

The Gulf Between Hardcore Restrictions in Regulation 330/2010 and ‘Object’ in Article 101(1) TFEU

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This article adopts the position that whilst the hardcore restrictions in regulation 330/2010 and the concept of ‘object’ as defined by Article 101 TFEU overlap, the reason for the growing gulf between the concepts is the European Commission’s new broader focus when analysing the ‘object’ of an agreement. On 20 April 2010, the European Commission adopted a revised vertical block exemption regulation that explains the Commission’s approach when considering vertical agreements. As Regulation 330/2010 concerns vertical agreements, in this article, the ‘object’ will be considered as it concerns vertical agreements, in order to provide a more accurate comparison. In light of recent decisions and the developing Court of Justice of the European Union jurisprudence, this article examines the gulf between hardcore restrictions and ‘object’ in Article 101(1) TFEU.

I. Introduction

Article 101(1) Treaty on the Functioning of the European Union (TFEU)¹ outlaws agreements that strike at the root of a harmonised EU, appreciably affecting trade or distorting, restricting or preventing competition within the internal market. The concept of object, as distinguished from effect², has two purposes. The first is to pre-emptively detect actions with the potential to impede competition. The second is a time-saving solution (it discharges the burden of proof) to catch anti-competitive practices. Once caught, the agreement in question (or its sections³) is deemed so likely to hinder competition that it is automatically void⁴ unless justified⁵. A definition of hardcore restrictions can be found in Article 4 of Regulation 330/2010 EU⁶

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¹ Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/88.

² C-519/06 *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2009] ECR I-09291.

³ Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* [2008] ECR I-8637.

⁴ TFEU, art 101(1).

⁵ TFEU, art 101(3).

⁶ Council Regulation (EC) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102.

(“The Regulation”). Hardcore restrictions remove the benefits conferred by the Block Exemptions granted in Article 2 of the aforementioned Regulation. The Regulation concerns vertical agreements, which are agreements entered into between undertakings that operate on a different level of the production or distribution chain. To unpack these terms: once an undertaking is caught engaging in collusion or concerted practice with a potentially appreciable effect on member states, it is infringing Article 101(1) TFEU. The penalty is usually a hefty fine (eg. 10% of the company’s turnover). In order to provide undertakings with a degree of certainty, the European Commission (Commission) issued the Regulation⁷ to provide Block Exemptions and guidelines for vertical agreements⁸ that fall outside of these Block Exemptions. The Block Exemptions (aka safe harbours) apply to certain business lines, sectors or industries (eg. the motor sector⁹) and are essentially an expedient way of applying Article 101(3) TFEU. If included in an agreement, these hardcore restrictions exclude the whole agreement from the benefit of the Regulation even if the market shares of the supplier and buyer are below 30%. There are four broad examples of hardcore restrictions: minimum and fixed resale prices; certain types of territorial protection (or market sharing); control on selective distribution and agreements between buyers and sellers of component parts. All of which are theoretically object infringements, however, because of the separate methods of analysis applied to the examples, hardcore restrictions are treated more rigidly. It is this distinction that this article will aim to examine. The article is divided into 4 sections and in sections A and B, each concept will be decoded in turn. Section C will then discuss the similarities of the two concepts, whilst section D explores how they contrast. The article then concludes having shown that despite academic arguments to the contrary, the concepts of object and hardcore restrictions *are* different and are treated as such by the Commission.

II. Decoding the Concept of Object in Article 101 TFEU

The concept of object has different meanings dependent on the case¹⁰ and the academic¹¹, possibly highlighting the fact that its scope has not been

⁷ *ibid.*

⁸ Council Notice (EC) of 10 May 2010 Guidelines on Vertical Restraints SEC 2010 041.

⁹ Council Regulation (EU) 461/2010 of 28 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector [2010] OJ L129/52.

¹⁰ *GlaxoSmithKline* (n 2).

