



FACULTY OF LAW

Lund University

Iina Hammarsten

UNDERLYING OBJECTIVES BEHIND THE
RECENT COMPETITION LAW
DEVELOPMENTS IN THE APPLICATION OF
ARTICLE 101 –
A MORE ECONOMIC OBJECT ANALYSIS

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Moreover, I have also taken note and accepted the rules of Lund University in regard to plagiarism.

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SUMMARY

Agreements between firms can be found illegal under the Article 101 of TFEU. Traditionally, according to the Article, there has been two ways to find agreements between undertakings anti-competitive, either by the object of the agreement, or by the effect of the agreement. These are two distinct conditions, which are clearly very different from each other by nature. The conditions are therefore also two alternative conditions – not cumulative, meaning that those requirements do not have to be applied at the same time.

However, the recent case-law development from the European Court of Justice has, arguably, been blurring the lines between these two requirements in their recent judgments, which might indicate a change in the approach of applying the Article 101 by object and effect. One particular case, a relatively recent judgment, if taking into consideration the few decades of competition law we have had in Europe, is central to the discussion;

C-32/11 - Allianz Hungária Biztosító, from March 2013. The judgment by the Court in the case has got a lot of attention and caused a considerable amount of debate in the field of competition law throughout the Member States, dividing opinions in the discussions around it and leaving question marks along the way.

The CJEU has a huge responsibility when deciding cases in competition law; they need to be aware of changing circumstances, “judge right” and keep the EU-wide goals in mind. The thesis is an insight to, and pursues an overview of, the way the ECJ works in its judgments in Competition law. The case of *Allianz Hungaria* was referred to the European Court of Justice by the Supreme Court of Hungary. It further tries to understand the objectives of the case-law from *Allianz Hungaria* by taking a more theoretical approach into understanding the underlying practices. There is constant development on the market by the different businesses, but also from the law enforcement side the approaches are changing.

Preface

I would like to thank my dear grandmother for forever doubting me. And even though last year you already started to believe in me - I got through this year by thinking that you may still have some left.

Iina Hammarsten

26 May 2015, Lund

1. INTRODUCTION

1.1. Towards a more economic jurisprudence

The jurisprudence concerning EU Competition law restrictions by object from the European Court of Justice, dates back all the way to the sixties, and to some well-known landmark judgments. The most important European case-law related to the field of competition law was established back then, and the then framed, strong conclusions of the Court still apply in terms of known legal criteria for EU competition law, legal analysis and policies. That is especially important for the sake of legal certainty throughout the Member States and for all the parties involved in whichever competition law matters.

In the scope of this thesis, the object restrictions that are considered as infringements under Article 101 are of importance and especially the analysis in object restrictions in terms of vertical agreements. Horizontal agreements are left outside of the scope of this paper, as the main focus on case-law considering an object restriction in this paper was inspired by a judgment by the ECJ that dealt with agreements of vertical nature, e.g. agreements which were entered into between companies operating at different levels of the production or distribution chain.¹

A reason why vertical agreements are one particularly interesting area of competition law is because they are usually not seen as harming to the competition as horizontal agreements between competitors on the same production or distribution level, as they are not directly competing with each other in the market. A vertical agreement may also have certain efficiencies when it comes to competition and consumer welfare. The Article 101(3) provides an exemption, which is specifically made for these kinds of agreements which are caught by the anti-trust provision in Article 101(1), but are ought not to be found illegal the by kind of agreement at hand, which is in fact actually doing the opposite and providing efficiencies to the competition and consumer welfare.²

¹ Commission notice: Guidelines on Vertical Restraints, 2010

² COMPETITION LAW GUIDELINE, Understanding competition law Vertical agreements https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284430/of419.pdf last viewed 26/05/2016, p.7

First and foremost this thesis is comparing the perspectives towards competition law and economic analysis from different perspectives. Later that is followed by analysis in the field and how it is applied in practice and what are the actual objectives that the current approach the CJEU is taking.

Some interesting points about competition law have to be mentioned, even though they are not thoroughly looked at in this here, they might still also have an impact on the way the law is analyzed in a sense. Competition law as a field of law enforcement differs a lot from for example law of obligations, where you have certain obligations to fulfil as an individual. Or from criminal law, where your actions are not private anymore, they become public interest and are to be punished, maybe even by jail time. Although competition law is indeed criminalized in some EU countries, in most Member States they are not considered under criminal law. This is to be kept in mind, where the paper will suggest a more “see-through” approach towards some competition law infringements.

Competition law deals with undertakings, which is firstly a Union concept³. It consider the endeavors of undertakings, in their main function, which is mostly conducting business and competing on the market. The goals, market power, might also differ from company to another, the aims of for example some pharmaceutical companies, or other areas heavily related to research and development may bring other objectives towards why they conduct business. What is common to all of them however is that they are financed by companies, institutions, some business entities; someone, who in the end is doing it to earn some money by conducting this specific business or method. And naturally, competitors, other firms that are trying to make it the same way as the others are, they exist, and that is what makes things interesting.

Vertical restraints and the reformation in the application of them, towards the approach the EU has on them today is looked at more closely and will follow after the introduction to the topic of this paper.

³ JONES & SUFRIN, EU Competition law, 5th ed., p.137-138

1.2. Research question

The research question forms mainly around the topic of economic analysis in the field of Competition law in the European Union. Do the actual economic effects on competition matter or affect the result in analyses, when applying the Union law into situations where agreements are being suspected of infringing the Treaty rules? To what extent are the economic effects be looked at when applying the Article 101.

The field of vertical restraints, strongly criticized – especially the means the EU has taken, is under a scrutiny here. The way the EU Courts' judges develop the law further by deciding cases in a way or another is looked at. It is significant to see why, how and what the current approach through their judgments is to where economic analysis stands to the central attention of this topic of Vertical agreements and Retail Price Maintenance in particular.

The motivation for writing this thesis comes from the strong willingness to understand the CJEU and its practices when it comes to deciding cases, something that comes to all of the Member States' attention.

In its simplicity, above all, this thesis is also trying to offer an approach towards why exactly is the internal market's Competition law practice tied in such a firm and confusing case-law knot around this case or the topic of it generally, when the European Union's practice is first and foremost all about removing the obstacles and avoid misunderstandings by the uniform interpretation of the laws.

What is important to note also is that competition law reflects on that economic behavior. The kind of economic behavior that will impact the competition in the long run⁴, and what really is the objective in the long run should not be a question looking at what has been stated by the Court in the previous case-law. The case-law also sees the object and the effect categories clearly as non-cumulative conditions⁵, it means that these are two separate criteria from each other, and do not have to be applied simultaneously.

⁴ Claus-Dieter Ehlermann & Mel Marquis, *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, 2008, p. lviii

⁵ Olav Kolstad, *Object contra effect in Swedish and European competition law*, Konkurrentverket, 2009, p.3

Therefore if you find an object restriction, you do not have to prove the effect, that is what is commonly known as a principle in Competition law.

Allianz Hungaria is a ground breaking judgment in the EU Competition law in its own type of agreements but show light to a path, where the Court of Justice has taken a slightly broader approach to measure the effects of the agreement between these insurance companies and car repair shops. It is not something just taken from thin air, the legal and economic context of agreements has been mentioned as needed to be looked at from the very first case they have had at the Court when it comes to measuring the object of agreements.

What was surprising in the judgment of *Allianz Hungaria* according to many commentators was the mentioning of economic context. Like written in the article “A revolution or A Reminder of Old Principles We Should Never Have Forgotten?” it states clearly that principles are there and have been there from the sixties and that the Court has not changed its view if following the case-law accordingly. Maybe the way of the Court expressing itself in this particular judgment of *Allianz Hungaria* was not the way people wanted it to be heard as but it sends the same message as of before.⁶

Having studied EU law for a few years in the university, and after having an idea of how EU case-law has developed in the past and how it is to be seen that the court makes these conclusions. For example incidental direct effect in the general application of EU law. Here again, too, the well-established conclusions the Court makes about EU law are not taken out of thin air.

