

**THE DISTINCTION
BETWEEN RESTRICTIONS
BY OBJECT AND
BY EFFECT UNDER
ARTICLE 101 TFEU**

STUDIENVEREINIGUNG KARTELLRECHT

Professor Richard Whish

3 APRIL 2014

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

STRUCTURE OF PRESENTATION

- ◉ INTRODUCTORY COMMENTS
- ◉ THE FACTS OF CASE C-32/11 *ALLIANZ HUNGÁRIA BIZTOSÍTÓ V GAZDASÁGI VERSENYHIVATAL*
- ◉ THE REASONING IN *ALLIANZ HUNGÁRIA*
- ◉ THE IMPLICATIONS OF *ALLIANZ HUNGÁRIA* FOR THE OBJECT-EFFECT DISTINCTION
- ◉ CONCLUDING COMMENTS

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

INTRODUCTORY COMMENTS

- ◉ THE BASIC RULE IS WELL-KNOWN: THE ‘OR’ IN ‘OBJECT OR EFFECT’ IS DISJUNCTIVE, SO THAT WHERE AN AGREEMENT RESTRICTS BY OBJECT THERE IS NO NEED TO DEMONSTRATE EFFECTS TO SHOW AN INFRINGEMENT: CASE 56/65 *LTM*, REPEATED MANY TIMES SINCE, INCLUDING AT PARAGRAPH 33 OF *ALLIANZ HUNGÁRIA*
- ◉ THERE IS ABUNDANT JURISPRUDENCE THAT ESTABLISHES THAT CERTAIN TYPES OF AGREEMENT RESTRICT BY OBJECT

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

INTRODUCTORY COMMENTS

⦿ THE CONTENTS OF THE ‘OBJECT’ BOX ARE THEREFORE REASONABLY WELL ESTABLISHED: FOR EXAMPLE

- HORIZONTAL PRICE FIXING
- HORIZONTAL MARKET SHARING
- EXPORT BANS IN VERTICAL AGREEMENTS
- RESALE PRICE MAINTENANCE

⦿ EFFECTS ARE RELEVANT IN OBJECT CASES ONLY FOR THE PURPOSES OF FINES AND DAMAGES (*T-MOBILE*)

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

INTRODUCTORY COMMENTS

⦿ AT THE LEVEL OF THE EU COURTS, NOTE HOW MANY CASES THERE CONTINUE TO BE ON THE QUESTION OF OBJECT RESTRICTIONS: FOR EXAMPLE IN 2013

- T-588/08 *DOLE FOOD COMPANY V COMMISSION*
- C-68/12 *PROTOMONOPOLNÝ ÚAD SLOVENSKEJ REPUBLIKY V SLOVENSKÁ SPORITEL'ŇA A.S.*
- C-32/11 *ALLIANZ HUNGÁRIA BIZTOSÍTÓ V GAZDASÁGI VERSENYHIVATAL*

⦿ THERE HAVE BEEN MANY OTHERS IN RECENT YEARS

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

INTRODUCTORY COMMENTS

- ◉ NOTE ALSO THAT THE COMMISSION'S DECISIONS IN BOTH *TELEFÓNICA/PORTUGAL TELECOM* AND *LUNDBECK* WERE FINDINGS OF RESTRICTIONS BY OBJECT
- ◉ IN ARTICLE 102 CASES THE MOVE IS TOWARDS EFFECTS ANALYSIS; AND YET UNDER ARTICLE 101 THERE ARE MANY CASES ON OBJECT RESTRICTIONS
- ◉ CONTRADICTION? IN MY VIEW 'NO' AS LONG AS IT IS UNDERSTOOD THAT ARTICLE 101(3) IS AVAILABLE IN OBJECT CASES

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE FACTS OF C-32/11 *ALLIANZ HUNGÁRIA BIZTOSÍTÓ V GAZDASÁGI VERSENYHIVATAL*