¹¹ A Gonzales, ‘Restrictions by object and the appreciability test: the Expedia case, a surprising judgment or a simple clarification?’ [2013] ECLR (9) p458.

sufficiently clarified by the European Courts.¹² Some opinions¹³ state that the courts mean any agreement that is anti-competitive by its very *nature* and some disagree, necessitating the inclusion of an analysis of the effects¹⁴ of the agreement in order to discover the object. This more holistic view can be seen in *GlaxoSmithKline* where a description that includes the, “economic and legal context in which [the agreement]” is formed. Both sides agree that in order to find an object to restrict competition, an objective assessment which includes the actual and economic context of the agreement and actions of the parties¹⁵, is necessary. Judging by the significant fines they attract (eg. the £98.6 million fine in *Nintendo v Commission*¹⁶), object infringements are considered serious by enforcement officials. That acknowledged, economic analysis suggests that vertical agreements would only harm consumer welfare if the firms that use them possess substantial (over 30%) market power¹⁷. As such, decoding the object of an agreement should, in theory, only be necessary if there would be a potentially substantial inter-state effect.

Once an object is found, an enquiry is made as to whether an objective exemption¹⁸ is applicable. Agreements formed between 1962 and 2004 had two routes to exemption. The first was prior notification and an individual exemption granted by the Commission, and the second was via a narrow set of Block Exemptions. In fact, the benefits of Block Exemptions were usually limited to agreements that would almost certainly satisfy the conditions of Article 101(3). Following criticisms, however, the era of self-assessment¹⁹ now reigns and firms can make their own judgements²⁰ and arrange their affairs in accordance with Article 101(3). This is, of course, a risky and costly exercise. It sparks the question of whether the undertakings concerned can instead rely on arranging their affairs within the confines of a Block Exemption and avoid the categories of hardcore restrictions.

¹² The term European Courts encompass the Court of Justice and the General Court.

¹³ *ibid.*

¹⁴ Case 56/65 *Société La Technique Minière v Maschinenbau Ulm GmbH (STM)* [1966] ECR 234.

¹⁵ *GlaxoSmithKline* (n 2).

¹⁶ Case T-13/03 *Nintendo Ltd and Nintendo of Europe GmbH v Commission* [2009] ECR II-00975.

¹⁷ Commission, *Hardcore Restrictions under the Block Exemption Regulation of Vertical Agreements: An Economic View* (2011) <http://ec.europa.eu/dgs/competition/economist/hardcore_restrictions_under_BER.pdf> accessed 1 September 2015.

¹⁸ TFEU, art 101(3).

¹⁹ *Guidelines on Vertical Restraints* (n 8).

²⁰ Council Regulation (EU) 13/1962 of 21 February 1962 on First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L13/204.

1. Decoding the Hardcore Restriction

The concept of hardcore restrictions refers to restraint of intra-brand competition, which may indirectly affect inter-brand competition through a softening of competition and/or facilitating collusion. The focus of this article is hardcore restrictions in the context of Regulation 330/2010 ie. how they apply to vertical agreements (eg. between manufacturer and retailer or producer and distributor). Illustratively, a lack of competition between Hollywood film studios was found to have a knockout effect on independent art houses' films, with their business models unable to survive loss of distributors' business²¹. Regardless of whether an agreement may ordinarily benefit from a Block Exemption, there are certain activities so hazardous to the competition in the Community (and ultimately to consumers), the Commission cannot permit them. Whilst vertical agreements are not considered as harmful to the inter-state market as horizontal agreements, it is considered unlikely that vertical agreements that contain the hardcore restrictions would satisfy the conditions of Article 101(3) TFEU. The concept originates from the Commission Guidelines²². According to the Commission, finding a hardcore restriction in an agreement automatically and simultaneously gives rise to the presumption that the agreement automatically violates Article 101(1) TFEU²³ and will not be justifiable under Article 101(3) TFEU. It essentially outlaws the hardcore restriction per se²⁴.

a) The Conceptual Similarities

In order to show that the concepts can be the same, this section will focus its exploration on three key similarities.

Firstly, the Guidelines²⁵ *specifically* refer to hardcore restraints as competition by object. Admittedly, there is temptation to group the concepts together because it appears that the Commission singled out actions that it finds particularly intolerable. This list includes, but is not limited to: direct or indirect price-fixing; excessive control of production or markets;

²¹ Europa.EU. 2011. Antitrust: Commission closes probe into Hollywood studios after they change terms of contracts for digitisation of European cinemas <http://europa.eu/rapid/press-release_IP-11-257_en.htm> accessed 1 September 2015.

