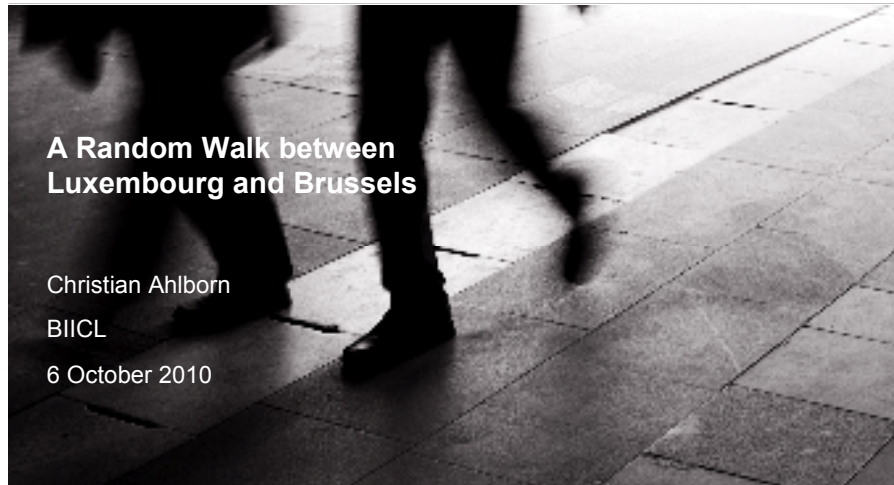


Object/Effect and Information Sharing



Contents

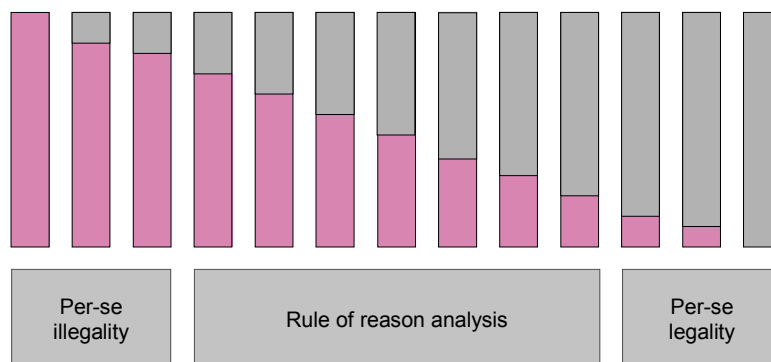
- > Prior beliefs
- > Object vs effect
 - > scope
 - > impact
- > Information exchange
 - > categories of information exchange
 - > prior beliefs
 - > case law
 - > the Horizontal Guidelines

Prior Beliefs

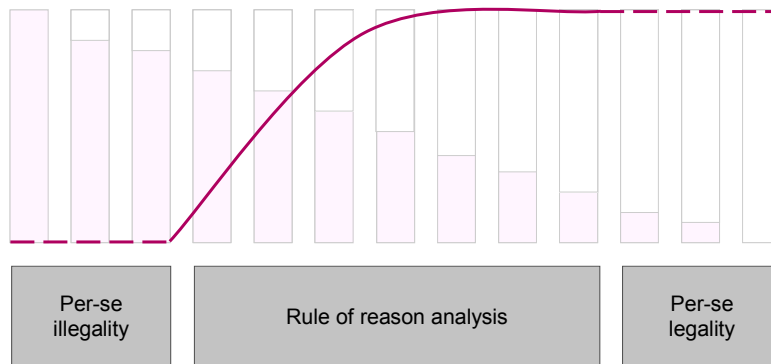
- > "Prior beliefs" shape the way the competition policy is implemented – whether or not this is explicitly acknowledged
- > "Prior beliefs"
 - > reflect the expected harm to competition of certain practices
 - > based on previous experience (and developments in economic thinking)
- > The more negative the prior beliefs (i.e. the greater the expected harm of a particular practice), the lower the evidential burden to establish a breach of competition law
- > Underlying rationale
 - > administrative convenience
 - > increase in legal certainty / greater predictability