The Court of Justice is well-aware how very well-known their judgments are and will be, therefore making these judgments is a call that has been left for them. The reasoning that made the public fully anxious this time around was probably the fact of that these, certain agreements, had the object already in the first place, and that was the actual question asked by the preliminary reference procedure in the first place. After the Hungarian National Competition Authority (Gazdasági Versenyhivatal) had decided the case in Hungary by establishing that the agreement had the object restricting competition under the Article 101.

⁶ James Killick & Jeremie Jourdan (White&Case), "Cartes Bancaires: A Revolution Or A Reminder of Old Principles We Should Never Have Forgotten?", Competition Policy International, 2014, p.10

Maybe it was a landmark judgment; nevertheless, it is classifying these kinds of vertical agreements, in the sector of retail price maintenance. The targeted audience of this judgment might be questioned, it may have been only aimed at the agreement type in question (where car repairers acting as the insurance companies' brokers, being able to increase their payments by the respective insurance companies, when more insurances to the customers were being sold, and at the same time the car repairers were acting as the one to repair the cars) but it might have some general aspects to be shared with all these kind of agreements for the future prospects.

1.3. Research methodology and materials

The thesis is researched and written upon a qualitative and comparative analysis. The methodology of research is legal dogmatic method. The written analysis itself is therefore supported by articles from different authoritative journals, older literature on the subject as well as new academic textbooks, and the Commission guidance. The framework of the paper forms around the aspect of economics in legal economic analysis.

1.4. Purpose

The purpose of this paper is to examine and show, whether or not the European Union, by the judgments from the European Court of Justice, who is empowered to decide upon disputes related to the Treaty, is starting to take a more economic approach towards competition law. Thereby, looking moreover objectives and background towards implementing EU law and the analysis that is done when finding infringements under the Article 101, in the recent development of the case-law by the European Court of Justice and the forces that its practice is influenced or driven by.

1.5. Outline of the analysis

The thesis is divided into six chapters, the first one being the introduction to the topic, which is thereby followed by a chapter about general background of vertical agreements and the approach the EU takes. The next three chapters give an overview by looking at one case study, identifying factors and explaining further the Court's respective judgment and how it has been reached and for which reasons or background. It will culminate in taking into consideration how the CJEU takes its tasks very seriously, has a lot of responsibilities towards the integration and internal market. And shows also how case-law development is extremely important in a field such as competition law. The last chapter before conclusions touches upon Hungarian legal analysis and underlying need for clarification in taking decisions in restrictions by object cases.

1.6. Keywords

EU Competition law

The Court of Justice

National Competition Authority

Market integration

The object

The effect

Vertical agreement

National law

Jurisdiction

Vertical cartel

2. VERTICAL AGREEMENTS – ARE THEY HARMFUL TO COMPETITION?

A reason why vertical agreements are one particularly interesting area of competition law is because according to many economic theories they are usually not seen as harming to the competition. At least not to the same extent as horizontal agreements, such as price-fixing between competitors, on the same production or distribution level, as they are not directly competing with each other in the market. There has been, and still is, continuous economic debate about vertical restraints not being harming to the competition at all, and thus should be legalized by the thoughts of some economists.⁷ Like mentioned in the introduction, this thesis deals with mostly the debated area of vertical agreements. This chapter will go through some contradicting views, explaining moreover, why it is so. What could be interesting to the reader to keep in mind throughout the reading of this thesis is that the EU claims above all to be an economic union. Firstly two economic theories, which strongly support the lawfulness of vertical agreements will be touched upon. That will be followed by further explaining the criticism towards the antitrust policy in vertical agreements in Europe has received. Seeing how the policies and approaches that the EU practice has been taking has been affected by the criticism, showing to which extent it has been on point and been dealt with by different papers issued on the matter by the Commission.

2.1. An American approach

Some economic theories suggest that vertical agreements are never harmful to the competition. One theory, by American legal scholar R. Bork, concludes basically that vertical agreements are always concluded for the simple reasons that they would improve the selling of the product itself, establishing efficient marketing options, or better ways of selling the product, and therefore they couldn't be harmful to the consumer. This is taking into account more economic perspective over the traditional legal thinking. Aspects should as the end-result of vertical agreements, the motivation for concluding the

⁷ CRAIG & DE BURCA, EU Law, Text, cases and materials, 5th ed., 2011, p.990

agreements is better sales opportunities, are taken into consideration and seen that they are moreover bringing more competition to the market and in that way better prices, and that cannot be seen as something that would be harmful for end-users. He also thinks that vertical agreements have been seen negative in an early stage, when concluding the agreements, where the agreements have seemed as something suspicious, but according to him, they all are proved as something that will create efficiencies to competition and consumer or fail to create them in the process but will anyhow not create any net effects. Since particularly because the “output” in the contract between the two vertical companies, that he refers to, is never created for anything other than to create more “output”, business-wise. Thus, vertical agreements should all be lawful since their aim cannot be restricting the competition, since it is always about creating better business circumstances for them and therefore, the competition and the consumer welfare.⁸

2.2. EU Internal market perspective

The European perspective in Competition law has traditionally been different from the American one and tends to give more weight to other aspects, that are more important in the kind of market structure that we have in Europe, whereas United States of America is one country of its own. The EU, having one single market needs to be more aware of the companies making these agreements that can result in dividing markets by for example national lines because it might become more of an obstacle for other companies to enter the market and the competition within the single European market. Specifically, because the EU has always been of the promoting nature for the internal market, where all barriers to trade should be removed.⁹

Another American scholar, B. Hawk, has critically commented on the main breaking points of the actual EC Competition policy and where it fails in terms of vertical restraints. The thoughts of him can briefly be summarized as follows. The rules of EC Competition policies are too strict and strive from the fear of vertical restraints interfering on trade between member states. Vertical restraints are too strictly forbidden

⁸ CRAIG & DE BURCA, supra note 7, p.991

⁹ Supra note 7, p.992

and that, according to him, shows deficiency in economic analysis, where vertical agreements are often found not having harmful effects on competition and in the best case, can even create efficiencies to the consumer welfare.¹⁰

2.3. Reformation in the EU towards a more economic approach on vertical restraints

Positive effects of the vertical restraints have been argued before and now it is turn to look at the negative effects that the vertical agreements may have. W.S. Comanor in his approach sees also the side, where vertical restraints, that are beneficial for the parties to the agreement, might not always have economical efficiencies on competition or consumer welfare as their main end-result.¹¹ They might only have positive outcome for the parties to the agreement or to only one side of the agreement.

The EU has been after a new direction and reforming its Competition policy moreover since 1996 and the Commission issuing a Green paper on Vertical Restraints in EC Competition policy. Taken straight from the Green paper, the acknowledgement of the ongoing integration creating perhaps “an extra dimension”¹² to the analysis of vertical restraints, basically admits that the background of ‘all eyes in Single European market’ it might have an insufficient degree in the analysis of vertical agreements. Nevertheless, the market integration is seen as the one and only way that enhances Competition throughout the Union, especially now in the situation where the country borders, that previously existed as barriers to trade between countries the member states have now been abolished, the companies themselves should not be creating barriers on their own against the fundamental market freedom principles of the European Union.¹³

What is said about the negatives effects of vertical restraints by Jones and Sufrin¹⁴ is that the fact that vertical restraints, which might provide pro-competitive effects on

¹⁰ BARRY E. HAWK, System Failure: Vertical Restraints and EC competition law, Common Market Review 32, 1995, p.973

¹¹ JONES & SUFRIN, Supra note 7, p.780-782

¹² European Commission, Green paper on Vertical Restraints in Competition Policy, 1996, para. 70

¹³ Supra note 7, p.782

¹⁴ Supra note 3, p.780

competition does not always rule out the possibility that they might be anti-competitive in nature. In the Guidelines at the time, the Commission was especially worried about vertical agreements hindering competition in common ways such as foreclosing the market, pushing up prices or facilitating collusion between undertakings operating on the same market and reducing the level of competition by creating these agreements between players, even though they are not direct competitors but vertical in nature, and also, like expressed in the Green paper in past, creating obstacles for the common market competition as a whole.¹⁵

As described above, a vertical agreement may also have certain efficiencies when it comes to competition and consumer welfare. The Article 101(3) is specifically made for these kinds of agreements to escape the anti-trust provision in 101(1) by not declaring illegal the kind of agreements, which are actually doing the opposite and being efficient to the competition in the field.