²² Council Regulation (n 6).

²³ Council Regulation (EU) 13/2011 of 14 January 2011 on Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance [2011] OJ C11/1.

²⁴ Guidelines on implementing Articles 85 and 86 (n 20).

²⁵ *ibid* paras 23, 96.

discriminatory pricing and “tying” agreements. This list means that the types of restrictions outlawed by hardcore restraints overlap with object infringements in Article 101(1) TFEU. One example is the hardcore restraint set out in Article 4(a) of the Block Exemption Regulation concerns Resale Price Maintenance (RPM), which is an agreement or concerted practice that has as its object (direct/indirect) the creation of a fixed or minimum price level to be observed by the buyer. An example of this can be seen in the *T-Mobile*²⁶ case when, as a result of market foreclosure of the six largest mobile phone networks with a combined market-share of 99.9%, access to the market for mobile telecommunication services was possible only via an agreement with one or more of the five existing operators. This allowed the networks to control charges within that sector to the detriment of consumers. Zenger and Walker²⁷ opine that the expediency created by the object infringement may create an incentive to so characterise this type of conduct, despite the fact that they do not usually have harmful anti-competitive effects. This appears to be the same type of hard-line approach found in the hardcore restraints.

Secondly, although here considered in light of vertical agreements, both concepts can apply to horizontal and vertical agreements as shown in the case of object by *Consten v Grundig*²⁸ and hardcore restraints by the *Guidelines*²⁹. Thirdly, the concepts can both have similar applications. For example, the exchange of information between competitors (per *Fresh Del Monte Produce Inc v European Commission and T-Mobile BV*³⁰) with an object to identify future intended quantities or prices of individual firms was deemed by the Commission as unlikely to satisfy Article 101(3) TFEU. Akin to hardcore restraints, here, certain object infringements are deemed to be practically unjustifiable from the outset and there is no need to consider concrete effects³¹. This approach reinforces the separation³² between ‘object’ and ‘effect’ in Article 101(1) TFEU. The presumption of illegality is the basis of hardcore restraints, and shall be discussed further in this article as a differentiation tool. Here, the case will serve to show that object

²⁶ Case C-8/08 *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2010] Bus. LR 158.

²⁷ Zenger, H and Walker, M. Theories of Harm in European Competition Law: A Progress Report. 2012. TEN YEARS OF EFFECTS-BASED APPROACH IN EU COMPETITION LAW, Bourgeois, K and Waelbroeck, D. eds. pp. 185-209, Bruylant, 2012.

²⁸ Case 56/64 *Consten and Grundig v Commission* [1966] ECR 429.

²⁹ Guidelines on Vertical Restraints (n 8).

³⁰ Council Regulation (n 20).

³¹ Zenger article (n 27).

³² Case C-209/07 *Beef Industry Development Society and Barry Brothers ('BIDS')* [2006] IEHC 294.

infringements may sometimes appear prosecuted by the Commission under ulterior motives and as a ban outright. The 2010 Commission Guidelines of Vertical Block exemptions³³ appears to conflate both concepts in its explanation of their infringement of Article 101(1) TFEU and presumed exemption from the justification offered in Article 101(3) TFEU. The Commission's statement which says: "Provided that they do not contain hardcore restrictions of competition, which are restrictions of competition by object," may catch out those who may not understand the subtle distinctions³⁴ between the two concepts. There is logic for this approach³⁵ in both cases, as it removes the requirement to prove, at large costs, the adverse effects of this type of conduct.

b) The Gulf Between

In order to distinguish the two concepts, this section will focus its exploration on three key differences.

One of the main differences between objects and hardcore restraints is that whilst *all* hardcore restraints will be considered object infringements, not all object infringements attract sanctions. The categories of hardcore restraints are treated more rigidly than the elements of Article 101 TFEU require with very limited exceptions³⁶ to protect R&D investments. Companies face a heavy burden challenging the presumption of anti-competitive effects of a hardcore restriction (regardless of the scope of the effect) and this is arguably inappropriate considering their *unconfirmed* effects on the inter-state market. Furthermore, including a hardcore restriction in an agreement runs a significant risk of unenforceability of the whole agreement. The tension is created by the reasoning behind the differential treatment of vertical agreements. The Commission accepts³⁷ that the harmful and positive effects of vertical agreements need to be considered frequently. The former includes: raising barriers to entry; reduction of horizontal inter-brand competition; reduction of horizontal intra-brand competition; reduction of inter-brand competition between distributors and limitation on consumer choice. The latter includes: reduction of "free riding"; protection of brand reputation;

³³ *ibid.*

³⁴ Gonzales (n 11).

