case law had established that the abusive effect of exclusivity rebates could be presumed (Case T-286/09 Intel v European Commission ECLI:EU:T:2014:547, para 72).


48 According to the Commission’s guidelines on vertical restraints, maximum resale price maintenance, however, is not to be considered an object restriction (Guidelines on Vertical Restraints [2010] OJ C130/1, points 223-229. The Commission had not previously distinguished clearly between different types of resale price maintenance, and it expressly acknowledged in the case of Nathan/Bricolux that it had changed its position on this point: Nathan-Bricolux (COMP/F.1/36.516) [2001] OJ L54/1, recital 87.

fact due to a change in case selection. Between January 2005 and June 2017, the European Commission has prohibited and fined 78 cartel agreements.\textsuperscript{50} During the same period, it has merely prohibited 10 non-cartel agreements under Article 101.\textsuperscript{51} In other words, around 87% of all prohibition decisions concerned since January 2005 have concerned hard-core cartels, which, as a matter of course, are not assessed as to their actual or likely effects, but are presumed to produce such effects. If one looks at the period between 1985 and 1997, for comparison purposes, one finds that only 13 out of a total of 59 Article 101 prohibition decisions (i.e. 22%)\textsuperscript{52} concerned classical cartels,\textsuperscript{53} with prohibitions of vertical restraints, in particular export bans, in fact outweighing cartel prohibitions.\textsuperscript{54}

The ten non-cartel cases prohibited since the Commission published its last set of 101 guidelines in April 2004\textsuperscript{55} also predominantly concerned object restrictions. Four of these decisions explicitly and exclusively based the liability on restrictions by object.\textsuperscript{56} In Telefónica/Portugal Telecom, the Commission examined an agreement between the Spanish and Portuguese telecommunications incumbents, which the Commission read as an understanding not to offer services on each other’s markets. The parties disputed the non-compete nature of the clause. The Commission’s assessment looked in some detail at the wording of the agreement, the objectives that it sought to attain, the economic and legal context of which the clause formed part, the actual conduct and behaviour of the parties, and their intentions.\textsuperscript{57} On that basis, it

\textsuperscript{50} ec.europa.eu/competition/cartels/statistics/statistics.pdf
\textsuperscript{51} SEP et autres/Peugeot SA (F-2/36.623/36.820/37.275); Groupement des cartes bancaires ‘CB’ (COMP/D1/38606); MasterCard (COMP/34.579), EuroCommerce (COMP/36.518), and Commercial (COMP/38.580) (‘Mastercard I’); Morgan Stanley/Visa International and Visa Europe (COMP/D1/37860); CISAC (COMP/C2/38.698); ONP (COMP/39510); Telefónica/Portugal Telecom (AT.39839); Lundbeck (AT.39226); Fentanyl (AT.39685); Perindopril (Servier) (AT.39612).
\textsuperscript{52} These numbers are based on the author’s analysis of the Commission decisions listed on DG Competition’s website at ec.europa.eu/competition/antitrust/cases/older_antitrust_cases.html.
\textsuperscript{53} The Commission’s Leniency Notice defines cartels as secret agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors (Commission Notice on Immunity from fines and reduction of fines in cartel cases OJ C298/17, para 1). Because of the secrecy requirement, the numbers cited in the text exclude agreements or decisions of associations notified to the Commission for clearance or exemption, even where these included elements of price-fixing or market sharing.
\textsuperscript{54} 22 out of these 59 prohibition decisions concerned vertical restraints.
\textsuperscript{56} Commission decision of 23 January 2013 (Telefónica/Portugal Telecom - AT.39839); Commission decision of 8 December 2010 (ONP - COMP/39510); Commission decision of 19 June 2013 (Lundbeck - AT.39226); Commission decision of 10 December 2013 (Fentanyl - AT.39685).
\textsuperscript{57} Telefónica/Portugal Telecom, recitals 238–536.
concluded that the clause in question was in fact a non-compete agreement which amounted to a market-sharing agreement and qualified as a restriction by object that could be presumed unlawful. While this assessment was relatively detailed, it was aimed at determining the purpose of the clause, rather than at assessing its effects on competition and consumer welfare.

The competitive assessment in *Ordre National des Pharmaciens* was equally straightforward and devoid of effects analysis. It dealt with a number of decisions taken by the professional body of pharmacists in France. The analysis focused on establishing the objective of the investigated decisions, and concluded that they indirectly intended to set minimum prices for laboratory tests and to prevent the emergence of laboratory groups in the market. On this basis, the Commission presumed the anticompetitive effects of the conduct.58

The Commission also treated the cases of *Lundbeck* and *Fentanyl* as containing object restrictions.59 Both cases concerned so-called ‘pay-for-delay’ or ‘reverse payment settlement’ agreements, in which two major pharmaceutical companies that held patents for innovative medicinal products had paid potential manufacturers of generic pharmaceuticals to delay their entry into the market with cheaper generic versions of the original drug. Reverse payment settlements can be economically desirable where they settle a genuine patent dispute. On the other hand, they extend the monopoly of the originator and thus delay the emergence of cheaper generic versions of the drug to the disadvantage of consumers. Pay-for-delay scenarios in the pharmaceutical sector are legally and economically particularly complex, because they require balancing the objectives and rules of competition law, intellectual property law and elaborate industrial regulation.60

Unsurprisingly therefore, the Commission’s assessments of whether the agreements in *Lundbeck* and *Fentanyl* could be considered restrictive by object were unusually substantial.61 This may also have to do with the fact that it was the first time the Commission dealt with reverse payment settlements and could therefore not rely on precedent. In both cases the Commission established whether the agreements had the