The Block Exemption Regulation issued by the Commission or by the Council pursuant to Article 101(3) of the EC Treaty, specifying the conditions under which certain types of agreements are exempted from the prohibition on restrictive agreements laid down in Article 101(1) of the EC Treaty. When an agreement fulfils the conditions set out in a block exemption regulation, individual notification of that agreement is not necessary: the agreement is automatically valid and enforceable. Block exemption regulations exist, for instance, for vertical agreements, R & D agreements, specialization agreements, technology transfer agreements and car distribution agreements.¹⁶

There has also been further reformation on the field of vertical restraints, reform in block exemption, different guidance papers and white paper where the Commission has allegedly nodded towards a more economic approach. All this is a point view taken after, or after being pushed by, harsh criticism in the field of vertical agreements and perhaps acknowledging that it is earned somehow, Commission adopted a new block exemption regulation Article 101.3. Final viewpoint towards them is however established; vertical agreements that may restrict competition by making limitations to the extent of territory

¹⁵ Supra note 7, p.780-783

¹⁶ European Commission, Glossary of terms used in EU competition, 2002, p.7

in which the distributor may supply, they are noted in the Vertical Block Exemption Regulation.¹⁷

Despite the reform in the area of vertical restraints, vertical agreements on prices and especially within the area of retail price maintenance have traditionally in EU Competition law been treated as something that is hard-core and cannot escape the definition of by object restrictions.¹⁸ The view is arguably in contrast with certain general views on vertical agreements, especially the ones that declares all of them lawful, and the approach ECJ takes is interesting for the purposes of this thesis.

2.4. All agreements that have as their object or effect...

As the Article 101 prohibits all agreements that have as their object or effect the prevention, restriction or distortion of competition within the internal market.¹⁹ All agreements covers therefore both, horizontal and vertical agreements.

The difference between restrictions by object and effect under the Article 101 TFEU itself is self-evident. An agreement has to have as its object or effect the aim of hindering competition. According to the European Court of Justice, from now on referred to only as “the Court” or “the ECJ” or the “CJEU” in its judgment *Consten and Grundig*, already in the year 1966 it was ruled that after the object of the agreement has been found anti-competitive in nature, there is no more need to even look at the effects of that agreement. Object restrictions, agreements having as their object the prevention, restriction or distortion of competition are based on a presumption of appreciable anti-competitive effects.²⁰

Methods that are known to be harmful from past experience, such as price-fixing in the

¹⁷ Petar Cimentarov, Expanding the “Object box” and its Perverse Effects. Does EU Competition Law Condemn Innocent Behaviour?, Mayer Brown, 2014, p.18

¹⁸ Maria Ioannidou & Julian Nowag (2015) Can two wrongs make a right? Reconsidering minimum resale price maintenance in the light of *Allianz Hungária*, European Competition Journal, 11:2-3, 340-366, DOI: 10.1080/17441056.2015.1080044, p.1.

¹⁹ Article 101 of the TFEU

²⁰ The ECJ in joined Cases-56 and 58/64, *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v Commission*

form of hardcore cartels are automatically declared void and illegal, affecting the competition. Sometimes it doesn't even matter if the competition is harmed; when the principle is based on law, when the kind of behavior is already illegal per se.²¹

There is another form of restrictions, restrictions by effect, where when an agreement cannot be seen from the economic and legal context to be illegal in nature, in other words doesn't have the anti-competitive object, it may still be considered illegal under the effects analysis that is then based on the actual effects of that agreement and the possible harm found to then have on the competition. In the object category the effects on the competition are presumed, or at least what is required that the harm on competition is likely²², it is presumed already only by the object of the agreement which is based on previous experience from hardcore competition restrictions.

It is therefore worth mentioning the evident from competition law practice that has been taking place previously, that agreements that are found to have an object restriction are easier to prove of having a restriction on competition than agreements with a restriction on effect. Since January 2000, 17 out of the 18 infringement decisions issued were "framed in object terms"²³. All 17 of them were considered to have an object restriction. It is argued that when it comes to the economic analysis of the effects on competition, it is much more difficult to show the actual effects on competition by a thorough economic analysis, whereas in object restrictions their effects on competition are already known from experience, they are expected – and not needed to be further examined.²⁴ This approach and the effects of this custom that has become almost a trend in the field it is more thoroughly looked at in the later Chapters.

Therefore, one effect that this thesis claims to be of the pressure from the previous practice concentrating only on object infringements, the European Court of Justice's judgment in the case of *Allianz Hungaria* came as a surprise to many. The case has got an incredible amount of criticism on especially how the Court came to the conclusion of declaring the

²¹ Supra note 3, p.202

²² Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the "De Minimis" Notice", European Commission, 2014, p.3

²³ Effects-based enforcement of Article 101 TFEU: the "object paradox": <http://kluwercompetitionlawblog.com/2012/02/17/effects-based-enforcement-of-article-101-tfeu-the-object-paradox/> Last viewed at 18/05/2016

²⁴ Lee McGowan, *The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy*, Edward Elgar Publishing, 2010, p.128

case as a restriction by object. The case-law by the CJEU, and how it has evolved, seeing how the economic and legal context in this judgment has kept up to date with the approach that the Court's jurisprudence has had in the past & today.

3. REPRESENTING A VERTICAL AGREEMENT – *C-32/11 ALLIANZ HUNGARIA*

The judgment in the Case of C-32/11 by the European Court of Justice, referred above as '*Allianz Hungaria*', was an answer to a question by the Supreme Court of Hungary concerning the application of Article 101. The facts of the case that was referred to a preliminary ruling read as follows. The National Competition Authority of Hungary had been dealing with a case, where certain Hungarian insurance companies had entered into bilateral agreements with car repair shops and/or car dealers in Hungary. The content of those agreements concerned e.g. negotiations on the hourly repair charges paid by the insurance company to the repaired for the repair of vehicles.

There was also an agreement made between GÉMOSZ, the national association of authorized dealers, and the insurance companies, where the kind of prices were negotiated annually by the firms. The firms were not only paid by the hour but also on the number and percentage of insurances taken out with the certain insurance companies through those car repairers/dealers. The car repairers were therefore acting as insurance brokers for the companies in question, and when more insurances were being sold, the higher the hourly charges for the work done by the car repairs would then be. The question for preliminary reference by the Supreme court asked, if these kind of vertical agreements qualify as having as their object the prevention, restriction or distortion of competition and contravene Article 101.(1).²⁵

3.1. Jurisdictional notice

The agreements at issue in those proceedings did not have an impact on intra-Community trade. Applying that situation to case-law, the Court has repeatedly held that it has jurisdiction to give preliminary rulings on similar questions.²⁶ Issues that concern European Union law in situations where the facts of the cases being considered by the

²⁵ Case C-32/11, *Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal*, judgment of 14.03.2013, para. 16.

²⁶ *Ibid.*

national courts were outside the direct scope of European Union law but where those provisions had been rendered applicable by domestic law, which adopted, for internal situations, the same approach as that provided for under European Union law. In those circumstances, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.²⁷

When the Court is considering requests for preliminary ruling procedures, the questions of maybe having a conflict in with the national legislation matters. The Hungarian legislation at stake however was said to almost exactly copy the Article 101(1) from the Treaty.²⁸ That was stated as something that became clearly apparent from the preamble to and the explanatory memorandum, that the Hungarian legislature had aimed to harmonize domestic competition law with that of the European Union. It was therefore not contested that that legislature tries to treat internal situations and situations governed by European Union law in the same way.²⁹

3.2. The blurry battle between object and effect

The discussion under the case *Allianz Hungaria* on object and effect analysis and the difference between them has been wide. The discussion has started to sound like as if the two conditions would almost exclude each other when applying the law and under the analysis in competition infringements. Yes they are not cumulative conditions like previously already mentioned³⁰, but as requirements are they excluding each other? Undoubtedly not. That is because the first requirement of the two, restriction by object, already in a way guarantees that the second one, effect or better yet effects on competition, exist. Therefore it can be considered that object analysis and thereby the declared restriction already imply the existence of the effects.

