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The Object of my Effect: The Role of Economics in Restrictions "By Object" in the European Union

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Introduction

Economic analysis has played an increasingly important role in the application of competition law, even in relation to investigations traditionally assessed from a legal perspective, such as potential infringements of Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Despite the increasing importance of the tools offered by economic theory,[1] both the European Commission (EC) and National Competition Authorities (NCA) tend to categorise many practices as restrictions "by object".[2] For example, in Spain, nearly all sentences imposed by the Spanish Competition Authority with the highest fines have been categorised as infringements "by object". These are practices that produce "obvious restrictions to competition" so that the use of economic analysis is usually not required to determine if the conducts infringe competition law or not.

Over the years, this has raised many concerns as to whether the level of enforcement has been appropriate in such cases. Recent case law, such as the European Court of Justice (ECJ) ruling in the *Cartes Bancaires* case, has reactivated this debate, suggesting that competition authorities should change their standard of proof when categorising practices as restrictions "by object".

In this brief article, we review the approaches that competition authorities and courts have taken, and outline the economic principles that we believe should be considered when dealing with such cases.

Restrictions "By Object"

Article 101 (1) of the TFEU prohibits:

> *"Agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."*

If a practice is found to be restrictive "by object", competition authorities are not required to demonstrate that the conduct had any anticompetitive effect[3] since these practices are considered, "by their very nature", to be harmful to competition:

> *"Restrictions of competition "by object" are those that by their very nature have the potential to restrict competition. These are restrictions which in the light of the objectives pursued by the Union competition rules have such a high potential for negative effects on competition that it is unnecessary for the purposes of applying Article 101(1) of the Treaty to demonstrate any actual or likely anti-competitive effects on the market."*[4]

Practices traditionally considered to be restrictive "by object" include agreements to fix prices, to restrict output, and to share (or allocate) markets. Other examples from case law embrace resale price maintenance and exclusive distribution agreements.

The use of restrictions "by object" has been justified by competition authorities for the advantages they offer, specifically:

- **Resource and time savings**. To the extent that resources from competition authorities are limited, a full economic analysis of every single case would be very costly and might turn out to be unnecessary, as it might just confirm what is obvious in the first place: that the practice in question clearly results in harm to competition.

- **Legal certainty and deterrence**. Identifying a set of practices that are known to be serious and harmful restrictions to competition—for instance, in the EC guidelines— allows companies to be more cautious when engaging in these practices.[5] Conversely, an effect-based approach, which demands an assessment of the firms' behaviour on a case-by-case basis, increases legal uncertainty since firms cannot be sure in the first place if their behaviour may constitute an infringement to competition law or not.

These advantages explain, to a certain extent, why competition authorities prefer the use of restrictions "by object", as they can rely on simple rules of thumb, avoiding the application of economic analysis.[6]

Despite these advantages, however, there are important risks when categorising practices as restrictions "by object". While it is true that the investigation requires less time and effort/resources, it carries the risk of unfairly condemning practices that do not actually restrict competition, or conduct that could also generate economic benefits that outweigh the negative effects. This, in turn, might prevent firms from engaging in practices that could be beneficial to consumers due to the fear of being accused of anticompetitive conduct.[7]

From a theoretical/qualitative perspective, the trade-off between the costs and benefits of classifying a restriction "by object" is straightforward. In practice, however, it is extremely difficult to know where the line should be drawn when defining restrictions "by object" vs. restrictions "by effect". This is particularly the case when considering that the potential benefits and costs could materialize in the long term and/or in other markets and contexts.[8]

It seems clear, however, that a competition authority should have strong arguments, particularly a solid and robust theory of harm,[9] and/or convincing empirical evidence, before the authority can conclude that a certain practice entails a restriction "by object" that is likely to harm competition. This is the only way to reduce the potential risk of unfair sentences that might discourage pro-competitive conduct in the future and/or in other markets. Thus, although the concept of a "by object" restriction inherently carries certain risk, the authority should try to minimise it.[10]

From an economic perspective, a theory of harm suggesting that a certain practice produces restrictions to competition is robust if:

a) Economic theory supports it; and
b) There is empirical/past evidence that shows that the practice in question always, or almost always (under most circumstances), harms competition.