59 *Lundbeck* - AT.39226; *Fentanyl* - AT.39685.
potential to restrict competition by their “very nature” by examining whether (1) the parties were at least potential competitors, (2) whether the generic undertaking committed itself to limiting its efforts to enter the market, and (3) whether the agreement was related to a transfer of value which substantially reduced the incentives of the generic undertaking to enter the market. In Lundbeck, the earlier of these two cases, it further considered whether the value transferred was based on the profit the generic undertaking would have expected to make if it had successfully entered the market, whether the originator could have obtained the limitations on entry through enforcement of its process patents, whether the obligations on the generic undertaking in the agreement went beyond the rights granted to holders of process patents, whether the agreement contained a commitment from the originator to refrain from infringement proceedings if the generic undertaking entered the market after expiry of the agreement. The assessment in Lundbeck in particular goes well beyond the automatic assumption of illegality the Commission applies to cartels, where it does not tend to examine the legal and economic context of the restraints in any meaningful way. In particular its arguments as to why, in its view, the parties were potential competitors was unusually lengthy for an object case. In terms of detail and individual circumstances, Lundbeck therefore certainly sits at the extreme end of the spectrum of object assessments, with cartels sitting at the extreme opposite end. This does not change the fact, however, that the Commission considered these practices to amount to object restrictions and did not assess the actual or likely effects on competition and consumer welfare either in Lundbeck or Fentanyl.

In the case of CISAC, which examined the conditions of management and licensing of authors’ public performance rights by collecting societies, the Commission established one clear restriction by object, but did not explicitly categorise the other two investigated restrictions as either restrictions by object or by effect. The lack of any

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62 Lundbeck - AT.39226, recital 661; Fentanyl - AT.39685, recitals 219.
63 Lundbeck - AT.39226, recital 662.
64 ibid, recitals 610-636.
65 The General Court has in the meantime confirmed the Commission’s decision in Lundbeck in its entirety, including the categorisation of the restraints as restrictions by object (Case T-472/13 Lundbeck v Commission ECLI:EU:T:2016:449). Lundbeck has appealed to the Court of Justice in Case C-591/16 P Lundbeck v Commission (pending). Incidentally, the US Supreme Court ruled in Actavis (2013) that reverse payment settlements were to be assessed under the rule of reason rather than be considered per se illegal under sec 1 of the Sherman Act, although it has left it to the lower courts to “structure the present rule-of-reason antitrust litigation” in particular with regard to the quality of proof required to prove the unreasonableness of the restraint (FTC v. Actavis, Inc., 133 S. Ct. 2223, 2238 (2013)).
analysis of the effects of the second clause, which concerned an exclusivity agreement, would suggest that the Commission also considered this a restriction by object. It examined the third restriction, i.e. the territorial delineation of the right to grant licenses, as to its effects on the process of market integration, rather than establish foreclosure effects and consumer harm.67

Three more prohibition decisions found that the agreements under investigation contained clear restrictions by object, but nonetheless additionally proved these agreements’ likely restrictive effects ‘for the sake of completeness’, while stressing that this was not legally required. In the cases of Servier68 and Groupement des cartes bancaires (CB)69 the complementary assessment of the likely effects was relatively substantial. Servier concerned yet another pay-for delay-agreement. CB, by contrast, investigated the decision by an association of undertakings in the banking sector to impose a range of fees on its members, the extent of which depended on the individual member’s acquisition rates.70 CB argued that these fees were necessary to encourage banks that were more active in issuing cards than in acquiring new merchants for the card system to expand their acquisition activities and thus to discourage free-riding. According to the Commission, however, these fees had the object of hindering new entrants from competing effectively, because the acquiring market was almost entirely in the hands of the large banks and there were substantial barriers to entry. Even though it considered that the anticompetitive effects could be presumed in this case, it additionally demonstrated the actual anticompetitive effects.71 The Commission’s categorisation of this measure as an object restriction was eventually struck down by the courts, but the prohibition was upheld on the basis of the additional effects analysis.72

67 supra, recitals 127; 145–152, and 200–222. On appeal, the General Court found that the Commission had not established the third restriction, i.e. the existence of a concerted practice relating to the national territorial limitations, to the required legal standard and annulled the Commission’s decision on this point (Case T-442/08 CISAC v Commission ECLI:EU:T:2013:188, paras 132, 182-183).
68 Commission decision of 9 July 2014 (Perindopril (Servier) - AT.39612), recitals 1102-2061, in particular 1213.
69 Commission decision of 17 October 2007 (Groupement des cartes bancaires “CB” - COMP/D1/38606).
70 In this context, “issuing” refers to an activity whereby a financial institution issues bank cards to cardholders, whereas “acquiring” consists in financial institutions enlisting merchants who will offer the service of processing card payment transactions to end consumers.
71 Groupement des cartes bancaires - COMP/D1/38606, recitals 193-251, and 252-36.
72 The General Court had initially upheld the Commission’s finding that the measures in question amounted to object restrictions (T-491/07 CB v Commission EU:T:2012:633, paras 123-268). However, on appeal, the Court of Justice found that the General Court had ignored established case law on the concept of object restrictions and that it was not possible to establish a sufficient degree of harm in this particular case to warrant qualifying the fees as object restrictions. It therefore referred the case back to the General Court to review the Commission’s effects analysis (Case C-67/13 P Groupement des cartes
By contrast, the additional effects analysis in SEP/Peugeot, which concerned measures to discourage exports to other Member States in a distribution context and which the Commission deemed restrictive by object, was less onerous than that in CB and Servier, as the Commission assessed this agreement as to its negative effects on market integration, and the additional assessment of the agreement’s actual effects was therefore limited to demonstrating that exports had declined as a consequence of Peugeot’s actions.