Prior Beliefs - the U.S. example

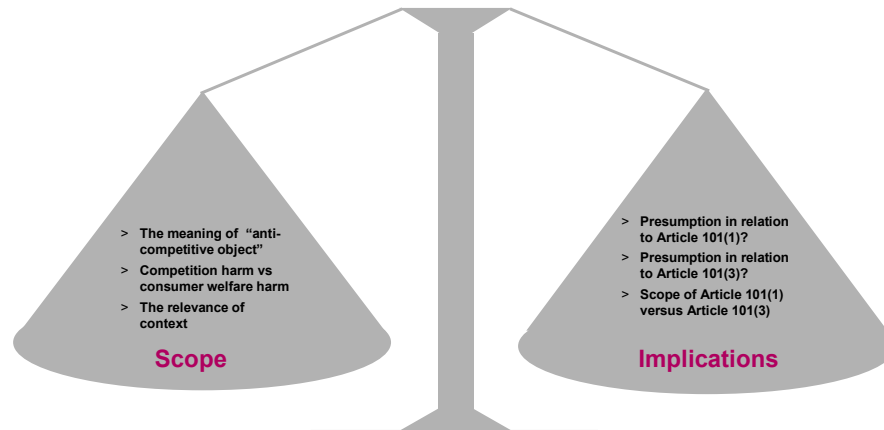


Prior Beliefs - the U.S. example



Object vs. Effect

Two Dimensions of “Restrictions by Object “



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Scope: Anti-competitive “object”

- > *Article 101(3) Guidelines*
 - > “Restrictions of competition by object are those that by their very nature have the potential of restricting competition”
 - > “These restrictions... have such a high potential of negative effects on competition that it is not necessary for the purpose of applying Article 101(1) to demonstrate any actual effect 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 jeopardise the objectives pursued by the Community Competition rules.”



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Scope: Anti-competitive “object” in *T-Mobile*.

- > In *T-Mobile*, the ECJ drastically expanded the definition of an anti-competitive object
 - > Previous cases suggested that only agreements or practices that restrict competition “by their very nature” should be considered as object cases (*Irish Beef*, *GSK*)
 - > Object cases tended to be those in which anticompetitive effects would arise “as a necessary consequence” of the agreement or practice (*Irish Beef*)
- > In contrast, in *T-Mobile* the ECJ said that:

“A concerted practice pursues an anti-competitive object for the purpose of Article [101(1)] where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition”
- > If taken literally, this formulation would not leave room for *any* effects cases.

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Scope: Competition Harm vs. Consumer Welfare Harm

- > *Irish Beef* (crisis cartel)
 - > BIDS claimed that the arrangements did not constitute a restriction by object because their purpose was “not adversely to affect competition or the welfare of consumers, but to rationalise the beef industry in order to make it more competitive by reducing, but not eliminating, production overcapacity.”
 - > The ECJ stated:
 - > An agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives
 - > It is only in connection with [Article 101(3)] that matters such as those relied upon by BIDS may, if appropriate, be taken into consideration for the purpose of obtaining an exemption from the prohibition laid down in [Article 101(1) TFEU].
 - > Expectation of harm to competition or harm to consumer welfare
 - > Excessive formalism by ECJ in *Irish Beef*?

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Scope: The Context of an Anti-competitive Object

- > The context may help to determine whether certain practices are restrictions by object
 - > *STM*
 - > *T-Mobile*
- > "Price fixing" in the context of a "joint venture" type arrangement
 - > *Visa International Multi-lateral Interchange Fees*: restriction by effect, not object
 - > Collective sport "products" (e.g. football leagues)
- > Restrictions by object in the context of the Single Market
 - > *GSK*



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Implications of "Restrictions by Object"

- > Presumption in relation to Article 101(1)
 - > harm to competition is presumed, not established
 - > is presumption irrebuttable? (see AG Kokott in *T-Mobile*)
 - > shift of burden of proof
- > Presumption in relation to Article 101(3)
 - > "restriction by object" is not the same as per se illegality
 - > "hardcore" restrictions exemptable only in "exceptional circumstance" – rebuttable presumption of consumer harm
 - > recent tendency to weaken that presumption? (see RPM approach)
- > Dividing line between Article 101(1) and Article 101(3) is critical.

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Conclusions on “Restrictions by Object”

- > ‘Scope’ and ‘implications’ of ‘restrictions by object’ have to be consistent
- > Two plausible solutions
 - > thin model: strong presumptions of consumer harm welfare with very restricted applicability
 - > fat model: weaker presumptions of consumer harm with a broader applicability
- > Strong arguments in favour of the thin model
 - > It does not lead to an overbroad interpretation of Article 101(1)
 - > benefits of ‘anti-competitive object’ approach only materialise if presumptions normally hold.