In other words, a restriction "by object" can be justified only when experience based on economic analysis and empirical evidence consistently indicates that the specific conduct in question entails an inherent risk of a serious harmful effect.[11] Practices that do not fulfil these criteria should not be classified as an infringement "by object", or at least not before some economic considerations have been made.

Aproaches to Restrictions "By Object"

Neither competition law nor the guidelines from competition authorities provide a conclusive definition or standard to be applied when identifying practices that should be classified as restrictions "by object". This concept has been subject to different interpretations, although three main approaches from case law stand out:

- **"Object box"**[12] is based on the rather ambiguous claim that a practice is a restriction "by object" when the characteristics of the practice, specifically its content or aim, implies "obvious or explicit restrictions to competition". That is, the mere fact that the intent of the parties involved in the practice was to restrict competition (for example, setting anticompetitive prices) may be enough to sanction them.

  Under this approach, it would be sufficient to analyse the broad terms of the practice (for instance, an agreement) and no further details, in order to determine if that practice should be categorised as a restriction "by object". This has led some authorities to define a list of practices falling under this category,[13] including:
  - Price fixing;
  - Output restrictions;
  - Market sharing (either geographical or product segment) agreements; and
  - Resale price maintenance.

The defined list of restrictions is based on the presumption that such practices produce harm to competition most of the times, regardless of the context, the details behind the agreement, and the characteristics of the market or any indirect or secondary effects they might produce. In other words, the presumption of harm accompanying object restrictions is irrefutable in most cases.[14]

This approach presents clear advantages, such as high legal certainty, since firms know exactly what not to do so that engaging in a practice outside the list guarantees, at least, a full-fledged economic assessment before firms can be accused of infringing competition law.

- **Legal and economic context**.[15] Under this approach, a restriction "by object" is not exclusively driven by the aim or content of the agreement, but the legal and economic context in which the conduct takes place also plays an important role. For example, the potential harm might depend on the specific market circumstances (possibly with few exceptions) so that specific conditions could prevent certain practices from restricting competition.

  To the extent that, for the same type of conduct, competition authorities may find a restriction "by object" in one case (in one particular market or at one particular period of time) but not in another, a case-by-case assessment is required. Taking the legal and economic context into account may help to absolve practices that would have been unfairly placed inside the "object box", but this comes at a cost: it undermines the justifications for the existence of restrictions "by object" (saving time and resources, providing legal certainty, and deterring potential anticompetitive practices).

- **Extended approach**.[16] This is a modified version of the "legal and economic" context approach, where a broader interpretation with some market analysis is needed in order to establish a restriction "by object". This might involve an extensive analysis of the competitive structure of the market and an assessment of market power.

  As this is a broader concept, it is more difficult to distinguish between the analysis required to establish a restriction "by effect" and the one needed to establish a restriction "by object". Indeed, this may lead to identifying restrictions "by object" that are, in practice, "reduced" versions of restrictions "by effect".

Groupement des Cartes Bancaires

The ECJ ruling of the appeal of the *Groupement des Cartes Bancaires* (GCB) case involving network bank fees in a two-sided market further refined the notion of "by object" restrictions of competition.[17]

The ECJ sentence criticized the simplistic approach followed by the EC in a case where it was not obvious that the conduct was harmful to competition.

The EC had accused the GCB of setting higher network fees to issuer banks that were inactive or not very active in its network, compared to other members with an extensive network of acquiring merchants and ATMs. The EC found that the practice's purpose was to keep the price of payment cards artificially high. GCB claimed, however, that these measures were aimed at preventing a "free-riding" effect, since some issuer banks "sat" on the investments made by other members that had extensive networks. This, in turn, reduced the incentives to invest and was, ultimately, detrimental to consumers.

The ECJ rejected the ruling of the European General Court (EGC), which had previously upheld the EC's decision that the price measures adopted by the GCB were restrictive "by object". It pointed out that the ECG had not conducted a thorough analysis of the arguments of the undertakings and of the economic evidence, and that it had failed to apply the core criterion for assessing the object of the GCB price measures: that it in itself "*revealed a sufficient degree of harm to competition*".