In yet another case, Mastercard I, the Commission simply left open whether it was dealing with a restriction by object or by effect. It took the view that the agreement between the members of the Mastercard payment system to levy a fee on each cross-border payment presented all the signs of a restriction by object because it de facto imposed a minimum price for payment cards. However, it decided not to commit itself on the point because it was able to demonstrate in an extensive analysis that the agreement in question had actually had the effect of raising prices.75

In fact, the Commission has only enacted one single infringement decision since 2004, in which it prohibited an agreement exclusively and explicitly for being a restriction by effect. This was the case of Visa in 2007, in which the Commission established that Visa’s refusal to admit a UK bank as a member of Visa Europe had the effect of restricting competition in the provision of credit card acceptance services, and that admitting this competitor would have generated positive effects on prices and service quality.77

V. What are the reasons for this development?

This is a remarkable finding. It raises the question why the Commission has focused its enforcement activities so strongly on object restrictions, after publicly embracing a more economic, effects-based approach and going to a great deal of trouble

74 Mastercard I (COMP/38.580), recitals 401–407.
75 ibid, recitals 408–523. The decision was upheld in Case T-111/08 MasterCard and Others v European Commission ECLI:EU:T:2012:260, and Case C-382/12 P MasterCard and Others v European Commission ECLI:EU:C:2014:2201.
76 Morgan Stanley/Visa International and Visa Europe (COMP/D1/37860).
to develop a consistent theoretical framework for assessing business conduct’s effects on competition and consumer welfare. There are no clear answers to this question, but a number of possible explanations come to mind.

Revised enforcement priorities following the decentralisation of the enforcement process

In May 2004, Regulation 1/2003\textsuperscript{78} made significant changes to the way in which Article 101 is enforced in the European Union. While Article 101(1) had always been directly applicable, the exemption contained in Article 101(3) previously had to be conferred by means of a decision\textsuperscript{79} or a Block Exemption Regulation. Moreover, only the Commission had had the power to grant this exemption. In practice, this meant that it was highly unattractive for national competition authorities to enforce Article 101 at all, because they could only assess the conduct under Article 101(1), but not apply 101(3) autonomously.

Regulation 1/2003 made Article 101(3) directly applicable,\textsuperscript{80} and created a system of parallel competences according to which both the Commission and the national competition authorities are competent and responsible for enforcing Articles 101 and 102.\textsuperscript{81} The aim of this fundamental procedural reform was to decentralise the enforcement of Article 101, with a view to allowing the European Commission to concentrate its resources on pursuing the most serious infringements.\textsuperscript{82} From the outset, the Commission earmarked cartels as a focus of its revised enforcement practice.\textsuperscript{83} The decisional practice since 2004, with its 87\% of cartel decisions, suggests that the Commission has adhered to this plan.

If one looks at the remaining 13\% of non-cartel cases prohibited by the Commission since 2004, what explains the preponderance of object cases? This is somewhat more difficult to explain. Are object restrictions necessarily more harmful to competition and consumers than other restrictions? The definition of an object restriction does not necessarily support such a conclusion. The Court defines object

\textsuperscript{80} Council Regulation (EC) No 1/2003, Article 1(2).
\textsuperscript{81} \textit{ibid}, Articles 4 and 5.
\textsuperscript{82} \textit{ibid}, recitals 3 and 4.
restrictions as agreements that are so likely to have negative effects on competition that it would be redundant to prove their actual effects.\textsuperscript{84} The degree of harm to competition and consumer welfare is not relevant in this formula.\textsuperscript{85} Rather, the determinative factor of an object restriction is its likelihood to result in anticompetitive effects. In other words, it may very well be that an agreement that ‘merely’ has the effect of restricting competition has negative implications for competition and consumer welfare that equal or even outweigh the harm caused by an object restriction, especially if the agreement has been in existence for a significant period of time, involves many market players and covers extensive product and geographic markets. The concept of object restriction does not take these factors into consideration at all.

\textit{The shift to a welfare-based interpretation of Article 101}

The issue of individual assessments v legal presumptions was not the only legal question that the Commission considered during the substantive review process aimed at bringing EU competition law more into line with economic theory. It also fundamentally rethought the legal objective guiding the competition rules. As a result of this review, the Commission adopted the consumer welfare aim that has guided US antitrust law since the late 1970s, and adapted its concepts of harm and countervailing effects accordingly. Adopting this ‘more economic’ approach had a number of significant practical implications that are likely to have contributed to the drop in decisions prohibiting agreements that have the effect of restricting competition.

\textit{The ‘filter function’ of the more economic approach}

The revised welfare-based interpretation of Article 101 has filtered out a great number of cases in which the Commission would previously have seen an infringement of Article 101, but which are no longer deemed problematic. Up until the late 1990s, the Commission had defined the aims of EU competition law more broadly, and had in particular considered the protection of individual commercial freedom and fairness to be key objectives of the competition rules.\textsuperscript{86} On that basis, it had previously qualified any appreciable restriction of economic freedom, be it of the investigated parties themselves

\begin{footnotes}
\textsuperscript{84} Case C-67/13 P Groupement des cartes bancaires ECLI:EU:C:2014:2204, para 51.
\textsuperscript{85} The actual harm caused by the anticompetitive conduct is traditionally taken into account when calculating the appropriate fine.
\end{footnotes}
or of their competitors, as a restriction of competition. According to the more economic approach, the primary purpose of the EU competition rules now is to enhance consumer welfare. Consequently, the more economic approach only considers such restrictions of competition anticompetitive that result in a reduction of consumer welfare in the form of higher prices, lower output, lower quality or lower levels of innovation. This more restrictive interpretation of Article 101, which the Commission finalised in its guidelines on Article 101(3) from 2004, has therefore significantly reduced the scope of the prohibition. As a result, fewer cases are nowadays caught by Article 101 than under the Commission’s previous reading of the provision.