- ◉ INSURERS IN HUNGARY ENTER INTO AGREEMENTS WITH REPAIRERS TO REPAIR CARS AT AN AGREED HOURLY RATE
- ◉ THE REPAIRERS ENGAGE GÉMOSZ TO NEGOTIATE ANNUAL FRAMEWORK AGREEMENTS WITH THE INSURERS AS TO THE HOURLY RATE
- ◉ IN 2004 ALLIANZ ENTERED INTO BILATERAL VERTICAL AGREEMENTS WITH REPAIRERS BASED ON THOSE FRAMEWORK AGREEMENTS

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE FACTS OF C-32/11 ALLIANZ HUNGÁRIA BIZTOSÍTÓ V GAZDASÁGI VERSENYHIVATAL

- ◉ INTERMEDIARIES IN HUNGARY WHO SELL INSURANCE POLICIES MUST DO SO IN THE INTERESTS OF THE CONSUMER, NOT THE INSURANCE COMPANY WHOSE POLICIES THEY SELL
- ◉ REPAIRERS ACT AS INTERMEDIARIES SELLING INSURANCE POLICIES
- ◉ BOTH ALLIANZ AND GENERALI AGREED WITH THEIR REPAIRERS TO PAY HIGHER RATES OF REMUNERATION DEPENDING ON THE NUMBER OF POLICIES SOLD BY THEM

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE FACTS OF C-32/11 *ALLIANZ HUNGÁRIA BIZTOSÍTÓ V GAZDASÁGI VERSENYHIVATAL*

- THE HUNGARIAN COMPETITION AUTHORITY CONCLUDED THAT THE HORIZONTAL AGREEMENTS (THAT IS THE DECISIONS OF GÉMOSZ AS TO RECOMMENDED PRICES), THE FRAMEWORK AGREEMENTS BETWEEN GÉMOSZ AND ALLIANZ AND THE VERTICAL AGREEMENTS BETWEEN ALLIANZ AND GENERALI, ON THE ONE HAND, AND PEUGEOT, OPEL AND PORSCHE AS INTERMEDIARIES SELLING INSURANCE RESTRICTED COMPETITION BY OBJECT

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE FACTS OF C-32/11 ALLIANZ HUNGÁRIA BIZTOSÍTÓ V GAZDASÁGI VERSENYHIVATAL

- APPEALS IN HUNGARY CULMINATED IN AN ARTICLE 267 REFERENCE TO THE COURT OF JUSTICE, ASKING WHETHER THE *BILATERAL* AGREEMENTS BETWEEN THE INSURERS AND THE REPAIRERS/INTERMEDIARIES OR THE INSURERS AND GÉMOSZ RESTRICTED COMPETITION BY OBJECT
- THE COURT OF JUSTICE CONCLUDED THAT IT HAD JURISDICTION TO TAKE THE CASE AND THAT IT WAS ADMISSIBLE

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE REASONING IN *ALLIANZ HUNGÁRIA*

- PARAGRAPHS 33 TO 38 OF THE JUDGMENT IN *ALLIANZ HUNGÁRIA* ARE ‘BOILERPLATE’:
 - NO NEED TO DEMONSTRATE EFFECTS IN AN OBJECT CASE
 - OBJECT RESTRICTIONS ARE ONES THAT CAN BE REGARDED AS BY THEIR VERY NATURE, INJURIOUS TO THE PROPER FUNCTIONING OF NORMAL COMPETITION
 - IN DECIDING WHETHER THERE IS AN OBJECT RESTRICTION ONE MUST LOOK AT THE CONTENTS OF THE AGREEMENT, ITS OBJECTIVES AND THE ECONOMIC AND LEGAL CONTEXT OF WHICH IT FORMS PART
 - INTENTION TO HARM COMPETITION IS NOT NECESSARY, BUT IS RELEVANT

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE REASONING IN *ALLIANZ HUNGÁRIA*

- PARAGRAPHS 40-42: THE COURT NOTES THAT THE AGREEMENTS LINK THE CAR REPAIR SERVICE TO THE CAR INSURANCE BROKERAGE MARKET: THIS IS AN IMPORTANT FACTOR IN DECIDING WHETHER THE AGREEMENTS ARE BY THEIR NATURE INJURIOUS TO COMPETITION
- PARAGRAPH 43: VERTICAL AGREEMENTS CAN RESTRICT BY OBJECT: THE COURT CITES *CONSTEN AND GRUNDIG*, *MILLER INTERNATIONAL* AND *PIERRE FABRE*