The ECJ ruling was clearly more inclined to the "extended approach", suggesting more specific standards of proof, and sending the signal that competition authorities should be more careful when categorising practices as restrictive "by object". In particular, the ECJ held that in order to determine whether an agreement had an anticompetitive objective or not, the "*content of its provisions, its objectives and the economic and legal context of which it forms part*", and the "*nature of the goods or services*", should be carefully considered.

The ECJ judgment in the GCB case has had some important consequences, which are relevant when assessing potential restrictions "by object":

- First, the EC should show likely effects on competition, unless it is obvious that the restriction at issue, "by its very nature", is harmful to competition;
- Second, demonstrating that a certain measure is merely "capable" of restricting competition is insufficient, except in the case of clear-cut restrictions; and
- Finally, and most importantly, agreements involving complex measures or with indirect/secondary aims or effects, such as those at issue in the GCB system, should not be subject to the "by object" simple/direct standard of proof.

Restrictions "By Object": The Economic Perspective

The tendency of the EC and NCAs to overly rely on the notion of a restriction "by object" to condemn practices that might not always produce obvious harm to competition under most circumstances is, somewhat, understandable. Scarce resources and time constraints often hinder the application of a proper economic analysis.

These benefits, however, could have been obtained at a very high cost: sanctioning numerous pro-competitive practices and deterring conduct that might benefit consumers in the long run.

In this sense, categorising certain practices as restrictions "by object", without assessing the economic context in which they are conducted, could bring more costs than benefits in the long run. Thus, for these cases, counting on a robust theory of harm that establishes that the practice in question is likely to restrict competition under most circumstances (or under the specific market circumstances of the case at hand) is crucial in order to define if that practice should indeed be considered as a restriction "by object".

Besides, if such a theory of harm shows that it is indeed evident that the conduct restricts competition, then it should not consume much time and resources to develop and test it empirically so that the existence of limited resources should not be an excuse not to do so.[18]

In addition, any practice that could also generate pro-competitive effects that compensate or reduce its negative impact likely will not constitute an obvious impairment to competition. This should be ruled out as a candidate for a restriction "by object", or at least not without any economic consideration.

Even extreme cases, such as some types of hard-core cartels, could, under certain circumstances, benefit consumers. For instance, if in the absence of a price-fixing agreement, only one firm could remain in the market. To the extent that collusion is not perfect,[19] then the agreement could be preferable. This is not to say that hard-core cartels should not be categorised as restrictions "by object"—indeed, most cases should be. But competition authorities should, in some cases, also assess the economic context and other potential effects before reaching the conclusion that the intent of the practice was to restrict competition, and that there is no other plausible explanation or countervailing effects.[20]

This view is in line with the "*rule of reason*" standard required by the US antitrust law where, in theory, an assessment of the legal and economic context and a balance between pro- and anticompetitive effects—as predicted by economic analysis—are necessary. This is also in line with the recent ruling of the ECJ in the GCB case.

The economic literature, however, does not currently offer a general analytical framework that could be applied to any case in order to determine if a practice should be categorised as restrictive "by object". Economic theory and experience show, however, that some market circumstances deserve careful consideration, especially when the market is complex and there are additional elements or indirect effects.

Below, we outline a series of practices or situations where either economic theory or empirical evidence has shown that the defined list of restrictions or arguments that, under normal circumstances would cause "obvious harm to competition", often do not.

Exchange of Sensitive Information and Other Practices Facilitating Collusion

Although collusive agreements are usually harmful to competition, there are some market characteristics and circumstances that might not allow or limit their effectiveness and sustainability, particularly when collusion is tacit/implicit or facilitated by certain practices, such as information exchanges among competitors. In these cases, the analysis of the market characteristics, the economic context, and other elements are relevant to build a sound and robust theory of harm.[21]

Thus, the economic literature and the EC guidelines have established that stable and transparent markets comprising high entry barriers, no major innovations, and a relatively constant demand, are prone to collusion. In a market where simple, homogeneous products are commercialized and where there are few competitors with symmetric structures and structural links (such as cross-ownership relationships), collusion is also easier to reach. Other elements, such as the lack of countervailing buyer power and frequent interaction of firms in the market or in other markets, might also facilitate collusion.