Further, more cases are exempted under the new generation of Block Exemption Regulations than was previously the case. During its substantive review process, the Commission not only revised its interpretation of Article 101(1), but also adapted its Block Exemption Regulations to reflect the new welfare-based interpretation of Article 101 by building in increasingly generous safe harbours for undertakings with relatively low market shares. As long as undertakings’ market shares remain below the relevant market share cap, which is meant to approximate their market power, and the agreement does not contain any particularly suspect clauses, the agreement will be automatically exempted from the application of Article 101(1). To a certain extent, these market share-based safe harbours have made EU Block Exemption Regulations themselves somewhat more ‘effects-based’ if one compares them to the older, more formalistic types of Block Exemption Regulations, which excluded smaller undertakings on the basis of a turnover threshold and exhaustively white-listed permissible restrictions for all other undertakings. However, it remains that even these modernised Block Exemption Regulations contain rigid legal presumptions and do not require an assessment of the actual effects. Strictly speaking, they also merely approximate the

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89 ibid, point 24.
91 ie hardcore restrictions and excluded restrictions, which are explicitly listed in eth relevant Block Exemption Regulations.
likelihood of the agreement being exemptible under Article 101(3), but do not pronounce themselves on whether the agreement has any anticompetitive effects to start with.

The welfare-based interpretation of Article 101 has thus undoubtedly reduced the number of cases caught by this provision. Nonetheless, it is hard to believe that over a period of 12 years in a jurisdiction as vast as the European Union there has only been one single instance in which businesses have entered into an agreement with cross-border context that, despite not containing any restrictions by object, had the potential to affect competition to the disadvantage of consumers. There are bound to be additional factors that have contributed to the decrease of decisions prohibiting restrictions of competition by effect.

**Cost implications of the more economic approach**

One of these factors is likely to be the comparative ease of proving an object restriction to the required legal standards, which makes object restrictions an attractive choice for enforcers. They require no in-depth economic analysis of individual effects and are therefore generally quicker and cheaper to carry out. These considerations are bound to have become much more relevant since the Commission adopted the consumer welfare objective. The new welfare-based concepts of competitive harm and countervailing factors have made the assessment of an agreement’s actual effects significantly more complex than before. Restrictions of economic freedom - the Commission’s original understanding of competitive harm - could usually be inferred relatively easily from the agreement itself. Unsurprisingly, if one looks at the Commission’s analyses of anticompetitive effects in prohibition decisions over the first forty years of EU competition law, one finds that these only tend to take up a few sentences. In fact, effects analyses were so straightforward and so heavily based on the legal assessment of the contractual clauses that the Commission often did not decide whether the investigated contractual clause was a restriction by object or effect. The great majority of cases either characterised the clauses as being “restrictions by object and effect”, restrictions “by object or effect”, or simply “restrictions of competition”

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without referring to the concept of object or effect restriction at all. This is because, in practice, the distinction was not all that relevant.

Since the more economic approach introduced the notion that only such restrictions of competition that result in a reduction of consumer welfare should be deemed anticompetitive, the distinction between restriction by object and effect has become crucial. In an assessment of an agreement’s effects, it is no longer sufficient to demonstrate that the agreement restricts somebody’s economic freedom (which a contract is, by definition, always bound to do). The competition agency now needs to demonstrate that the agreement resulted in coordination or foreclosure effects, and these were likely to reduce consumer welfare. In other words, it not only needs to prove the restriction of competition, but also must prove a causal relationship between the restriction of competition and an increase in price, output reduction or another tangible negative effect on consumer welfare. All of these effects need to be established on the basis of cogent empirical evidence. This is significantly more resource-intensive than merely inferring from an agreement that it has the effect of restricting either party’s or their competitors’ freedom of action or opportunities, especially if one throws in a quantitative study or two to complement the qualitative analysis of such effects. Likewise, assessing in an economically sound manner whether the conduct engenders efficiency effects that offset the reduction in consumer welfare is more complex resource-consuming than the much less scientific balancing exercise that the Commission used to carry out under Article 101(3) before it adopted the welfare-based reading of this provision. While the burden of proving efficiency effects initially lies on the undertaking invoking the defence, the Commission has to engage with the

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97 As a consequence of adopting the consumer welfare aim, the Commission also reinterpreted Article 101(3) as referring to consumer welfare-enhancing efficiency effects only (eg Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97, points 48-72), whereas it had previously also taken into account non-economic benefits (see A Witt, Public Policy Goals Under EU Competition Law—Now is the Time to Set the House in Order” (2012) 8 (3) European Competition Journal 443).
calculations and evidence offered by the investigated undertaking in-depth and refute these to the required legal standard, if it intends to reject them.

