

Seventh Annual Conference of the Global Competition Law Centre (College of Europe)

Ten Years of the Effects-Based Approach in EU Competition Law
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The Scope of object v. effect under Article 101 TFEU :

Criminal v. non-criminal?

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- Object v. effect restriction dichotomy;
- Scope and meaning of “*restriction by effect*”;
- Scope and meaning of “*restriction by object*”;
- Predictability, presumption of innocence and standard of proof in the criminal sphere.

Restrictions by effect

- Restriction on freedom of action;
- Restriction on structure of competition;
- Potential effect on one parameter in abstracto;
- Negative effect on consumer in concreto;
- Counterfactual;



lack of clarity on legal test.

Restriction by object (I)

- Status quo :
 - Price fixing;
 - Market sharing;
 - Others?

- “Easily identifiable” restrictions :
 - Role of subjective intent;
 - 3 conditions : seriousness – likelihood – foundation;
 - A parasitic concept?

3 conditions: seriousness, probability, experience

"Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101] (1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardize the objectives pursued by the Community competition rules".

Article 101(3) guidelines, para 21

Restriction by object (II)

- Contextual analysis :
 - Extent;
 - Purpose;
 - Relevant factors.
- Narrow interpretations :
 - Significance;
 - Challenges.

Four “P”s

- **Predictability :**
 - Definition of “*restrictive effects*”;
 - Economic analysis.
- **Presumption of innocence**
- **Proof :**
 - Beyond reasonable doubt.
- **Penalties**

CONCLUSIONS

- Object v. effect
- Criminal v. non-criminal
- Danger of abuse of private enforcement too
- Comparison with US
- What the future holds

THANK YOU