

# Appreciability Analysis: Does the Future of an EC (European Competition) Law Doctrine Hang in the Balance?

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Traditionally, EU competition law had two separate tests for determining whether an agreement is anti-competitive—the object test (the agreement’s purpose) and the effects test (its actual effect on competition). Thus, an agreement would be prohibited as anti-competitive either because it had an anticompetitive purpose or effect.

As discussed below, recent **European Court of Justice (ECJ)** decisions have added analytical glosses to these tests, perhaps tending to merge or confuse the two types of analysis.

## Object Test

Generally, agreements with the object of restricting competition are prohibited by Article 101 (1) of the Treaty of the Functioning of the European Union (TFEU) due to their significant chance of negatively affecting competition, regardless of their actual effects.<sup>[i]</sup> Article 101(1) TFEU lists some object restrictions, such as price-fixing, bid-rigging and market sharing.

However, while clear in principle, defining in practice what constitutes an anti-competitive object may be harder. The list included in Article 101(1) TFEU may not be exhaustive. The ECJ implied as much in its *T-Mobile* case, striking down as unlawful the exchange of sensitive price information between competitors because it had an anti-competitive object.<sup>[ii]</sup> The ECJ may not have clarified the matter in the *Beef Industry* case, holding that to determine whether an agreement has the object of restricting competition, courts should consider its content, and its legal and economic context.<sup>[iii]</sup>

## Effects Test

When a court cannot determine an agreement’s restrictive object, the effects test assesses whether the agreement is anti-competitive. To do so, analysis of the agreement in its market context is necessary. In *Asnef-Equifax and Administration del Estado*, the ECJ explained that,

it should be emphasized that the appraisal of the effects of agreements or practices in the light of article 101 TFEU entails the need to take into consideration the actual context to which they belong, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of

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the market or markets in question. <sup>[iv]</sup>

## "Appreciability:" A Possible Step Towards Merging the Objects and Effects Tests?

In its 1969 *Völk/Vervaecke* decision, the ECJ explained that courts should conduct an "appreciability" analysis in both objects and effects cases — an agreement that does not appreciably restrict competition cannot be anti-competitive. <sup>[v]</sup>

Immediately after *Völk/Vervaecke*, the European Commission issued a *de minimis* notice (the notice), stating that to qualify as anti-competitive, an agreement must have an appreciable impact on competition. <sup>[vi]</sup> Agreements between parties whose aggregate market share is less than 10 percent are unlikely to appreciably impact competition, and are thus not prohibited.

This appreciability gloss blends the object and effects analyses. It requires courts to look at common legal elements regarding an agreement's surrounding circumstances to determine whether the agreement is anti-competitive under Article 101(1) TFEU. As discussed next, recent ECJ decisions seem to blur the line between the objects and effects tests.

The ECJ's December 13, 2012 *Expedia* decision addressed an agreement between Expedia and the French state railway company SNCF to create a joint subsidiary. The French Competition Authority found that the agreement, which fell below the notice's 10 percent threshold, had a restrictive object. Referring to its 2011 judgment in *Pfleiderer*, <sup>[vii]</sup> the ECJ held that the Commission's *de minimis* notice is not binding on member states. According to the ECJ, an agreement which falls short of the notice's thresholds is not automatically exempted from Article 101(1) TFEU, and may nonetheless be anti-competitive. Moreover, the ECJ stated that irrespective of its concrete effects, an agreement with an anti-competitive object inherently affects trade and appreciably restricts competition.

The ECJ *Expedia* holdings question the ECJ's prior appreciability rulings, which were the notice's jurisprudential foundation. <sup>[viii]</sup> By casting aspersions on the appreciability gloss's continued viability, *Expedia* may have blurred the differences between the object and effects tests.

On March 14, 2013, the ECJ may have added to the confusion in *Allianz*, <sup>[ix]</sup> which involved two insurers that agreed with the national association of authorized car dealers to annual rates and conditions for repairs performed for them by car dealers. The Hungarian Supreme Court requested an advisory opinion from the ECJ regarding whether the agreements were object or effect restrictions. Acknowledging that Hungarian law was applicable, the ECJ accepted the case to ensure consistent application of European competition law.

The Allianz agreement was intended to increase the market shares of the two parties to the agreement. Prior to Allianz, this alone would not have been sufficient for an agreement to meet prohibited restrictive object test, which "must be interpreted strictly and must be limited to cases in which a particularly serious inherent capacity for negative effects can be identified." <sup>[x]</sup> However, the ECJ analyzed the agreement under a different standard. To determine whether the agreement had a restrictive object, the Allianz court looked at the agreement's content, objectives, economic and legal context, the nature of the goods or services affected, and the relevant markets' conditions, function, and structure. This detailed scrutiny to determine an anticompetitive object bears a resemblance to the anticompetitive effects analysis (which perhaps contrasts with the ECJ *Expedia* decision's seemingly heightened differentiation between the two tests). Allianz's more thorough "by object"

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analysis should, at least in theory, have included an appreciability analysis as part of the broad factual and legal analysis.

Allianz's full effect remains to be seen. However, it may increase the potential for divergent outcomes in "by object" cases. On the one hand, agreements that may have been prohibited by Article 101(1) TFEU under a restrictive reading of the ECJ *Expedia* decision (not requiring an appreciability analysis), may be permitted under the broader Allianz analysis (possibly including appreciability). On the other hand, perhaps Allianz's greater scrutiny will result in more agreements being considered unlawful "by object" restrictions.

## The Notice's Proposed Revision

This past July, the Commission launched a public consultation period considering whether to revise its 1969 *de minimis* notice to reflect the latest developments in the ECJ, including whether agreements with "by object" restrictions benefit from the notice's protection.<sup>[xi]</sup> We shall see whether and how the Commission will revise the *de minimis* notice.<sup>[xii]</sup>

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[i] Joined Cases 56/64 and 58/64 Consten and Grundig v. Commission [1966] ECR 299, 342; Case C-7/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission [2006] ECR I-78725, paragraph 125; and Beef Industry Development Society and Barry Brothers, paragraph 16.

[ii] Case C-8/08, T-Mobile Netherlands and Others (T-Mobile) [2009] ECR I-4529, paragraphs 32 to 39.

[iii] Case C-209/07 Beef Industry Development Society and Barry Brothers [2008] ECR I-0000.

[iv] Case C-238/05 Asnef-Equifax and Administración del Estado [2006] ECR I-11125.

[v] Case C-5/69, 9 July 1969, *Völk/Vervaecke* [1969].

[vi] Case C-5/69, *Völk/Vervaecke* [1969].

[vii] Case C-360/09, 14 juni 2011, *Pfleiderer AG/Bundeskartellamt* [2011] ECR I-05161.

[viii] However, the ECJ does not seem to have abandoned its *Völk/Vervaecke* holding.

[ix] Case C-32/11, *Allianz Hungaria a.o./Gazdasági Versenyhivatalon* [2013] ECLI:NL:XX:2013:BZ5285.

[x] Case C-209/07 *Beef Industry Development Society and Barry Brothers*.

[xi] The revision also excludes protection for agreements containing hardcore restrictions, and more technically-focused, the revision will ensure that the Notice does not need to be updated every time another competition law regulation is revised.

[xii] The consultation period has ended; the Commission has not yet expressed itself on any comments it received.

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