One can therefore conclude that the resources that the Commission is required to put into enacting individual prohibition decisions under all three pillars of EU competition law must have increased significantly since the introduction of the more economic approach. An obvious manifestation of this phenomenon is the remarkable increase in the decision length. The average length of an Article 102 infringement decision between 1971 and 1998 was around 19 pages. Since 2005, when the Commission started proving the actual effects on competition and consumer welfare in several cases, Article 102 infringement decisions have averaged 216 pages. Merger prohibitions in the 1990s were on average just under 36 pages long, whereas prohibition decisions on the basis of the new Merger Regulation currently span 465 pages on average. Even in the context of Article 101, in which the Commission has focused very heavily on object restrictions, one can observe a similar trend. While the average length of an Article 101 decision in the 1970s was just under 10 DIN A4-pages, a non-cartel infringement decision post-2004 now averages 157 pages. The mixed decision in Servier, establishing an infringement of both Articles 101 and 102, currently holds the record with over 800 pages.

Admittedly, this not only has to do with the inclusion of econometric studies and the assessment of effects. Even cartel decisions have significantly increased in length. Another key factor in this development is that the Commission has notably increased the type, variety and quality of evidence used to support its assumptions since the General Court struck down three merger decisions in 2002 because of poor evidentiary standards. It remains, nonetheless, that a state-of-the-art effects analysis means ‘more work’ than applying a legal presumption of illegality based on the fact that an agreement contains a certain contractual clause.

**Judicial review**

Object cases present another potential advantage. They are not only easier and hence cheaper to do, but may also be more likely to survive judicial review. Because

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99 Perindopril (Servier) (Case AT.39612).
the anticompetitive effects are legally presumed, there is significantly less room for assessment errors. Although the Court of Justice considers that the Commission has a certain discretion with respect to assessments of an economic nature under the EU competition rules and the EU judicature, at least,101 will therefore exercise a degree of restraint in reviewing these assessments,102 the EU courts have nonetheless been known to strike down Commission decisions because of manifest errors of assessment.103 The Court of Justice recently reconfirmed in Cartes Bancaires that, when reviewing complex economic assessments, the EU judicature is not only under an obligation to establish whether the evidence relied on is factually accurate, reliable and consistent, but also to ascertain whether that evidence contains all the relevant information necessary to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.104 Decisions being upheld on review again translates into cost savings for the Commission, as it is usually the unsuccessful party that bears the costs for judicial proceedings in EU courts.105 A good track record on appeal also enhances the enforcement agency’s image and reputation as an institution that tends to ‘get it right’. These are additional considerations that may contribute to making object cases more attractive for the Commission than effects cases. However, one should maybe not accord too much weight to this point - the above-mentioned case of Cartes Bancaires demonstrates that it is also perfectly possible to misinterpret and misapply the concept of object restriction.106

The advent of commitments decisions

One last factor to consider is the advent of commitments decisions. In 2004, Regulation 1/2003 not only decentralised the enforcement of Articles 101 and 102, but also introduced a new procedural tool, which allows the Commission to accept commitments offered by the investigated parties intended to address the competition

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101 In the UK, the Competition Appeals Tribunal carries out an unlimited review of the Competition and Market Authority’s decisions on appeal.
concerns identified in the Statement of Objection. If the Commission considers these commitments sufficient to alleviate its concerns, it adopts a decision that makes the commitments legally binding on the parties and closes the case without reaching a final conclusion on the legality or illegality of the conduct. 107 The Commission does not deem commitments decisions suitable for cartel infringements. 108 However, they are in theory suitable for all other types of infringement unless the Commission considers the infringement so serious that it considers a fine more appropriate. 109 Commitments decisions are a quicker and cheaper way of closing a case than prohibition decisions. To date, the Commission has enacted 15 such commitments decisions regarding suspected Article 101 infringements on the basis of Regulation 1/2003. 110 One could therefore contemplate at least whether the Commission has been using this tool instead of formal infringement decisions to enforce Article 101 against restrictions by effects.

If one looks at the preliminary assessments carried out in these decisions, they are, by definition, cursory and legally often non-committal. However, if one examines the types of restraints addressed in these decisions, one finds that at least four cases concerned restraints that the Commission is likely to have considered restrictions by effect. One of these decisions concerned an exclusive distribution system, 111 which cannot be presumed restrictive by object according to the case law. 112 Two decisions examined the joint selling of media rights by football clubs, 113 which is a scenario that the Commission has in the past assessed as to its effects instead of applying an object rule. 114 A further decision addressed an instance of contractual tying, which the commitments decision itself refers to as a potential restriction by effect. 115 By contrast, six commitments decisions express a clear suspicion that the investigated agreements contained restrictions by object. 116 The remaining decisions are too vague to be able to

110 This number is based on the commitment decisions available on the European Commission’s website at ec.europa.eu/competition/antitrust/cases/index.html.
111 Repsol CPP (COMP/B-1/38.348).
112 Case 56/65 Société Technique Minière v Maschinenbau Ulm ECLI:EU:C:1966:38.
113 DFB (COMP/C-2/37.214) and Joint selling of the media rights to the FA Premier League (COMP/38.173).
114 Joint selling of the commercial rights of the UEFA Champions League (COMP/C.2-37.398).
116 VISA MIF (COMP/AT.39398); Continental/United/Lufthansa/Air Canada (COMP/AT.39595); BA/AA/IB (COMP/39.596); Siemens/Areva (COMP/39.736); Air France/KLM/Alitalia/Delta (COMP/AT.39964); Container Shipping (COMP/AT.39850).
draw any reliable conclusion as to the Commission’s legal position on this point. In sum, since 2004, four effects cases at least have been addressed by means of commitments decisions, this contributing, albeit to a modest extent, to the drop in prohibition decisions against restrictions by effect.