To the extent that information exchange and other practices facilitate the creation of or strengthen these elements, it is more likely to reach a collusive agreement. This, in turn, depends on how the exchange or practice is conducted, and on the nature of the information exchanged, specifically:

- **The type of information**. If information is aggregated and does not relate to future intentions on "strategic variables" of competition, such as prices or production capacity, it is unlikely to facilitate collusion.

- **Market coverage**. If firms do not cover a sufficiently large share of the reference market, it is very unlikely that information exchanges will have restrictive effects on competition.

- **The level of information detail**. It is harder for firms to predict the future conduct of competitors and adjust their strategies accordingly when the information exchanged is not comprehensive.

- **The age and reference period of the exchanged information**. Generally, the exchange of historical data does not facilitate collusion, as it does not contribute to the timely detection of firms that deviate from an agreement.

- **The frequency of the exchange**. If information exchange is relatively infrequent in relation to price setting in the industry, firms are not able to adapt their commercial policies promptly in response to their competitors' strategies. Moreover, the timely detection of deviations is crucial to sustain collusion, since punishments have to be credible and effective.

There are no specific thresholds to determine when a variable is strategic, or what the relevant market coverage, the level of detail of the information, and the age and frequency of the exchange should be in order to facilitate collusion. This depends on the specific economic context as defined by the market characteristics.

Thus, whether an information exchange between competitors is anticompetitive and should be categorised as a restriction "by object" will depend both on the pre-existing market situation and on the manner in which the exchange alters this situation. This, in turn, depends on the type of the information and on how it is specifically exchanged.

One recent example is the Spanish Case S/0404/12 ("AENA Commercial Services"), where the Spanish Authority's investigation focused on the exchange of commercially sensitive information between car rental companies in several Spanish airports, and categorised this conduct as a restriction "by object". However, there was no consideration of the economic context, how the information was exchanged, or the manner in which the exchange took place, which was crucial in order to determine if the conduct was anticompetitive or not.

Markets with Asymmetric Information

Asymmetric information concerning consumers may justify practices that, without a careful assessment, might appear like a restriction "by object" has occurred.

For instance, in markets where companies do not hold information regarding their customers, information exchanges about client profiles may help firms eliminate the inefficiencies associated with such asymmetry, particularly by allowing them to have a better understanding of the market conditions, such as the demand structure. This allows the firms to implement effective marketing strategies and efficient distribution systems, which benefit consumers. Moreover, in markets with high demand fluctuations where suppliers are compelled to maintain high stocks to satisfy demand peaks, information exchange can lead to better demand forecasts and stock optimization.

Information sharing also enables certain sectors to operate effectively, such as the financial and insurance markets where an in-depth knowledge about the risk profile of clients is crucial. Regular sharing of information among credit institutions or insurance companies about the risk that a borrower cannot pay a loan, or the probability that an event triggering insurance coverage occurs, allows companies to reduce the risk and charge lower prices for their products and services which, in turn, benefits consumers.[22] The former UK Competition Commission has stated that, in the case of financial/credit markets, data sharing regarding clients' claim history facilitates firms' operation in those markets, and that the absence of such data sharing will eventually harm competition.[23]

One very well-known Spanish case where these issues were relevant is "*Cartel del Seguro Decenal*" (Inherent Defect Insurance Cartel)[24,25] categorised by the Spanish Authority as a restriction "by object". This sentence was subsequently annulled by the Spanish High Court. Among others arguments, the Court considered that the insurance companies had not engaged in collusive behaviour but rather in cooperation agreements in order to conduct joint actuarial analysis, and exchange historical data on the frequency of incidents and the amount of damages in order to set prices that properly reflected the risks assumed.