²⁷ *Allianz Hungária*, supra note 25, para.17

²⁸ Ibid.

²⁹ Supra note 25, paras 21-23.

³⁰ Supra note 8.

Competition law reflects on the economic behavior but does it strive from only the behavior of the firms involved? What is happening on behalf of the firms, or what is the objective in competition law actually. The economic impacts on competition in the long run.³¹ Based on how EU law is pursued, this case can be seen as something where the ECJ might be starting an approach, or trying to establish a frame, the kind of agreements, that are vertical, to qualify into the object category under Article 101(1) and make it easier for future reference of everyone whom might be concerned by the competition law infringement analysis.

It is obvious that this judgment has now been criticized for that it was made to fit under the object criteria, for vertical agreements and into the “object box” in EU law.³² In the view of pursuing the ECJ’s practices, it is trying to make things easier, for themselves, for the Commission and the NCAs, to find infringements in severe competition law cases, in the field of EU law and that the judgments. Despite of the fact that they might not be seen as something not crystal clear and precise, they, in their mysteriousness try to also help the EU market integration as a whole by establishing common rules and policies for the whole Europe to enjoy. Linking that to the problems or the criticism that the EU has faced in its Competition law policies and approach against vertical agreements, as reviewed in the Chapter before this, and showing or proving the market integration side that is present in the application of the law. The fact that the EU’s objective in Competition law still relies on the market integration, does not mean that it is not on it’s way towards positive development by removing of obstacles.³³

3.2.1. Are object restrictions always harming the competition?

Going back to the general concept of classifying infringements as object restrictions and to the remark that the economic effects that are the objective in the long run of deciding cases as anti-competitive. Object cases may, or may not, end up being harmful to the competition on the market. They might end up leaving the competition completely

³¹ Claus-Dieter Ehlermann & Laraine Laudati, *European Competition Law Annual 1997: Objectives of Competition Policy*, 1998, p.414

³² Maria Ioannidou & Julian Nowag, *Supra* note 15, p.27

³³ CRAIG & DE BURCA, *The Boundaries of EC Competition Law*, Oxford University Press, 2006, p.13-14

neutral. If thinking about it, it is enough to say that one case in a million doesn't harm the competition, there is always the exception to the rule of course. Drunk driving is banned by law but it does not always mean that you end up in the middle of an accident, you might still arrive home safe and sound.³⁴

What is meant by a more economic analysis in that example is, that in general these end-results, the effects and the prohibiting of the actual economic effects on competition is what is guaranteed by prohibiting restrictions by object. The kind of restrictions that do not harm the competition; that are neutral towards the competition, are so called "type 1-errors".³⁵

Such policy is however acceptable if it is likely³⁶ to cause harm by the kind of anti-competitive behavior in question, and being so, that it is close to "always or almost always" being anti-competitive in the long run. In other words having the anti-competitive effects to the competition. By saying that, the conducting of economic effects analysis is clearly unnecessary under object criteria.

Looking at the matter in question from the defense-side, what can be acknowledged is that there is this kind of, or it can be seen as, short-sightedness, towards by object restrictions. Because the fact that the effects are not looked at. They are only presumed. But because they are previous experience, that being exactly why they are not looked at anymore.

By the judgment in *Allianz Hungaria* the CJEU is helping the Commission, the National Competition Authorities in the Member States, and by doing so also making easier their own work - but also the companies on the market. The CJEU, by bringing this way to look at these kind of vertical agreements, where also the companies acting on the market benefit by using the same, old methods and concepts of legal and economic context when assuring first – before deciding upon an object agreement – taking into consideration the structure of the market the existence of alternative distribution channels and their respective importance and the market power of the companies concerned³⁷. Before

³⁴ James Killick & Jeremie Jourdan, p.10

³⁵ Sven Gallasch, Activating Actavis in Europe – the Proposal of a "Structured Effects Based" Analysis for Pay for Delay Settlements, Centre for Competition Policy Working paper 15-3, p.16

³⁶ Saskia King, The Object Box: Law, Policy or Myth?, European Competition Journal, 2011, p.273

³⁷ Supra note 25, para.48

completely closing the case a pure object case - and judging by that, that they will have an impact on the competition as a whole.

The case-law in *Allianz Hungaria* is establishing case-law that will avoid the kind of cases, so called false positives of by object restrictions³⁸, or “type 1-errors”, where the effects of the anti-competitive agreement having object, were not that severe in the end.

3.3. Object restrictions – a trend over effects analysis?

The development of this approach is a result of many different aspects. The difficult effects analysis and the fact that most cases are found as restriction by object criteria compared to restriction by effect. Because the CJEU, the Commission, commentators, everyone generally, has noticed that they (but even more so if only looked at for example Commission here), the Commission is usually finding more by object restrictions. Or at least finding a way to qualify them as object cases. There is nothing wrong with that per se, that is the law that currently governs over EU competition law and the Article 101(1) does give the unlimited option of finding cases either by object or by effect. One requirement being more popular compared to the other one does not rule out the possibility of using it in the next case, and the case after that, and the case after that. No matter how similar, or not at all the cases are by their characteristics. However, now the economic and legal context, needs be more thoroughly looked at under object in the evolution of 101(1) and the object criteria.

For example, in the case of *NVAI – International Belgium v Commission*, and the judgment’s paragraphs 23-25, it clearly states that the determination of whether an agreement has as its object the restriction of competition, is not depended on the subjective intent of the parties but on its terms, the legal and economic context in which it was concluded and the conduct of the parties involved. It is true that context and interesting word, especially in this context.³⁹

³⁸ Supra note 6, p.9

³⁹ DOROTHY HILDEBRAND, The role of Economic analysis in EC Competition law, 2nd ed., 2002, p.33

Regarding the economic context of the agreement. How does one determine context, as in vertical context, the market context? Some economic effects are to fall in that context.

According to the well-framed case-law, it is necessary that the aims pursued by the agreement as such, in the light of also the economic context, in which the agreement is to be applied in order to determine whether a given agreement has the object of restricting the competition within the meaning of Article 101(1).⁴⁰

3.4. Was this a vertical agreement?

Then again, about vertical agreements generally, was the agreement in question in *Allianz Hungaria* a truly vertical agreement? There are many opinions undoubtedly; one of them is that this was not an obvious vertical agreement. From one angle it can be seen as one, or in another it can be seen just disguised as one by the companies. In another one it could also be seen as a kind of a cartel. A vertical cartel, where the insurance companies were giving the kind of “fidelity rebate” to the car repair shops for selling more – for them to sell more insurances, and therefore getting rebates or more so advantages of some sort, for getting more clients. They were also getting more clients themselves by this agreement and more billable hours themselves to charge from the insurance companies. Basically this was just a systematic way for everyone taking part in the agreement to benefit from the contract, benefiting from the market and their clients by agreeing upon these conditions.

It seems that any significant efficiencies to the competition on the market could not be expected when undertakings agree upon conditions of their own without competing anymore. The car repairers would most probably not suggest any other insurance companies to their customers anymore because they have their own interest in those insurance companies that were parties to the agreement. At least efficiencies to competition as such cannot be seen from the viewpoint as it stands.

Another interesting aspect is that the association of car dealers was one party to one of the agreements. The whole market was therefore, if belonging to the association was

⁴⁰ Ibid.

absolutely necessary, party to the agreements. There were still only a couple insurance companies involved in this, not the whole market of them. The car repair shops therefore had their own interest in these two insurance companies, then more commonly known ways of choosing your insurance company would be left outside of the option pool for insurances. If having to step at a car repair shop for some reason or when buying a totally new car from a dealer, which is when you also at the latest, start thinking about getting an insurance, in the event that would be then be potentially governed or at least influenced by this vertical agreement.