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Information Exchange

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Types of Information Exchange

<p>Cartels</p>	<p>Tacit collusion</p>	<p>Competitive strategies</p>	<p>Pro-competitive merger on agreements</p>	<p>Gossip</p>
<ul style="list-style-type: none"> > Info exchange between competitors > Private > High potential of negative effects 	<ul style="list-style-type: none"> > Info exchange between competitors and/or other market participant > Private or public > A-priori ambivalent: could restrict or enhance competition 		<ul style="list-style-type: none"> > Info exchange between competitors > Private 	<ul style="list-style-type: none"> > Info exchange between competitors and other market participant > Private or public

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Prior Beliefs

- > The type of information may give some indication as to the likely effects
 - > Public announcements are less likely to be useful for collusion and more likely to deliver benefits for consumers
 - > Information on non-strategic variables (e.g. costs) are less likely to be useful for collusion and are more likely to be useful for competition.
- > The specific market characteristics can give clues as to whether communications are anti-competitive or benign:
 - > Tacit collusion requires BOTH coordination and monitoring. Unless the information exchange and the market context can deliver both, the exchange is unlikely to be anti-competitive
 - > If the market has a large number of firms or limited ability to “punish” deviations (e.g. no excess capacity) then information exchange is unlikely to be anti-competitive

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Article 101 TFEU and Information Exchange.

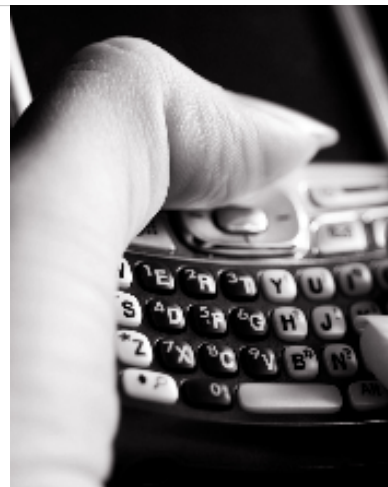
Four key features emerge from the European cases before *T-Mobile*:

- > Confidential communications concerning future prices are “object” cases (*Independent Schools*)
- > Confidential communications concerning recent past strategic variables may be infringements by effect (*UK Tractors*)
- > Although in perfectly competitive markets information exchanges may be acceptable, in highly concentrated markets ANY reduction in certainty that affects behaviour will have anti-competitive effects, even in unconcentrated markets (*Thyssen Stahl*)
- > Public communications are generally lawful, even where they convey information about future pricing (*Woodpulp*).

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Information exchange in *T-Mobile*.

- > AG Kokott's reference to 'risk offences' is a clear indication of her prior beliefs
- > The ECJ applied its expanded object test to take a hard line on information exchange:
 - An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings*
- > This could catch many information exchanges that would previously have been effects cases
 - > e.g. exchange of recent cost, price or quantity data
- > Given that the *T-Mobile* exchange was a discussion between competitors on future remuneration for mobile phone dealers it is not clear why the ECJ felt it necessary to go this far.



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Horizontal Guidelines

- > Restrictions by object
 - > information exchange between competitors of individualised data regarding intended future prices or quantities;
 - > information exchange on current conduct that reveals intention on future behaviour
 - > combination of different types of data which enables the direct deduction of intended future prices
 - > information exchanges which are part of a cartel
- > Basis:
 - > exchange of information about intention on future conduct is the most likely to enable companies to reach a common understanding
 - > but: does it have a high potential of negative effects (independently of market circumstances)?
- > “Exchanges of genuinely public information are unlikely to constitute an infringement of Article 101(1)”: what about exchange of public individualised data regarding future prices or quantities
- > Guidance not reconcilable with *T-Mobile*

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Conclusions on Information Exchange

- > The concern about the consequences of “reducing uncertainty” is approaching paranoia
 - > Although reducing uncertainty can facilitate collusion, it can also facilitate competition
 - > If the reduction of uncertainty always gives rise to collusion, then why is public transparency acceptable?
- > The courts do not require a rigorous theory of tacit collusion before accepting that information exchange has anti-competitive effects
- > The ECJ’s decision in *T-Mobile* has made matters even worse by casting doubt on whether any meaningful information exchanges can escape the “object” test.
- > Information exchange cases are natural candidates for a careful effects based analysis
- > Competition authorities should construct a robust theory of harm based on facilitating tacit collusion

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Any questions?