Two-Sided Markets

Two-sided markets are markets that contain platforms that allow the interaction between two end-user groups. These types of markets can be found in many sectors, such as search engines (users and advertisers), payment card systems (cardholders and merchants), and newspapers (readers and advertisers).

One crucial characteristic of these markets is that the platform and the benefits of each consumer group are affected by how each side of the market is used. How much each side decides to use the platform, however, does not always take into account the effects that such usage might have on the other side. This might lead the platform to underperform, which would be harmful for consumers. For instance, in order for a payment card system to be effective, merchants require that many of their customers pay with cards, while consumers require that many merchants accept their credits cards as a means of payment. However, cardholders' decisions to purchase do not take into account the costs of developing the network.

In those cases, firms often engage in practices aimed at achieving the correct balance between the different uses and the availability of agents on both sides of the market so that the platform functioning is optimized. These practices have often been categorised as anticompetitive restrictions "by object". For instance, the payment card system sector has been accused of setting excessive interchange fees.

Interchange fees are payments made by the merchant banks ("acquirers") to the cardholder banks ("issuers") for each payment/card transaction. Acquirers, in turn, pass this cost on to their merchant customers. Since interchange fees have traditionally been set collectively by issuing and acquiring banks in open payment networks such as Visa and MasterCard, they have often come under antitrust scrutiny under Article 101 by the EC and by NCA in a number of Member States.

In some instances, jointly setting interchange fees has been considered a restriction "by object". The underlying argument is that these practices distort competition in acquiring markets by increasing acquiring costs and hence merchant fees. However, in the same way that interchange fees increase acquiring costs, these also lower issuing costs (in theory, by exactly the same amount).[26]

From an economic perspective, interchange fees might fulfil the role of achieving a profit-maximising price structure across issuing and acquiring markets.

Thus, in order to conduct a proper assessment, one must consider the interactions between the issuing and acquisition activities of a payment system, and the fact that those activities produce "indirect network externalities": the extent of merchants' acceptance of cards and the number of cards in circulation each affects the other.

The GCB payment system of debit/credit cards is another example where apparent restrictive practices (fee-setting agreements) were actually intended to promote the efficient use of the bank network. The ECJ was right when it stated that the agreements were legitimate, since they were intended to mitigate a negative externality—the "free-riding" effect—of one of the parties in this two-sided market. To the extent that many new banks in the network had more incentives to be in the card-issuing business rather than extend their networks to provide services to merchants, differentiated network fees were needed to provide the right balance between the two sides. This prevented some issuer banks from "free riding" on the investments made by other members that had extensive networks, and provided the right incentives to be active on both sides of the market, which clearly benefited consumers, both cardholders and merchants.

Resale Price Maintenance (RPM)

In vertical relations, the incentives of producers/wholesalers and retailers are often not aligned, which creates several inefficiencies that can result in high consumer prices.

For instance, in markets where it is difficult for consumers to observe the characteristics or quality of the products they wish to acquire, there are often incentives for retailers to "free ride" on the sales efforts made by other retailers, which might allow them to offer more attractive prices. In the long run, firms are less eager to invest and devote resources to promoting sales, which is harmful not only for the producers/wholesalers but also for consumers, as they are less informed when making appropriate purchasing decisions.

Besides, when the incentives between the two parties are not aligned, retailers tend to set higher prices in order to increase their individual margins, leaving consumers worse off. This is a well-known effect identified in the economic literature called "double marginalization".

RPM—an agreement between a producer/wholesaler and a retailer to sell the products at a specified value—solves these problems by preventing retailers from offering lower prices, and therefore being unable to steal consumers from competitors preventing the free-riding problem, or by precluding firms from setting higher prices, which avoids double marginalization. Further benefits of RPM identified in the economic literature include its role as an entry facilitator, as a signal for quality, or as a tool helping to align other parties' incentives that are not directly related to prices.[27]

However, competition authorities have often regarded RPM as a price-fixing mechanism aimed at facilitating collusion among producers/wholesalers by reducing inter-brand competition, or among retailers by reducing intra-brand competition. While this may be true under certain circumstances, particularly in a competitive retail market with stable retail cost conditions where RPM could enhance cartel stability,[28] this is not always the case.