Very significant to notice, that after vertical agreements the past academic and economic debate that they are not really harming towards the competition, or that is what the presumption has been, that these insurance companies in this way are hiding their agreeing of prices and rebates that harm the competition, and transfer it to a vertical agreement that does not ever seem harmful per se. But it actually turns out to be harmful, after having look at the economic and legal context of the agreement, and does not even need a deep effects analysis to be established.

When it comes to the case-law by the CJEU and the developments of the Court, the Court is also keeping up with the evolving strategies that the companies have today. They can be somewhat vicious, and whereas the law is the central, principal weapon, to fight these kind of illegal practices, the law unfortunately always comes a bit behind.⁴¹

Here we are being blinded by vertical agreements presumed to not be anti-competitive in nature to the competition and here, where the Court of Justice has actually noticed that there are cases that maybe these kind of agreements are becoming more and more familiar to the CJEU, that the firms are concluding these kinds of agreements and what was wanted by this case-law established now, that they are by object cases, self-evidently. The Court is in itself therefore communicating this to the common market, the market players and the consumers, the internal market as a whole, that even if vertical agreements are not seen as anti-competitive per se, they might still have as, not even as their effect, but as their object, which is worse of the two in my opinion, the hindering of competition.

⁴¹ Katalin Judit Cseres, *Competition Law and Consumer Protection*, Kluwer Law International, 2005, p.14

Especially because of the reason that this was a vertical agreement, the by object restriction and therefore infringement on competition contravening Article 101(1) was important to declare. If it were the effect way around the companies would try to justify their actions by other means by outweighing the effects by the positive efficiencies, then there could also be different approaches to the economic analysis in the field of vertical agreements and it would be lengthier procedure to show the restriction on competition where we could easily find the reasons by object from the agreement and its legal and economic context and proceed with that.

It is of course not fair to say that the CJEU wants to make it easy for everyone. An argument like that does not fly without wings. However, something similar could rather be concluded from the way they are now making it rational for everyone to see and acknowledge (or at least they give the possibility for everyone to do that by reading their judgments) and even companies would agree that after this time, when the economic context that has been evident from the case-law from the beginning that the economical aspects are, and have to be looked at. And therefore it has to be seen as something where the objective of the case-law is now avoiding the kind of cases where the actual effects do not really exist on the competition.

Regardless of what was just mentioned, and in addition to that in fact, we should keep in mind the potential effects on competition. There is not really a need to look at the effects, there is a case about potential harm to competition on the market⁴². There is still an option, that it will not harm the competition, there is potential but it might not happen, it will not hinder competition in the end. That approach is looking for the economic context, this approach now that we are taking now is more of looking into the economic context, the effects, so that if there are none, the case should not be proceeded with in the infringement procedure under Article 101, by object criteria. It is important to distinguish the potential from the harm in here because we are still taking that chance in object restrictions because they are the kind of restrictions by object that are illegal per se, that they will not harm the competition absolutely in all cases, as been established above. That is always an option in by object cases, it can rare but that is still a chance.

⁴² European Union Competition law, Object and Effect, www.eucomplaw.com/object-and-effect/ last viewed 26/05/16

4. THE PHENOMENA CALLED EU LAW: IMPORTANCE OF CASE-LAW IN COMPETITION LAW DEVELOPMENT

The obligation of the Court of the final instance at the national end of the matter of the dispute, to refer questions to the ECJ in Luxembourg, has been made especially to avoid the emerging of different national policies striving from the interpretation of EU law. Fulfilling their purpose of uniform interpretation the ECJ in preliminary rulings. The purpose being uniform interpretation of EU law.⁴³

The awareness of the European Courts of their judgments and their affectability, the constant drill, the “need” to develop law, that is only something very logical coming from the Court’s side and will avoid controversy in the Member states.

The preliminary rulings in Competition law, in the EU do usually not have a purely technical matter to be solved or at the central attention of the case. The question is often more about something else. That is also one thing that comes from the strong economic background of competition law, which is commonly known, and is immediately relevant to the competition practitioners’ daily life where a great number of professionals with a background in economics and another great number of professionals with a background in law solve issues related to the field in supposed mutual understanding.

The impact of the rulings and the importance of the judgments is very significant in competition law, especially for that matter. The impact that the Court has with its competition law judgments and the case-law, is moreover legislative than in other areas of EU law. The questions referred to the Court are usually something where the Court clearly has to choose a way to proceed with the dispute, a way that is one between other alternative ways they could be taking. They usually give an answer to a debated area of law and economics, that is contemplated, something that is therefore then shaping the EU Competition rather significantly at times.⁴⁴

Because of the nature of competition law, it is especially often so, that the Court will show the further direction that should substantially be taken into consideration and then

⁴³ Kari Joutsamo, *The Role of Preliminary Rulings in The European Communities*, 1978, p.270

⁴⁴ Ibid.

same solutions can be applied to many different cases, with different circumstances but more considered as principles that should be applied.

Whereas in many other areas of EU law, it is only about the interpretation of the actual Treaty law, the Article, the text. Then again, in Competition law the wording is quite clear, but the guidelines under which the articles should be applied and under which the cases can be seen as infringements, for instance object and effect can be quite vague at times, yet precise wordings on their own. Then the sphere of them just varies in agreements and legal economic contexts and the direction is therefore often decided by the ECJ and out of many alternative options to go for. In other areas of EU law and free movement, fundamentally, it is about interpreting the actual Treaty words in their actual meanings to the situations that are already at stake and mostly all aspects of the circumstances in the current case are already fully known in the proceedings.⁴⁵ That is why competition law and the ECJ's judgments in the Competition law of the European Union and the interpretation of the Treaty and law, which is, in the event of disputes, cleared out by the preliminary reference procedure is of special importance in Competition law cases the EU.⁴⁶

Thus, Ingeborg Simonsson suggests by her writing in the book about EU Cartel control and gives cartel law as an example, that even though law usually comes *ex post*⁴⁷, – in her chapter about legal theory she admits that the Community courts are ahead of scholars when developing EU law in certain, very central, concepts of it, such as agreements or concerted practices and procedural matters.⁴⁸ She calls this the situation, which is evolving from the end-result of the amount of litigation being done in the Community Court's throughout the history. Skilled practitioners in the Courts, she also suggests that because of the huge amount of cases, appeals and judgments that they have to pump out from the Courts, has made it difficult for the case-law to put together and remain as something that is very clear and precise, from the behalf of EU Court's, since the beginning of Competition law judgments in the EU Courts and that is why they might seem, blurring the lines, when the demand to 'producing' of resolutions to cases is high.

⁴⁵ Ibid.

⁴⁶ Ingeborg Simonsson, *Legitimacy in EU cartel control*, Bloomsbury Publishing, 2010, p.330

⁴⁷ Katalin Judit Cseres, *supra* note 41.

⁴⁸ Ingeborg Simonsson, *supra* note 46.

She further admits there, that the application of Article 81 EC (now Article 101) is often based on “free-movement thinking” or the need to uniform interpretation with the Treaty rules within the member states as a whole and clarify the rules of the Treaty further bringing coherency to the application of EU law in competition law cases in the member states.⁴⁹

As referred to in the introduction already, the article concerning the case “*Cartes Bancaires*” it states clearly that principles are there and have been there from the sixties and that the Court has not changed its view if following the case-law accordingly.⁵⁰ Maybe the way of the Court expressing itself in this particular judgment of *Allianz Hungaria* was not formed in the way it wanted to be heard as but it sends the same message as before.

4.1. De Minimis Notice

De minimis is a concept of that applies to infringement procedures as an exemption and has been given guidance in agreements whose thresholds do not exceed an appreciable amount of competition and are therefore of “minor importance”.

De minimis notice gives a clear approach towards market shares, certain thresholds to which extent they are considered as too small, minimal, to affect the competition to an appreciable amount. However the CJEU in its judgment in the case of *Expedia*, from 2012, stated that if it is an object restriction, then De minimis notice does not apply and that the exemption for minimal shares was only created for effect restrictions.

Agreements that have as their object the restriction of competition cannot thereby escape the Article 101 by De minimis notice because all object restrictions constitute appreciable restriction on competition per se.⁵¹ Otherwise it could be classified as non-

⁴⁹Supra note 46.