VI. Is this development a reason for concern?

The last question, which needs addressing, is whether, set aside its somewhat paradoxical character, this development is a reason for concern. Does it matter that the Commission has hardly enforced Article 101 against agreements that have the effect of restricting competition by means of prohibition decisions since 2004? This would not be the case if alternative forms of enforcement adequately addressed the dangers caused by agreements restricting competition by effect. Enforcement at the national level, commitments decisions and private enforcement come to mind.

Enforcement at the national level

One must therefore consider whether the national competition authorities have stepped in since 2004 and have picked up the restrictions of competition by effect that the European Commission has no longer been pursuing. It would go beyond the scope of this article to examine the enforcement practice of all 28 national enforcement bodies. The following therefore focuses on the enforcement practice of three major national competition agencies: the UK Competition and Markets Authority (CMA), the German Bundeskartellamt and the French autorité de la concurrence. Germany and France were chosen for this sample because they are the two jurisdictions with the highest output of decisions under Regulation 1/2003. The reason for including the decisions practice of the UK competition authority in this analysis is that, while the CMA and its predecessor have enacted a relatively low number of decisions for a large EU Member State, the UK was one of the main proponents of introducing a more economic and more effects-based approach to EU competition law. This is therefore the jurisdiction where one could reasonably expect to see a significant proportion of effects cases.

In fact, as the following shows, the decisional practice of these three national competition agencies reveals a very similar picture to that of the European Commission:

there have hardly been any decisions finding an infringement of Article 101 by effect at the national level either since 2004.

**The United Kingdom**

Since Regulation 1/2003 entered into force, the CMA and its predecessor, the Office of Fair Trading (OFT), have enacted 10 decisions establishing an infringement of Article 101. All of the investigated agreements were categorised as object restrictions, and primarily concerned hard-core cartels such as price-fixing, market allocation, bid-rigging, as well as a few instances of resale price maintenance. In a number of instances, the CMA nonetheless demonstrated the likely effects on competition in addition to the establishing the agreement’s anticompetitive object. That was the case, for example, in the 2016 decision prohibiting GlaxoSmithKline’s reverse-payment-settlement agreements with a number of generic pharmaceutical companies. This complementary assessment does not change the fact, however, that the CMA considered this case to constitute an object restriction. In addition to these object cases under Article 101, the CMA also found numerous infringements of the equivalent UK competition provision, i.e. section 2(1) of the Competition Act 1998 (‘the Chapter 1 prohibition’), which did not fall within the scope of Article 101 because they did not affect inter-state trade. These infringements also exclusively concerned object restrictions.

**Germany**

Since 2004, the German Bundeskartellamt has published 15 decisions establishing infringements of Article 101. Of these, only two assessed the effects of

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118 CMA, *Online resale price maintenance in the light fittings sector* (Case 50343), decision of 3 May 2017; *Supply of products to the furniture industry* (Case CE/9882-16), decision of 27 March 2017; *Galvanised steel tanks for water storage* (Case CE/9691/12), decision of 19 December 2016; *Conduct in the modelling sector* (Case CE/9859-14), decision of 16 December 2016; *Paroxetine* (Case CE-9531/11), decision of 12 February 2016; *Online resale price maintenance in the commercial refrigeration sector* (Case CE/9856/14), decision of 24 May 2016; *Online resale price maintenance in the bathroom fittings sector* (Case CE/9857-14), decision of 10 May 2016; *Conduct in the ophthalmology sector* (Case CE/9784-13), decision of 20 August 2015; OFT, *Airline passenger fuel surcharges for long-haul flights* (Case CE/7691-06), decision of 19 April 2012; *Loans to large professional services firms* (Case CE/8950-08), decision of 20 January 2011 (available at www.gov.uk/cma-cases).

119 CMA, *Paroxetine* (Case CE-9531/11), decision of 12 February 2016, Parts 6 and 7.

120 Available at www.gov.uk/cma-cases.

121 Bundeskartellamt, *Booking.com* (Case B9-121/13); *HRS Bestpreisklausel* (Case B9-66/10); *TV-Grundverschlüsselung* (Case B7-22/07); Gemeinschaftsunternehmen *CVH Chemie* (Case B3-19/08); Rabattabsprache zwischen Bundesinnung für Hörgeräteakustiker und den Krankenkassen (Case B3-134/09); Kontaktslinsen (Case B3-123/08); Merck KGaG und VWR International Europe (Case B3-64/05); *KS-Quadro* (Case B1-165/01); *Arzneimittel-Hersteller* (Case B3-6/05); *Gesellschaft für Glasrecycling*
the investigated conduct. Both cases concerned price parity clauses operated by major hotel booking platforms that prohibited hotels from offering lower room prices on competing booking platforms. The agency assessed and established negative effects on competition both between booking platforms as well as between hotels. By contrast, the remaining 13 cases were deemed clear object restrictions, and did not assess the effects of the conduct. Like the UK competition authority, the Bundeskartellamt additionally prohibited agreements under the equivalent German prohibition provision in cases lacking cross-border context, and, like in the case of its UK counterpart, the great majority of these cases were deemed object restrictions.