Indeed, to the extent that the net impact from pro- and anticompetitive effects of RPM are not straightforward, an analysis of the market characteristics and other economic elements are essential before a practice can be categorised as a restriction of competition "by object".

Following the *Leegin* case in the US,[29] the ECJ took a step forward in the *CEPSA* case[30] when it stated that RPM was not necessarily a hard-core restriction because it could generate efficiencies that could be passed onto consumers. Moreover, the EC Vertical Block Exemption Guidelines have also recognized such advantages on many occasions. Nonetheless, several NCAs in the EU have continued to apply a restrictive approach to RPM, often categorising these practices as hard-core infringements or restrictions by "object".[31] For instance, in the Spanish case *VS/652/07* (REPSOL/CEPSA/BP), the competition authority condemned a practice of recommended and maximum retail prices in petrol stations. In its decision, however, the authority never mentioned the benefits of this practice, which included avoiding double marginalization or providing retailers with information on optimum prices given the specific competition conditions of their stations.

Markets with Natural Monopoly Characteristics

The conduct of firms operating in markets with characteristics resembling natural monopolies also deserves careful assessment. This is usually the case in markets where firms have large fixed costs and low or decreasing marginal costs so that it would be more efficient for only one (or very few) firms to operate in the market, taking advantages of economies of scale. Otherwise, none of the firms would be profitable, jeopardizing the supply or the quality of the products or services, which would be detrimental to consumers.

Although sectors that resemble natural monopolies are usually regulated, this is not always the case. For instance, in the liner shipping industry firms incur high fixed or investment costs (the ship fleet) but very low marginal costs.[32] Hence, competition in this sector tends to be fierce and firms often engage in aggressive price wars that jeopardize their financial viability and the quality and security of the service.[33]

Indeed, on some occasions, the EC has granted block exemptions for services in the liner shipping industry, exempting firms from prohibiting anticompetitive agreements under Article 101.[34]

Nonetheless, not all firms in this industry, nor all sectors observing these characteristics, are always subject to such exemptions. In these cases, a careful assessment of the market characteristics and the economic context is necessary in order to establish if a certain agreement represents a restriction "by object".

In Spain, the competition authority has recently issued various sentences relating to the liner shipping industry for alleged anticompetitive price-fixing agreements.[35] The parties involved raised some allegations that the competition authority did not seem to have considered carefully, such as that, for certain routes and dates with very high demand, competitors were required to agree on the price of the tickets, since they were obliged by law to accept passengers from other suppliers in order to speed up the transport service. Also, the firms have been consistently generating losses in certain routes, although in some cases they could not exit the market because of public service obligations.

Final Remarks

In this short article, we have outlined relevant case law dealing with the everlasting debate of how the notion of restriction "by object" should be defined and applied by competition authorities.

The EC and NCAs have very often categorised practices as restrictions "by object" and condemned conduct where the harm to competition was not always obvious or when there was plausible explanations for the practice, other than an anticompetitive practice intended to restrict competition.

This tendency is, to some extent, comprehensive, due to resource and time limitations faced by authorities to develop and test a solid and robust theory of harm, as well as the need to provide legal certainty and deterrence.

Nonetheless, this should not come at a high cost. Although it is not obvious where one should draw the line when defining a restriction "by object" and a restriction "by effect", it is clear that competition authorities should follow certain basic economic principles in order to minimise the risk of unfair accusations, as this may be harmful for consumers in the long run.

The economic perspective supports the view that practices that are not obvious restrictions to competition under most circumstances deserve a careful assessment backed up by a solid and robust theory of harm based on economic theory and empirical evidence. In cases where one can identify potential pro-competitive effects, or where a quick and simple assessment is not enough to demonstrate negative effects, then these should not be categorised as restrictions "by object", or at least not without a careful consideration of the economic context and market characteristics. Indeed, if it is that obvious that the practice restricts competition, it will not be necessary to devote much time and effort to develop a solid and robust theory of harm.