⁵⁰ James Killick & Jeremie Jourdan (White&Case), “*Cartes Bancaires*: A Revolution Or A Reminder of Old Principles We Should Never Have Forgotten?”, *Competition Policy International*, 2014, p.6

⁵¹European Court of Justice simplifies classic case law and rules that all object infringements that have an effect on interstate trade violate Article 101 TFEU
<http://www.lexology.com/library/detail.aspx?g=d94c6e60-d955-414b-b1d0-29cd11e275ab> Last viewed at 18/05/2016

appreciable. Guidance paper from 2014 further confirms the view.⁵² Thus, what is evident from the De minimis notice is that Commission sees object restrictions as something that cannot be escaped.

Firstly, it can be understood that object restrictions are sufficiently serious breaches as on their own to the detriment of competition. Secondly, it gives guidance towards the effect-based analysis, where as a starting point to the analysis the market shares are thoroughly looked at and after the economic analysis in the background for the De minimis notice it has been established that firms, having such small market shares as mentioned in the notice, cannot restrict the competition as a whole and therefore puts a stop to the analysis of economic effects by the Notice and agreement therefore, without further examination, escapes Article 101.1.

However, giving a pass to agreements, concluded by small, even tiny, firms, with potential effects on competition makes one wonder, when the end-result should be the same in both of them, how can object restrictions be more harmful to the competition, when in effects analysis the agreements by the same firms can be lawful and valid? It is self-evident therefore, that the Commission could not give free-pass by a Notice of the kind, to all minor firms' agreements that might have as their object the hindering of competition.

That anyhow draws the attention to the fact that in object restrictions the consequences are presumed and well-known from previous experience. Object and effect restrictions are however very different in nature, which is important to notice, and it can be seen from that approach they took in the Notice that object restrictions are taken very seriously by the Commission and CJEU in their practice. They are direct, anti-competitive "attacks" towards the perhaps otherwise prospering competition on the market and cannot be escaped no matter how low the market shares of the companies involved are.

The key here represented by the view of this thesis is that Commission simply cannot give free passes to object restrictions. That can be seen as a very strict approach, when

⁵² Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, European Commission, 2014, p.3

the market shares of the companies in effect analysis can be counted and declared not appreciable enough towards affecting the competition on a certain market.

What the Commission is actually doing here is still keeping the object restriction as purely legal, carried out by the legality principle, that declares all the agreements void, that have as their object the hindering of trade. Furthermore, the Competition practice that *Allianz Hungaria* is promoting is not about loosening the part of “which companies” or “agreements by these companies” cannot be declared as anti-competitive but the practice is loosening the strictly legal approach from the other end, where some consideration is left to the Competition authorities end, and/or National courts to have in terms of deciding upon the economic and legal context in which the agreements were concluded. But it just cannot be given in the name of De minimis notice, when object restrictions are considered to always be restrictive in nature.

Because of vertical agreements, the view that is widely known on them by now, because of the differences in object and effect analysis, because of the arguably more easier way to classify agreements as anti-competitive by their object because the effects on trade are presumed, rather than by the time-consuming and thorough effects analysis, where the effects have to be proven and the burden of proof relies on Commission and the firms may show efficiencies in a more active manner but still often fail to do so.⁵³

4.2. Appreciability

The judgment *Völk*, the CJEU reasons how only agreements that would have an “insignificant effect” on the competition on the market is of the kind to not be in the scope of Article 101(1). In the same judgment, it was also mentioned that the appreciability is not only based on the position of the parties on the market, and confirmed that an agreement must have appreciable impact on competition in order to infringe Article 101.1 whether if it’s an object restriction or effect restriction.⁵⁴ The judgment notes that in both categories, restrictions by object and by effect the agreements

⁵³ Effects-based enforcement of Article 101 TFEU, supra note 23.

⁵⁴ Ibid. p.13

must “perceptibly” restrict competition and be capable of affecting trade between the Member States, to be able to fall in accordance with the Article 101.1.

As being established previously in the case-law that the restrictions under the EU competition law acts must have an appreciable effect on competition to be able to restrict competition, AG Kokott agrees upon that approach in her opinion in *Expedia*. The object concept must also have an appreciable effect on competition but it is just to know that there is appreciability, and though, it is ought to be to “a lesser degree” than under the effect concept. She sees that the *Expedia* case further clarifies the requirements for finding a restriction by object in the Union level.⁵⁵

In *STM* the court also said that it is appropriate to take into account, inter alia, the nature and quantity of the products covered by the agreement and the position and importance of the supplier and distributor on the market for the products concerned.⁵⁶ The requirement was repeated in *Allianz Hungaria*, *Expedia* and *Cartes Bancaires*.⁵⁷

In *Cartes Bancaires* the Court however referred to the agreement having to have a sufficient degree of harm. The Parties’ market power is an important factor but therefore does not reveal whether the agreement’s aim is to restrict competition by object or by effect.⁵⁸

It is therefore necessary to show that the agreement has the capability, of restricting competition to an appreciable amount but it is not necessary to prove that it will do so, in the object category, whereas in the effect category proof is required.

⁵⁵ Saskia King “How appreciable is object? The de minimis doctrine and Case C-226/11 *Expedia Inc v Autorité de la concurrence*, European Competition Journal, 11:1, 1-25,” Opinion of AG Kokott in *Expedia* p.7

⁵⁶ *Ibid.*, p.17

⁵⁷ *Ibid.*, p.18

⁵⁸ In *Völk* it was also mentioned that the appreciability is not only based on the position of the parties on the market, and further confirmed that an agreement must have appreciable impact on competition in order to infringe Article 101.1 whether if it is an object restriction or effect restriction. The de minimis doctrine was established in Case C-5/69 *Völk v Vervaecke*

4.3. AG Wahl on Cartes Bancaires and the living EU law

AG Wahl states, in his opinion in *Cartes Bancaires*, regarding the appreciability that even in the most serious infringements of competition and here, refers to a horizontal price-fixing agreement, a cartel, that while it has been established by reference to previous experience that a restriction of the kind is in known to be generally highly harmful for competition. However, that conclusion is not inevitable in his words, in the event where undertakings concerned hold tiny market shares of the markets concerned. In other words after examining the context that the agreement was concluded in, it could not be regarded as having the object by its very nature of appreciably restricting competition if the market shares are tiny, it cannot be considered that the agreement has an object under the Article 101.⁵⁹

AG Wahl is also very well aware of the that the line between by object and by effect analysis should be clearer. He in his view says that the proper reading in Article 101 must however, at the risk of causing confusion, economic and legal context must be taken into consideration when identifying an object restriction. He however remarks that the consideration of the context can only reinforce or neutralize the examination of the actual terms of an agreement. Therefore it cannot act as a remedy to a failure to identify an object by then looking at the economic and legal context about potential effects in the question of it.⁶⁰

AG Wahl is clarifying further what the CJEU has said, or has been wanting to show by the its recent judgments in his views and that there is still a clear cut between the effects analysis and looking to the economic and legal context of agreements that are suspected to be restrictions on competition by their object, under Article 101(1). And further establishing how important, looking into the economic and legal context is in object cases too.

And whilst De Minimis Notice does not apply to object restrictions, it is purely something that the CJEU could not give a free pass upon. Especially because of the reason that what is regarded as having a tiny market share can differ, and that not being

⁵⁹ Opinion of AG Wahl in Case C-67/13 P, *Groupeement de cartes bancaires (CB) contre Commission européenne*, delivered on 27 March 2014, paras.40-42

⁶⁰ *Ibid.*, paras.42-44

something self-evident in object cases; what is the appreciable amount, is therefore left for further considerations. And as said in AG Wahl's opinion, it is established that an agreement, a horizontal agreement, is highly harmful for the competition. It is known from previous experience but are the tiny shares worth it to be considered an infringement under the Article, that is another matter.