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE REASONING IN *ALLIANZ HUNGÁRIA*

- PARAGRAPH 44: THE AGREEMENTS BETWEEN ALLIANZ AND GENERALI ‘AIM TO MAINTAIN OR INCREASE THEIR MARKET SHARES’
- PARAGRAPH 45: IF THERE WAS A HORIZONTAL AGREEMENT BETWEEN ALLIANZ AND GENERALI, THAT WOULD RESTRICT COMPETITION BY OBJECT: THE NATIONAL COURT SHOULD CHECK THAT
- SUCH A HORIZONTAL AGREEMENT ‘WOULD ALSO RESULT IN THE UNLAWFULNESS OF THE VERTICAL AGREEMENTS CONCLUDED IN ORDER TO IMPLEMENT THAT AGREEMENT OR PRACTICE’

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE REASONING IN *ALLIANZ HUNGÁRIA*

- PARAGRAPH 46: BUT EVEN IF THERE IS NO HORIZONTAL AGREEMENT BETWEEN ALLIANZ AND GENERALI, IT IS NECESSARY TO DETERMINE WHETHER THE VERTICAL AGREEMENTS ARE SUFFICIENTLY INJURIOUS TO COMPETITION ON THE CAR INSURANCE MARKET AS TO AMOUNT TO A RESTRICTION OF COMPETITION BY OBJECT

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE REASONING IN *ALLIANZ HUNGÁRIA*

- PARAGRAPH 47: GIVEN THAT HUNGARIAN LAW REQUIRES BROKERS TO ACT INDEPENDENTLY FROM REPARIERS, THE REFERRING COURT MUST CONSIDER WHETHER THE VERTICAL AGREEMENTS SIGNIFICANTLY DISRUPT THE PROPER FUNCTIONING OF THE CAR INSURANCE MARKET

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE REASONING IN *ALLIANZ HUNGÁRIA*

- PARAGRAPH 48: FURTHERMORE THE VERTICAL AGREEMENTS COULD RESTRICT BY OBJECT IF COMPETITION ON THE MARKET COULD BE ELIMINATED OR SERIOUSLY WEAKENED TAKING INTO ACCOUNT:
 - ‘THE STRUCTURE OF THAT MARKET, THE EXISTENCE OF ALTERNATIVE DISTRIBUTION CHANNELS AND THEIR RESPECTIVE IMPORTANCE AND THE MARKET POWER OF THE COMPANIES CONCERNED’
- PARAGRAPH 49: A FURTHER RELEVANT FACTOR IS THE HORIZONTAL ISSUE, THAT IS THE DECISIONS OF GÉMOSZ

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE REASONING IN *ALLIANZ HUNGÁRIA*

- PARAGRAPH 50: IF THE GÉMOSZ ARRANGEMENTS RESTRICT BY OBJECT ‘THE UNLAWFULNESS OF THOSE DECISIONS WOULD VITIATE THOSE [VERTICAL] AGREEMENTS, WHICH WOULD THEN ALSO BE CONSIDERED A RESTRICTION OF COMPETITION BY OBJECT’

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE REASONING IN *ALLIANZ HUNGÁRIA*

- PARAGRAPH 51: SO THE BILATERAL AGREEMENTS MAY RESTRICT BY OBJECT IF ‘FOLLOWING A CONCRETE AND INDIVIDUAL EXAMINATION OF THE WORDING AND AIM OF THOSE AGREEMENTS AND OF THE ECONOMIC AND LEGAL CONTEXT OF WHICH THEY FORM PART’ IT IS APPARENT THAT THEY ARE INJURIOUS TO THE PROPER FUNCTIONING OF NORMAL COMPETITION ON ONE OF THE TWO MARKETS CONCERNED

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE IMPLICATIONS OF *ALLIANZ HUNGÁRIA* FOR THE OBJECT-EFFECT DISTINCTION