Although economic theory does not offer a consolidated analytical framework applicable to any case, it can play an important role in determining whether a practice should be categorised as a restriction "by object". For instance, as part of the theory of harm, modelling the economic incentives of the parties can help to assess whether the parties' allegations are plausible or whether an alternative explanation is more likely.

Since a practice's restrictive nature depends on the market context and circumstances, competition authorities need to carefully address these elements in order to demonstrate the likely harm to competition and consumers. As stated by Cimentarov (2014) when referring to King (2011),

> *"One cannot simply limit object restrictions to a list of practices, but has to perform a case-by-case assessment of each practice in the broader legal and economic context within which it takes place."*

In this article, we have also identified four situations that have traditionally been categorised as restrictions "by object", but where such conclusions do not seem straightforward. As a general principle, if markets are not simple (in the sense that there have secondary or indirect effects, particularly externalities), then practices that are usually considered as obvious restrictions might not be so.

Economists usually identify these situations where "market failures", particularly externalities, asymmetric information, and natural monopolies exist. A market failure is a term used to describe a situation that occurs when the supply of a product or service is not efficient so that effective competition is not reached and, therefore, social welfare is not maximized.

Many of the firms' practices observed in these markets are designed to correct these failures rather than pursuing an anticompetitive purpose. In other words, even though these practices might seem intended to be anticompetitive, they very often do not restrict competition and are aimed at overcoming problems in the interest of consumers.

In short, with very few exceptions, it is difficult to explicitly define what the "by object" restrictions' box should encompass; perhaps only explicit agreements with the intent to set anticompetitive prices/outputs in sectors with no market failures and other indirect/secondary effects. Although the risk of condemning pro-competitive practices cannot be reduced to zero, as this is inherent to the concept of a "by object" restriction, before categorizing a practice as restrictive, the authorities should at least make some economic considerations in order to minimize this risk.

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Notes

[1] For instance, to build a solid and robust theory of harm to determine if a certain practice should be considered anticompetitive or not.

[2] In this regards, Cimentarov (2014) points outs that:

"*There is an ongoing tendency by both the European Commission and the European Courts towards finding object restriction. In the period between 2000 and 2011 the Commission issued, excluding cartels, 18 infringement decisions, 17 out of which involved object restrictions and only one case that was a restriction by effect. At the level of the ECJ, it is barely possible to find an Article 101 judgment which does not conclude that the practice at hand is an object restriction*."

Similarly, Zenger and Walker (2012) mention that:

"*The problem mainly derives from the Commission's proclivity to characterise agreements as restrictions by object that do not "by their very nature" harm competition and for which there is no "presumption" with regards to the "serious nature of the restriction" or "experience showing" that the type of agreement is "likely to produce negative effects". In particular, the Commission has sometimes shown an inclination to interpret certain (open) types of non-cartel restrictions as cartel-like conduct, even if they serve a fundamentally different economic purpose*."

[3] That is, object and effect requirements are distinct and alternative conditions, and are not cumulative. See, for instance, the ECJ rulings in cases:

– *Société Technique Minière v Maschinenbau Ulm GmbH*, Case 56/65;

– *Competition Authority v Beef Industry Development Society ("BIDS") and Barry Brothers*, Case C-209/07; and

– *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Case C-8/08.

[4] "*Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the "De Minimis" Notice*". European Commission. 2014.

[5] The sanctioning power of competition authorities, the fines in previous cases, as well as the possibility of private damage actions, clearly enhance this effect.

[6] See, for example, "*Green Paper on Vertical Restraints in EC Competition Policy*." COM (96) 721 final, 1997, EU Commission, paragraph 86.

[7] In this regard, it is also fair to note that an in-depth economic analysis of a potential infringement "by effect" (which may be time and resource consuming) does not necessarily guarantee accurate results, as the lack of appropriate data and the complexity of the analysis can limit its effectiveness and robustness.

[8] For instance, how could the benefits of deterring potential anticompetitive practices in the future be quantified? How could the costs of not investigating a potential anticompetitive practice by a NCA due to insufficient resources be estimated?