4.4. A reminder of objectives in Competition law

Now we have looked at the analysis under object cases from many different aspects. Perhaps the most interesting part of competition law still however remains in the objectives that it is driven by. One thing that should be included here is that it is the consumer welfare that is initially discussed, when thinking about detriment to the competition and the final consumer. A reason why competition law is significant and central to our everyday lives.

Where the extra money from applying competition laws accordingly goes to the State, it is of course of the aim of also leaving more money (or with more goods and therefore less money, it depends on the way it seems preferable to the customer) in the consumers' pockets in the future. The already lost money, that we have already suffered from when there was a bus cartel in the long-distance trips in your home country, does not of course go back to the pocket of the consumer in the form of instant refunds. Even though it should probably in principle be so, for the reason of having had a market situation on which the proper functioning of competition was interrupted and some others suffered more than the others.

Competition law enforcement however improves the conditions of competition to a situation where also future harm on your pocket being safeguarded in a way. That is only of course in the case that the restrictions on competition are illegal in fact and hindering competition, that is what the competition law analysis is constantly trying to figure out. Justin Breyer has remarked in his Leegin dissent that what makes competition law,

analysis, and all the objectives taken into account, taken into consideration, makes it extremely hard “to separate the beneficial sheep from the antitrust goats”.⁶¹

Interestingly though, it is not all about the detriment to the final consumer. Mainly it is about the competition itself. The protection of competitors, which is not one of the main objectives but it includes under protecting competition, therefore protecting competitors on the same market to some extent.

A harm done by British Airways to Virgin Airlines on the market of flights within the UK, British airways was harming Virgin airlines in a previous case where it became self-evident that competition is not all about protecting the consumer or thinking about the welfare that of the consumers. Of course that is one of the main objectives, it is just not always the case, the sole driving force of competition law, which is usually the way that it is referred to as. One concluding remark, about hurting the end-consumer, or the well-being of the end-consumer is not always at stake. There can be more efficient ways also for the consumer’s perspective for competition to work but what indeed needs to be shown in the end is that to be shown indefinitely but the level competition as a whole is weakened.⁶²

For example the combining of competition law and consumer protection is therefore not seen as something congenial. In Finland the Finnish Competition Authority and the Finnish Consumer Authority work under one roof now and it has been said to have been one of the hardest of tasks, to fit the policies together when the two Authorities were combined together as one office.⁶³

⁶¹ Cristoforo Osti (2015) Antitrust: a Heimlich manoeuvre, European Competition Journal, 11:1, 221-264p.235

⁶² Ibid., p.236

⁶³ Seppo Reimavuo, <http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/selvitykset/2015/kkv-selvityksia-4-2015-kilpailuvirasto-kilpailupolitiikan-suunnannayttajana.pdf> last viewed 20/05/16, p.2

4.5. A perspective: Running the red lights

Going back a bit to the role of economic analysis and legal analysis after a reminder on the objectives. It has been said by Cristoforo Osti quite firmly in his article that “economic analysis plays a complementary role in legal studies”.⁶⁴ That is to say that not only legal aspects are to be taken into consideration. More importantly, economics stand in a place in legal theories that are affected by the economic behavior of others and especially in areas of economic law such as competition law. Thus, it plays a very central role in it. In the next perspective competition analysis is being compared to a more regular life situation. Important when following this approach is to keep in mind that the competition laws in most countries in the Member States are not criminal law.

When driving a car or a bike or when even walking, doing it while the light is red is something you should not be doing. It is something that is prohibited by law. It stems from the basic criminal law, because you are causing harm to the traffic, and you might be risking your own life but also everyone else’s life in the intersection, when you suddenly run the red light. And no matter what, if the police can see you doing that, you are then caught by doing something illegal, e.g. you broke the law. You will probably be fined for what happened, depending on the seriousness of risking the safety of those traffic lights for the people and you. Nothing serious might have happened but you did something that you were not supposed to do according to the law.

In the United States however, while driving a car, you are allowed to turn to the right, even when the light is red. Once after looking to left and right, making sure that nobody is coming by car or foot to your direction, you are allowed to take a right turn. No warnings or fines would be issued even though the police would see you doing that because it is completely lawful in (at least most of the States) in the United States. If an accident happens and it would be because you turned on red it is still not considered as something that you did illegally because there is a right to turn on red light.

One way to look at the topic of the companies causing harm by agreements that have as their object the restriction on competition, is the principles behind the law versus running

⁶⁴ Supra note 61.

the red lights. The policy in the United States is something that was created by the government, it does not exist for us here in Europe (or at least not in the Nordic countries) - you are not allowed to turn on red light, it's illegal and you will be fined for risking the safety of others and your own. But in the U.S. you may do that.

The perspective is a way of visualizing the agreements that were made and entered into, that were object restrictions. They were made on the red light, but then we could see, right after a few seconds, that there was no one on the street, no accidents happened, etc. The agreement was made on the red but nothing happened. Therefore you may have turned to the red, and have had this agreement in force because it does not affect anybody; anybody as being the competition on the market.

You are not allowed to turn to the left. Probably because of a more of a possibility that you will hit something, so that is still prohibited. Turning on red is still prohibited but turning to the right is cleared. Even though the light was red in the first place, because nothing happened.

In the United States however, the change in approach how they act when the red light is on was made because of lack of gas in the industry at the time, a few decades ago. In other words for the everyone to be able to save fuel.⁶⁵ They however probably had not reached this conclusion in the U.S., if they did think that it had significantly bad consequences.

Therefore to conclude, they had noticed from experience that with some common sense, making sure that looking to both sides of the road and then taking that turning on the red doesn't create any more safety issues, and rather saves something that is important, fuel in that matter. In case of making a straight conclusion and reference to the situation in competition law practice and analysis in Europe, the CJEU is making a well-aware choice of not spending too much fuel waiting for the light to turn green on some cases that might seem suspicious, or even have the object, but rather taking that short while and spending it on looking at the case from left to the right and deciding that it is nothing serious to proceed with, and turn on over to the right anyway, continuing the journey.

⁶⁵ Right turn on red, U.S. Department of Energy <http://energy.gov/articles/right-turn-red> last viewed at 25/05/16

Therefore the more economic approach is equal to a more rational approach in perspective of the thesis. Concluding that to be something that the CJEU could possibly be striving for and what the judgments are to be looked as.

Practitioners might not want to see it the approach because of many different reasons, and the companies may see this as an attack against them. In the CJEU's defense however, the National Competition Authorities too, have to do more work now finding an object restriction and to proving that there really is a by object restriction in this vertical agreement. But also less work, compared to a full effects based analysis. That is also something that can be seen as saving tax payers money, and the companies are maybe caught by lesser effort than an effect analysis but with the decreasing volume of false alarms in terms of harm on competition.

However, firms might see this as something where their legal certainty is at stake. They also might see that when including agreements that are only beneficial for them and their competitors or their business partners that are not direct competitors, they might also be aware of doing something fishy.

Even though that is not the law, in the name of law you can and cannot do all the things that have currently been regulated. Law does not work retrospectively. In competition law cases however, compared to other fields of law and where for example an individual might claim that he was not aware of the law and therefore did wrong. Companies involved in competition law infringements usually are fully aware of them doing something fishy, which might even be declared as an infringement and obviously in all anti-trust cases where the infringement has been found, that has been the case. It is not something that happens unexpectedly, because the action always involves the form of some kind of action whether it is a concrete agreement or concerted practice, which have been testified and apply also even in the cases of for example price-signaling, where no actual agreeing upon of prices is not communicated directly.⁶⁶

⁶⁶ Mat Hughes and Frederick Wandschneider, The European Antitrust review 2016, AlixPartners p.14

5. ONCE AN OBJECT, ALWAYS AN OBJECT

Taking one more look at the central case of the discussion. According to the Hungarian National Competition Authorities *Allianz Hungaria* this was a clear object case from the beginning. From square one, it was declared as an object restriction by them and their analyses under object restrictions. Other practitioners do agree, like Rainer Lindberg in his article⁶⁷, even though he wonders why the CJEU concluded *Allianz Hungaria* in this way and why they went this far talking about the legal and economic context, what he thinks was a mistake, and that it was more of an effects analysis, when this was clearly an object case from the beginning.⁶⁸ From the beginning, like the Hungarian NCAs suggested it.