**France**

During the same period, finally, the French autorité de la concurrence enacted a total of 45 decisions establishing an infringement of Article 101. Of these, 40 were deemed clear object restrictions. 5 contained some level of effects analysis. Three of the latter concerned exclusivity agreements, in which the autorité de la concurrence established the foreclosure effects (but not the effects on consumer welfare) of the agreement. In the fourth, it assessed the effects of information exchange on competition in addition to several other restrictions that were deemed clear object restrictions:

*Und Abfallvermeidung (Case B4-1006/06); Haushaltskleingeräte (Case B7-42-06); Pharmagroßhändler (Case B3-129/03); Deutscher Lotto- und Totoblock (Case B10-148/05); Nord-KS (Case B1-116/04) (available at: www.bundeskartellamt.de.)*

122 *Booking.com (Case B9-121/13); HRS Bestpreisklausel (Case B9-66/10) - in this case, the authority actually left open, whether the agreement constituted an object restriction, because it could prove the actual effects: ibid, para 8.*


124 *Decision 09-D-36 of 9 Dec. 2009 relative à des pratiques mises en œuvre par Orange Caraïbe et France Télécom sur différents marchés de services de communications électroniques dans les départements de la Martinique, de la Guadeloupe et de la Guyane; decision 09-D-31 of 30 Sept. 2009 relative à des pratiques mises en œuvre dans le secteur de la gestion et de la commercialisation des droits sportifs de la Fédération française de football; Decision 09-D-06 of 5 Feb. 2009 relative à des pratiques mises en œuvre par la SNCF et Expedia Inc. dans le secteur de la vente de voyages en ligne.*
cases. The final decision that discusses the effects of the agreement in question is actually unclear as to whether the contractual clauses were deemed to restrict competition by object or effect. This decision dates from 2005, the early days of the more economic approach, and appears to analyse the foreclosure effects of similar standardised long-term distribution contracts, but does so very briefly and in a highly abstract manner, without providing much empirical evidence.

In sum, the competition authorities of the three biggest EU Member States have also overwhelmingly focused on pursuing object restrictions, and only very exceptionally assessed suspect agreements as to their actual effects before prohibiting them.

Commitments decisions

Commitments decisions are unlikely to address the dangers caused by restrictions of competition that do not fall into the object category adequately. First, one needs to bear in mind that, while the Commission has enacted 15 commitments decisions in cases of suspected Article 101 infringements since 2004, only four of these clearly concerned effects cases. Even if these were really the only restrictions of competition by effect that have taken place over this period, it is questionable whether a systematic policy of closing effects cases by means of commitments decisions would be adequate.

The public enforcement of Article 101 pursues two main objectives: it aims to eliminate the ongoing restriction of competition and intends to deter undertakings (both the investigated undertakings and third parties) from engaging in future anticompetitive conduct by imposing sanctions and thus making the conduct less attractive. Commitments decisions are capable of achieving the former of these aims. If the competition authority assesses the commitments offered by the parties properly and finds that these are sufficient to address its concerns, the danger to competition should

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125 Decision 05-D-65 of 30 Nov. 2005 relative à des pratiques constatées dans le secteur de la téléphonie mobile.
127 ibid., paras 38-46.
128 Since 2004, the German Bundeskartellamt and the French autorité de la concurrence have enacted 48 and 16 commitments decisions pursuant to Article 101 respectively. In comparison, the UK CMA merely appears to have enacted one commitments decision on the basis of Article 101.
129 See
be eliminated, provided that the parties abide by them. However, commitments decisions do not have a strong deterrent effect. Granted, the investigated undertaking will have to bear the cost that arises from the need for legal representation during the commitments procedure. However, it escapes a fine. As long as the legal costs do not exceed the profit made from the anticompetitive conduct, there will be little deterrent effect.

Private enforcement

Finally, private enforcement is unlikely, at this point, to pick up cases in which agreements restrict competition by effect within the meaning of Article 101. Unlike in the United States, public enforcement remains the norm and private actions for damages have traditionally been much rarer in Europe. Stand-alone actions, i.e. judicial proceedings in which injured parties sue the parties to an anticompetitive agreement independently of an infringement decision, are even less common than follow-on actions, in which the parties base their claim for compensation on a prior finding of anticompetitive conduct by a competition agency.

The European Commission has tried to encourage more private enforcement for the past years, and, on its proposal, the European Parliament and Council enacted Directive 2014/104/EU in November 2014. This directive requires Member States to enact a number of rules that will remove certain practical obstacles to compensation for victims of competition law infringements. For example, Member States are to ensure that infringement decisions by national competition authority are binding on the courts of that jurisdiction. They are also to facilitate access to evidence. However, quite apart from the fact that the transposition deadline for this directive only expired in

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130 The Commission and the national competition authorities therefore reserve the right to monitor the implementation of the commitments (eg European Commission, Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/6, point 128).
132 While standalone actions are still relatively rare in Europe, they are by no means unheard of. The UK Competition Appeals Tribunal, for example, recently awarded damages in such a constellation in Sainsbury’s Supermarkets Ltd v Mastercard (Case no 1241/5/7/15) [2016] CAT 11.
135 Article 9(1) of Directive 2014/104/EU, supra.
136 Articles 5-8 of Directive 2014/104/EU, supra.
December 2016, and a number of Member States have still not fully implemented the
directive, many hurdles remain. In particular, the directive does not require Member
States to make available the possibility of collective redress in their national legal
systems. EU Member States have very different legal traditions, and not all of these
systems incorporate collective redress. Some form of collective redress, however,
seems crucial to the success of private claims for damages, given the high cost of
antitrust proceedings and the often relatively limited individual return of such
proceedings. Furthermore, Directive 2014/104 was primarily designed to facilitate
follow-on actions, and was neither intended nor expected to significantly increase the
number of stand-alone actions for damages.\textsuperscript{137} In other words, private stand-alone
actions in national courts are currently unlikely to tackle the effects cases that the
European Commission and national competition authorities have not been pursuing
effectively under Article 101 for the past fifteen years.