³⁵ A Jones, 'Theory, "Left behind by modernisation? Restrictions by Object under Article 101(1)' [2010] Vol. 649.

³⁶ Guidelines on Vertical Restraints (n 8) part 4.

³⁷ *ibid.*

protection of financial investments; protection of intellectual investments and the protection of economies of scale. The recent overhaul of the application of Article 101 TFEU to include not only the interests of consumers and competitors, but also to protect the structure of the market³⁸, makes its application broader than the narrow categories of the hardcore restraints. Indeed, in *GalaxoSmithKline* the Court held that one cannot determine whether restrictive object simply by relying on clauses of agreements without reference to legal and economic context. As Jones recognises³⁹, by excluding hardcore restrictions from consideration under the Commission's new approach, attitudes towards hardcore restrictions have remained the same, whilst those towards object infringements are changing.

Secondly, there is a little more clarity to hardcore restraints. The Court gives an exhaustive list of actions which, if proven, frustrate the Block Exemptions and create a (difficult, but not impossible⁴⁰, to rebut) presumption of illegality⁴¹. The Block Exemptions are issued to take account of market developments and were specifically designed with companies' compliance costs in mind. So, in terms of including a hardcore restriction in the agreement, it places the burden of proof on the defendant. Strategically speaking, the undertaking cannot rebut any enforcing authority's charge of anti-competitive effect by arranging its affairs to provide a commercially objective justification, like it could do under Article 101(3) TFEU with an object infringement. Furthermore, the object infringement does not give rise to a presumption of illegality (unlike section 1 of its United States (US) counterpart⁴² where similar infringements can be necessarily and irretrievably unlawful), and merely discharges the burden of the Commission/accusing party and invites the defendant to use their efficiency defence to secure the exemption. That said, rebutting the presumption of illegality attached to the object infringement makes sense theoretically, but it is extremely hard to rebut in practice⁴³. Plus, there are some hardcore restraints that may be excused as necessary for the existence of an agreement eg. for the first two years, restriction of passive sales outside a contractual territory may be considered necessary if a distributor must make substantial investments in order to launch a product. Furthermore, pro-competitive effects can be argued

³⁸ *GalaxoSmithKline* (n 2).

³⁹ *Gonzales* (n 11).

⁴⁰ Case T-17/93 *Matra Hachette v Commission of the European Communities* [1994] II-00595, para 85.

⁴¹ Council Regulations (n 6).

⁴² Sherman Anti-trust Act, 1890 sec 1.

⁴³ *Gonzales* (n 11).

in vertical and retail price maintenance agreements. In addition, some firms eg. *Schindler Holding Ltd v European Commission*⁴⁴ may choose to take the risk of such agreements despite the possible consequences. In that case, even though the elevator cartel arrangement was a flagrant disregard of the restriction, the participants myopically kept their focus on the potential financial rewards.

Thirdly, appreciability under both concepts creates a noticeable distinction if only because, whilst legal clarity seems achievable under object, it is absent from hardcore restraints. Appreciability is measured by taking into account the circumstances, content and objectives of the agreement⁴⁵. A small effect is dismissed under the *de minimis* threshold. The present *de minimis* notice⁴⁶ overlooks vertical agreements with market-shares under 15%. Such clear rules are easy to apply eg. in *Völk v Vervaecke*⁴⁷, where the combined market share of the parties was less than 1%, it was stated that an agreement that provided too insignificant an effect to either impact interstate trade or competition and would not attract penalty under Article 101(2) TFEU.