[9] A theory of harm is an hypothesis about how a practice could produce harmful effects to competition and adversely affect customers. In order to formulate the hypothesis, it should be tested against economic theory and empirical evidence.

[10] That is, although a certain percentage of "false positives" (condemning pro-competitive conduct) may be acceptable (to the extent that other benefits are achieved, such as time and resource savings and legal certainty), this percentage should be very small.

[11] As stated in the Guidelines of Article 101(3) (supra note 25, paragraph 21), the presumption of harm for object restrictions in the EU is justified by their "*serious nature*" and by past "*experience showing that restrictions of competition by object are likely to produce negative effects on the market and jeopardize the objectives pursued by the Community competition rules*".

[12] See, for instance, Whish and Bailey (2012), paragraph 124; and the ruling of the ECJ on *European Night Services v Commission*, Case T-374, 1998, paragraph 136.

[13] See, for instance, the EC notices:

– *"Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC)"*, 2004*;*

– *"Guidelines on Vertical Restraints",* 2010; and

– *"Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements",* 2011.

[14] In this regard, see, for instance:

– *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit,* Case C-8/08, paragraph 31;

– King (2011), page 294;

– Whish and Bailey (2012), pp. 117-118; and

– Nagy (2013), p.554.

[15] See, for instance, Kolstad (2009). This view was also taken by the General Court when it rejected the EC decision in *GlaxoSmithKline Services Unlimited v Commission*, Case T-168/01, 2006, which concerned the setting of higher wholesale prices for pharmaceutical products intended for export in order to avoid parallel trade.

[16] This view is exemplified, for instance, in the ECJ's decision in *Allianz Hungária Biztositó and Others*, Case C-32/11, 2013.

[17] *Groupement des Cartes Bancaires v European Commission*, Case C 67/13 P, 2014.

Groupement des Cartes Bancaires is a network of the main French banks that was established to manage a system of debit and credit cards, enabling consumers to make payments to all affiliated merchants to the network.

[18] As a matter of pure logic, if it is difficult and/or very time consuming to demonstrate that a practice is harmful, then one cannot be certain that this is very likely to produce an obvious restriction to competition. Although the analysis has been done properly many times in the past, not all circumstances are the same and new cases may deserve at least some economic considerations before they are categorized as a restriction "by object", especially when other plausible explanations for the conduct in question may exist.

[19] In the sense that firms set high prices compared to a situation of effective competition, albeit below monopoly levels.

[20] In particular, the alleged (usually pro-competitive) objective or intent of the conduct claimed by the parties, as well as any additional element or market circumstance.

[21] For more information see, for instance, Ivaldi *et al* (2003).

[22] For more information, see OECD (2010).

[23] "*Guidelines for market investigations: Their role, procedures, assessment and remedies*." UK Competition Commission. 2013. (Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf)

Notes

[24] Defects that new buildings /construction might have and that only become apparent once in use.

[25] Case S/0037/08.

[26] This is why cardholder fees are usually so low.

[27] See, for instance, Inderst and Maier-Rigaud (2015) and Font-Galarza et al (2013).

[28] For more information, see Motta (2004), p 158.

[29] *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877 (2007).

[30] *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, Case C-279/06.

[31] See Amato (2013). In this respect, it is also worth noting that the Bundeskartellamt (German Competition Authority) recently fined Recticel Schlafkomfort GmbH (a mattress producer) for €8.2 million for imposing RPM on retailers. (http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/22_08_2014_Matratzen.html)

[32] Once a ship is acquired, it is relatively cheap to assign it to a route—basically, only the fuel and the port fees have to be covered. Once a ship has been scheduled to cover a route, the marginal cost of allowing additional passengers is practically zero.

[33] In this regard, see Phang (2009).

[34] For instance, the Maritime Consortia Block Exemption Regulation (extended recently until April 2020) allows shipping lines with combined market shares below certain thresholds to enter into cooperation agreements to provide joint cargo transport services.

[35] See, for example, cases *S/0080/08* ("Navieras Ceuta"), *S/0241/10* ("Navieras Ceuta II"), and *S/0244/10* ("Navieras Baleares").

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