\textit{Sensible priority setting?}

In sum, it appears that Article 101 is currently not being enforced effectively
against agreements that have the effect of restricting competition. As restrictions by
effect can be just as harmful to society as restrictions by object in terms of negative
effects on competition and consumer welfare, this seems like a highly unsatisfactory
situation at first sight. However, one also needs to be realistic about the EU competition
agencies’ enforcement capacities. Like any public body, competition agencies have
limited resources and are expected to use these wisely. Given the comparative
difficulty of proving restrictions of competition by effect to the required legal standard,
one must therefore consider whether reserving costly prohibition decisions for object
restrictions is not simply the most efficient way of enforcing Article 101. From a short-
term efficiency perspective, it does indeed not seem sensible to allocate resources to
prohibiting one restriction of competition by effect if it would have been possible to
bring to an end several legally less complex object infringements on the same budget
instead.

One the other hand, one also needs to consider the long-term consequences of an
enforcement strategy that focuses on pursuing object restrictions only. The lack of
enforcement action against effects restrictions risks sending the message to

\textsuperscript{137} W Wils, ‘Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement:
Past, Present and Future’ (2017) 40 \textit{World Competition} 3.
undertakings that such restrictions will no longer be prohibited and, more importantly, no longer be fined. From a psychological point of view, this message deprives Article 101 of its deterrent effect with regard to restrictions by effect. Consequently, one may expect undertakings to enter more readily into agreements that ‘merely’ restrict competition by effect. From a legal point of view, this enforcement pattern could furthermore end up creating administrative precedent, from which the Commission, being bound by the principle of equal treatment, may not deviate without reason in individual cases. All of these factors should be taken into account and balanced against each other when setting enforcement priorities.

Conclusion

Is this the demise of restrictions by effect under Article 101? The patient certainly seems to be in a critical condition. Despite having carried out an extensive reform that emphasised the need to carry out detailed assessments of the investigated conduct’s actual effects instead of relying on formalistic presumptions of illegality, both the European Commission and the national competition authorities have in practice only rarely carried out such assessments under Article 101 since 2004. This is not the result of having extended the concept of object restriction to include new types of agreements. Rather, it is the outcome of a revised case selection: for the past 10 years and counting, the European competition authorities have almost exclusively chosen to prohibit cases containing object restrictions. Effects cases, if they were pursued at all, have primarily been addressed by means of commitments decisions.

The reasons for this development are not entirely certain. While the European Commission and most national competition authorities are committed to prioritising the fight against cartels, there does not seem to be any official pan-European enforcement policy according to which prioritising non-cartel object restrictions over effects restrictions is best practice. The most likely explanation for this phenomenon, however, is that object cases are comparatively easier and cheaper to pursue. Since the European Commission revised its interpretation of the EU competition rules so as to require the likelihood of consumer harm in addition to the restriction of economic freedom or mere foreclosure effects, proving actual or likely anticompetitive effects has become significantly more burdensome. By the same token, adding this new requirement to the analysis of an agreement’s effects has resulted in one more element of analysis that courts could topple on appeal. It is therefore understandable that the competition
authorities, which operate on a limited budget, should prefer to focus their formal
prohibition decisions on legally more straightforward objects cases that are quicker and
cheaper to see through. This is particularly so in the case of DG Competition, which
juggles many responsibilities, all of which make competing demands on its resources.
In addition to enforcing Articles 101 and 102 and overseeing their enforcement at the
national level, DG Competition is also responsible for carrying out EU merger control
and enforcing the State Aid rules. And while it has a large degree of discretion on
whether to pursue a case under the first two prohibition provisions,\(^ {138}\) it has
significantly less so with regard to the latter two. Clearly, it needs to prioritise.

That does not mean, however, that the current trend is a desirable development.
Restrictions by effect are not necessarily less harmful to competition and consumer
welfare than object restrictions. Focusing on object restrictions only therefore results in
an under-enforcement of Article 101 to the detriment of competition and consumers.
Commitments decisions and private enforcement cannot fully stop this gap. While
commitments decisions can put an end to the suspected infringement, they only have a
minimal deterrent effect for future anticompetitive conduct, and private enforcement is
not yet sufficiently developed in Europe to fulfil a similar function to private antitrust
enforcement in the United States.

The European Commission and the national competition authorities therefore
need to consider whether the current pattern of case selection is really desirable in the
long term. The danger is that the systematic non-enforcement of Article 101 against
agreements that have the effect of restricting competition undermines the deterrent
effect of this prohibition for such conduct. It is also liable to create administrative
precedent which could result in Article 101 no longer being enforceable against
restrictions by effect in the individual case. One solution may be to strike a better
balance in the case selection. While it is sensible to focus on cases that are both
harmful and relatively easy to win under the aspect of an efficient use of resources, one
should not entirely neglect effects cases so as not to send the message to the business
community that Article 101 will no longer be enforced against such conduct. One
might also think about whether current prohibition decisions have not, with the best
possible intentions, somewhat overshot the mark in terms of depth and amount of
evidence collated to prove or approximate the investigated effects. The 816-page long

\(^{138}\) See eg W Wils, Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU
Antitrust Enforcement (2011) 34 World Competition 353.
decision in *Servier* comes to mind, amongst many others. This discussion could usefully be integrated into the current debate about strengthening the enforcement powers of competition authorities in Europe.\textsuperscript{139}

\textsuperscript{139} European Commission, Staff working document, Implementation Plan accompanying the document ‘Proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, SWD(2017) 116 final, available at ec.europa.eu/competition/antitrust/implementation_plan_en.pdf.