However, consider *Expedia v France*⁴⁸ where an infringement was found regardless of the mere 1% combined market-share (that was duly brought to the Court of Justice of the European Union (ECJ)'s attention). The ECJ's intent could be to send the message that the more serious the anti-competitive nature of the agreement, the less likely it is to be dismissible and as such, the non-binding nature⁴⁹ of the *de minimis* notice is acknowledged. With hardcore restrictions, however, market-share always deemed irrelevant⁵⁰ with regards to enforcement. On the other hand, as the Dutch courts reminded us in the aftermath of the *Batavus v Commission*⁵¹ case, not all object infringements are appreciable. Ordinarily, infringement of object under Article 101(1) TFEU requires appreciability⁵² with regards to inter-state trade whereas hardcore restrictions are outlawed outright. However, in the

⁴⁴ Case C-501/11 *Schindler Holding Ltd v European Commission (Re Elevators And Escalators Cartel)* ECR II-4819.

⁴⁵ Case C-226/11 *Expedia Inc. v. French National Competition Authority* OJ 2013 C 38/6.

⁴⁶ Council Notice (EU) 2001 of 22 December 2001 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C368/13.

⁴⁷ Case 5/69 *Völk v Vervaecke* [1969] ECR I-295.

⁴⁸ *Elevators and Escalators Cartel* (n 44).

⁴⁹ *Expedia* (n 45).

⁵⁰ Guidelines on Vertical Restraints (n 8) art 4.

⁵¹ *Batavus v Vriend's Tweewielercentrum* [2011] (NLD).

⁵² Council Notice (n 46).

Expedia⁵³ case, the ECJ confirmed that appreciability is no longer a requirement⁵⁴ in an agreement that would, by nature, otherwise be an infringement under Article 101(1) TFEU. Ancillary to this point, an obvious object infringement cannot avoid application of Article 101(1) or (2) TFEU by creating an “insignificance defence”. For example in *Mannesmannröhren-Werke v Commission*,⁵⁵ it was ruled that:

“Undertakings which conclude an agreement whose purpose is to restrict competition cannot, in principle, avoid the application of Article [101(1) TFEU] by claiming that their agreement should not have an appreciable effect on competition.”

Even though this appears to be a rare pleading, as hardcore restraints are by nature outlawed outright, because object infringements under Article 101(1) TFEU are considered in their various contexts, the treatment of the two concepts is significantly dissimilar.

The final point is regarding the subject of intention. Subjective intention is not considered when discussing hardcore restraint, but it does appear somewhat relevant in discovering the object of an agreement. Whilst objective characteristics are the primary factors, it has been said⁵⁶ that a finding of subjective intention makes the agreement more likely to result in a restriction of competition if the parties are intentionally⁵⁷ working toward this end. This takes into account the minds of the actors, rather than scrutinising the words of the agreement as hardcore agreements would do.

III. Conclusion

In conclusion, the concepts of object and hardcore restraints can sometimes appear conceptually similar because the activities they outlaw can overlap. Even expert competition judges and lawyers may sometimes⁵⁸ confuse them. Ultimately, however, this article has distinguished the two concepts in a bid to show that they are different in scope, size and application. One suggestion could be for the formulistic approach of the hardcore restraint to be mirrored

⁵³ Elevators and Escalators Cartel (n 44).

⁵⁴ Expedia (n 45).

⁵⁵ Case T-112/98 *Mannesmannröhren-Werke AG v Commission* [1998] ECR II - 729

⁵⁶ Okeoghene Odudu ‘Restrictions of Competition by Object: what’s the beef?’ [2008] Competition Law Journal (13) p 11.

⁵⁷ *ibid.*

⁵⁸ Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence and Ministre de l’Économie, de l’Industrie et de l’Emploi*. [2011] WLR (D) 359.

by the object concept in Article 101(1) TFEU in a bid to close the gap. Such a move may – from the undertakings’ point of view – close the categories of infringements they may be exposed to. It may also allow firms to arrange their affairs more readily, so as not to be caught by accusations of anti-competitive intent. In a bid for absolute legal certainty (arguments⁵⁹ to the contrary⁶⁰ notwithstanding), clarity is needed either way in order to ensure that the experts are not confused by the agreements. It would remove the need to prove the adverse consequences of such conduct and save valuable Commission resources.

⁵⁹ Roberto Taufick interviews Richard Whish – part 2 [2011] <<http://tiny.cc/03pqdx>> accessed 1 September 2015.

⁶⁰ David Bailey, ‘Presumptions in EU Competition Law’ [2010] *European Competition Law Review* (9) p 20.