5.1. Hungarian legal analysis

In fact, according to history and how law and economics as academic fields have developed, there is quite clear academic evidence about how the economic analysis in law hasn't developed and isn't as advanced as it may be in other European countries. Because of the long periods the country was ruled together with other countries in the past, how the schools of thought were therefore distributed far from each other and how they were developing under the course of historical revolutions in Hungary, a system in economic schools and law schools was instructed – it is argued that they went pretty far from each other and that economics doesn't have a strong standing in the legal analysis there, because of the changes in the schools of thought that were ruling in Hungary.⁶⁹

What is remarkable about this is that most likely, even though the National Competition Authority, having the full competence in their actions that they do and would be taking into account the economic and legal analysis accordingly, that is to be included in the legal analysis of restrictions by object under the Article 101 TFEU. But because the case did go as far as it did, to the Supreme Court in Hungary, and then all the way to ECJ, and because this is something that can be read from the history books, the judicial system

⁶⁷ Rainer Lindberg, Onko taloudellisilla vaikutuksilla merkitystä kilpailuoikeudessa – missä mennään juuri nyt? Defensor Legis N:o6, 2015, p.999

⁶⁸ Ibid.

⁶⁹ Katalin Judit Cseres, Competition Law and Consumer Protection, 2005, p.36

itself must be aware of their likeliness to lack thoroughness in the economic analysis, perhaps they might lack competence in the economic analysis in the European level of standards. Thus the Supreme Court had to refer this question to the Court in Luxembourg, to determine whether their legal analysis is in the same place with the European Union's level and is of uniform application of the law. This was clearly an object case from the beginning of it in Hungary, without mixing things with the by effect analysis. Economic analysis doesn't stand a foot as deep in the legal context under the legal analysis to the extent what is to be concluded and therefore this was a clear object case and the ECJ just wanted to remind Hungary, since they asked, but also the member states as a whole about the standard level of analysis in the application of Article 101; looking into the legal and economic context, under deciding between whether or not cases are object infringements under 101(1).

5.2. The Exemption under 101(3) - does it work?

One more further confirmation on the developments that have led to the more rational approach the CJEU is taking according to this thesis in object cases recently, is the question on the exemption clause under Article 101. One relatively recent argument regarding the exemption clause in the Article 101 has been made and it is argued that the exemption of 101(3) does not really work accordingly in cases object restrictions.⁷⁰

Basically what is meant by that is, that the kind of agreements that can be found to be object restrictions, the idea behind those agreements is rarely to create efficiencies on competition. They are rather made to create efficiencies on their own trade. The object restrictions, or agreements that constitute an object infringement, are not created as something that would then later have the efficiencies on competition on the relevant market. Especially having exactly efficiencies of the kind that would amount to outweighing the negative effects on competition, which is what is required from an agreement thereby to have under the Article 101(3) that it would be possible to escape the infringement that was firstly found under the Article 101(1). Luc Peeperkorn argues

⁷⁰ Luc Peeperkorn, *Concurrences REVUE DES DROITS DE LA CONCURRENCE: COMPETITION LAW JOURNAL* Defining "by object" restrictions, *Article Concurrences* N° 3, 2015, p.43

in his article that the exemption for object restrictions therefore does not work in a way that it perhaps should be working and that it's a bad solution in order to defend agreements that have as their object the restriction on competition. This is an area that might also need a reform because according to him, agreements are often not found to have the efficiencies that would escape Article 101(1) infringements. They cannot be found, because efficiencies do not exist as a goal when concluding the type of agreements, but it doesn't always mean that they are always harming competition even though the positive effects, efficiencies on competition would not outweigh the negative ones.⁷¹ However in the case of GlaxoSmithKline, the object could be exempted by 101(3)⁷² and is a case that reminds of the possibility for exemption under Article 101. It therefore still exists, in the application of Article 101, even though the discussion about the effectiveness of the 101(3) is contested.

6. CONCLUSIONS

The Court, by its recent judgments making the application of Article 101 under object restriction clearer by developing case-law further. That is mainly to develop the law on Competition, that the 28 Member States as a whole so closely follow, and indeed therefore has chosen now a more realistic approach towards the object analysis. Taking a more, rational approach, an approach that from the perspective of this thesis would gladly be called the more economic approach. Because this is law, and economics is only complementing the law, and economic analysis is only providing a tool for the law to develop into more realistic approaches in competition law.

The Court of justice of the European Union is establishing under the object criteria, a way for the competition law enforcement how to avoid false positives, explained to earlier, in cases where there is no definite negative impact on the competition, for the purposes that the Article 101 was created.

⁷¹ Ibid.

This is evident by only looking at the economic and legal context, where it can be seen that whether if it is going to affect the competition or not, in the markets concerned and after having this deeper, more careful look, this case and the proceedings with the case will be seen more clearly.

The CJEU is reminding of old principles that have been established in the case-law of the Court of Justice in the EU long ago. Principles that are based on also the objective of market integration in European member states as a whole. Reaching a conclusion where a National Competition Authority would rather stop proceeding with a case after looking at the economic and legal context more closely to see if it really is affecting the competition, as it seems to be based on the previous experience that in a way precludes harmful effects, in a way that would seem like something contrary to the Article 101(1) in its meaning today. But the development to this direction is happening step by step. Partly because of the evolution of cases being scrutinized under the Article 101; more likely by the object rather than by the effect.

Whereas it has been already established that the infringement after an effect analysis is harder to prove to as having an infringement in the end, and causing significant harm on competition. This case-law is only helping the legal analysis where, by law, restrictions on competition law are considered as infringements to the Treaty.

The effects analysis is commonly considered as more time consuming, compared to object analysis, and effect analysis is more based on economic behavior and effects and economic analysis is therefore more complementary to the legal analysis there, towards finding the effect restriction on competition.

The reason why we have these two categories, two different requirements, that are cumulative, towards the Article 101(1) is because not always an object requirement can be found in the agreement but the effects analysis will therefore in the end reveal it, if looked into. In a way the effects analysis is more of a safe harbor to the object criteria. Where it was not caught, and where the agreement can still be declared as infringing the Treaty, found as acting against the common competition.

It is true that the authority has little to lose here, and that could be seen as something that is unfair to the companies or from the companies' side, but it has to be kept in mind that

there is still a chance to show that the agreement that are suspected of being anti-competitive and that they have not infringed the Treaty and that the agreement did not have negative effects on the competition on the market. Less cases that lack real potential in harming competition will be found of infringing the Treaty after this approach.

It is not very new that the law prohibits something seen as unfair from the defendants' side. By object criteria is a purely legal concept. Pure as it can be in economic law. The Court has therefore acknowledged that since competition law is such an economically involved area of law, what is needed is to take a better look at the economic context before declaring it contrary to the Treaty's legal framework. This thesis also suggests that the Court also acknowledges that this is economic law, not criminal law and until it is criminalized not all of the cases restricted by object necessarily need to be deemed as something contrary to the Treaty only because of the "known" consequences on competition and market structure. The situation on the market is relevant when deciding upon the appreciability of the effects on the competition law infringements within the competition of the common market area, in the EU as a whole.

A direct quote from Helmut Schröter in terms of Competition law where he wrote about the reform to a more current competition policy that the "object analysis is only the beginning of effects analysis"⁷³ still applies until. Effects analysis is something that is not meant to be mixed with the object analysis, even though the trend of object cases is starting to make the Court take a more economic, or more rational approach, the analysis presented under object restrictions has little to do with an effects analysis where all actual effects are measured. What is to be kept in mind is that the judgments by the Court are only to reaffirm the law of the Treaty and uniform interpretation constitutes the main task of the Court of Justice, especially in preliminary rulings.⁷⁴

⁷³ Helmut Schröter, Vertical Restrictions under Article 85 EC: Towards a Moderate Reform of Current Competition Policy, Current and Future Perspectives on EC Competition law, edited by Laurence Gormley, 1997, p.27

⁷⁴ Kari Heitsamo, supra note 30, p.300

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