- ◉ MANY COMMENTATORS HAVE CRITICISED THE EU COURTS IN RECENT YEARS FOR THEIR ADHERENCE TO (AND EXTENSION OF) OBJECT ANALYSIS
- ◉ IN PARTICULAR THERE IS THE CRITICISM THAT OBJECT ANALYSIS FLIES IN THE FACE OF THE ‘MORE EFFECTS-BASED APPROACH’ TO COMPETITION CASES
- ◉ NOTE THE ARTICLE 102 JUDGMENTS, FOR EXAMPLE IN *TELIASONERA* AND *POST DANMARK*, AFFIRMING THE NEED FOR EFFECTS

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE IMPLICATIONS OF *ALLIANZ HUNGÁRIA* FOR THE OBJECT-EFFECT DISTINCTION

- ◉ IN MY VIEW, RECENT JUDGMENTS OF THE EU COURTS (EG *GSK*, *BEEF INDUSTRY DEVELOPMENT SOCIETY*, *T-MOBILE*, *DOLE*) WERE ALL EXPLICABLE OBJECT CASES
- ◉ IN *GSK*, *BIDS* AND *DOLE* THE QUESTION WAS (OR SHOULD HAVE BEEN) WHETHER OBVIOUS RESTRICTIONS OF COMPETITION COULD SATISFY THE CRITERIA OF ARTICLE 101(3)
- ◉ NOTE ON THIS POINT THE STAR ALLIANCE COMMITMENT DECISION

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE IMPLICATIONS OF *ALLIANZ HUNGÁRIA* FOR THE OBJECT-EFFECT DISTINCTION

- ◉ WHISH AND BAILEY *COMPETITION LAW* HAS THEREFORE BEEN ‘SYMPATHETIC’ TO THE JURISPRUDENCE ON OBJECT RESTRICTIONS
- ◉ BUT *ALLIANZ HUNGÁRIA* IS DIFFICULT TO SYMPATHISE WITH
- ◉ WERE THESE ‘OBVIOUS’ RESTRICTIONS OF COMPETITION (TO USE THE LANGUAGE OF THE GENERAL COURT IN *EUROPEAN NIGHT SERVICES*)?

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE IMPLICATIONS OF *ALLIANZ HUNGÁRIA* FOR THE OBJECT-EFFECT DISTINCTION

- WHAT WAS IT THAT MADE THESE AGREEMENTS ‘SMELL BAD’:
 - THE VIOLATION OF THE PRINCIPLES OF HUNGARIAN CONSUMER PROTECTION LAW?
 - THE HORIZONTAL ARRANGEMENTS BETWEEN THE REPARIERS?
 - THE MARKET SHARES OF THE PARTIES AND THE DISTRIBUTION CHANNELS IN HUNGARY FOR CAR INSURANCE PRODUCTS? BUT ISN'T THAT EFFECTS ANALYSIS?

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

THE IMPLICATIONS OF *ALLIANZ HUNGÁRIA* FOR THE OBJECT-EFFECT DISTINCTION

- ◉ THE JUDGMENT IS UNSATISFACTORY AND BLURS THE (PERFECTLY JUSTIFIABLE) DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS
- ◉ HOWEVER, AT LEAST IN THE COMMON LAW WORLD, IT SHOULD BE RELATIVELY EASY TO DISTINGUISH THE CASE ON ITS FACTS!

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

CONCLUDING COMMENTS

- ◉ THE OBJECT-EFFECT DISTINCTION ONLY WORKS EFFECTIVELY IF THE 'OBJECT BOX' IS LIMITED TO 'OBVIOUS' RESTRICTIONS OF COMPETITION
- ◉ IN PARTICULAR WE HAVE A *REDUCTIO AD ABSURDUM* IF WE DECIDE THAT AN AGREEMENT RESTRICTS BY OBJECT ON THE BASIS OF EFFECTS ANALYSIS
- ◉ THE EU COURTS MUST NOT UNDERMINE THE DISTINCTION BY EXTENDING OBJECT ANALYSIS TO NON-OBVIOUS RESTRICTIONS

THE DISTINCTION BETWEEN OBJECT AND EFFECT RESTRICTIONS

CONCLUDING COMMENTS

- ◉ NOTE ALSO *PIERRE FABRE* - SELECTIVE DISTRIBUTION SAID TO BE A RESTRICTION BY OBJECT: REALLY?
- ◉ THANK YOU FOR YOUR ATTENTION!

