Object Analysis in Information Exchange Among Competitors

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In the last few years, the substantive assessment of information exchanges among competitors has become a hot subject of debate. Despite the well-known pro- and anti-competitive effects of information sharing, recent developments show an increasing trend of EU competition authorities, including the Commission itself, to assess certain information exchanges under the 'object approach'. This view has officially been expressed by the Commission in its recently published horizontal cooperation Guidelines. This article analyses from an economic and a legal perspective whether it is appropriate to identify certain types of information exchanges as 'restrictions by object', which automatically violate article 101(1) TFEU.

I. Introduction

The legal treatment of information exchange among competitors has long been a controversial subject in the field of EU competition law and policy.[1]

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[1] See for instance, Antonio Capobianco, 'Information Exchange under EC Competition Law' (2004) 41(5) Common Market Law Review 1247; Florian Wagner-von Papp, 'Who is that can inform me? – the exchange of identifying and non-identifying information' (2007) 28(4) European Competition Law Review 64; Hans-Jorg Niemeyer, 'Market information systems' (1993) 14(4) ECLR 151; Eugenio Bissocoli, 'Trade Associations and Information Exchange under US and EC Competition Law' (2000) 23(1) World Competition 79; Cristoforo Osti, 'Information exchanges in the obscure light of Woodpulp' (1994) 15(3) European Competition Law Review 176; Florian Wagner-von Papp, 'Information Exchange Agreements' in D. Geradin and I. Lianos (eds.), *Research Handbook on EU Antitrust Law* (Edward Elgar Publishing, forthcoming) <http://www.ssrn-.com/abstract=2015674> accessed 12 December 2012.

As it is well known, information exchanges can have both pro- and anti-competitive effects. In certain cases, the availability of information enables firms to enhance the efficiency of their distribution systems improves their marketing activities and stimulates new investments in capacity or research and development (R&D). Furthermore, through benchmarking against each other's 'best practice', companies can increase their productive efficiency.[2] Conversely, it has also been demonstrated that information exchanges may present significant risks for the competitive process. Most importantly, information exchange can play an important role in facilitating collusion and, thereby, considerably harm competition and consumers.

The wide-ranging effects of information exchange would not be problematic for enforcement agencies if there were a method to draw a clear line between its pro- and anti-competitive types.[3] The major difficulty lies in the fact that, as the economist Kai-Uwe Kühn notes, 'Almost under any circumstances information exchange could be good or bad'.[4] For instance, if companies share information about their pricing activities, such exchange may lead to higher prices in the market and, thus, restrict competition or, on the contrary, it may lead to intensified price competition among the market rivals, which can be extremely beneficial for consumers. Logically, these varying and, at times, conflicting effects resulting from information sharing pose a real challenge for the substantive legal assessment conducted by competition authorities. In this context, the question of 'what is the appropriate legal standard to judge the flow of information among competitors' represents, indeed, an important issue.

Given the acknowledged pro- and anti-competitive effects of information exchanges, in principle, it may seem appropriate to assess these practices case-by-case under the so-called effect-based approach, in order to

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[2]See, for instance, OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (DAF/COMP(2010)37), Note by the Delegation of the European Union, 308. <http://www.oecd.org/dataoecd/12/52/48379006.pdf> > accessed 12 December 2012. For a brief overview of the benefits of information sharing, see Matthew Bennett and Philip Collins, 'The Law and Economics of Information Sharing' (2010) European Competition Journal 311, 314-320.

[3] See Jorge Padilla, 'The elusive challenge of assessing information sharing among competitors under the competition laws' in OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (DAF/COMP(2010)37), 435; see also Wagner-von Papp, 'Information Exchange Agreements' (n 1) 4.

[4]Kai-Uwe Kuhn, 'Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results' in OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (DAF/COMP(2010)37) 416.

determine whether the conduct has any adverse impact.[5] However, it appears that national competition authorities and the European Commission (Commission) itself are fully prepared to embrace the idea that certain types of information sharing can – and should – constitute restrictions of competition by object. This recent tendency is well illustrated by the enforcement practice of some competition authorities[6] and, particularly, by the recently published *Guidelines on horizontal cooperation agreements*,[7] in which the Commission clearly states its view that certain types of information exchange should be considered restrictions of competition by object.[8] Predictably, this approach has been criticised by a number of authors who expressed their concern that the Commission's approach to the types of information exchange that fall within the scope of *object* restrictions is too wide. [9] Moreover, it has been argued that since the effects of information exchanges may significantly vary depending on the

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[5] See Padilla (n 3) 435.

[6] For example, in the UK, the Office of Fair Trading (OFT) qualified certain exchanges as anticompetitive by object. See e.g. decision of the OFT No CA98/05/2006, 'Exchange of Information on Future Fees by Certain Independent Fee-paying Schools', 20 November 2006 (Case CE/2890-03); OFT press release 34/10, 'RBS Agrees to Pay £28.5 Million Penalty for Disclosing Pricing Information to Competitor', 30 March 2010. In Spain, the SCA adopted the same approach in the STANPA case. See SCA decision of 7 February 2011, Case number S/0155/09. Also the Portuguese Competition Authority issued an decision regarding the exchange of information on bread prices which had the object of restricting competition in the Lisbon Bakers' case (Associação dos Industriais de Panificação de Lisboa, see press release at <http://www.concorrencia.pt/-vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200821.aspx> accessed 12 December 2012. See also Decision ref.: R 126/2008/01-3227/2009/310/ADr of March 18th 2009, regarding a case in the Czech Republic in which the 'Funeral associations' issued price recommendations.

[7] Communication from the EU Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1 (Cooperation Guidelines).

[8] ibid paras 73 –74.

[9] Such suggestions were, for instance, intensely made in the context of the consultation of the draft of the Guidelines which the Commission published in May 2010 and put forward for public consultation. See, for instance, Allen & Overy, 'Response to the European Commission - Draft revised rules for the assessment of horizontal co-operation agreements', para 2.16 *ff.* <http://ec.europa.eu/competition/consultations/2010_-horizontals/allen_overy_en.pdf> accessed 12 December 2012. More precisely, they observed that 'the Commission's approach is (…) too broad and goes beyond the Commission's position in the General Guidelines and current European court case law, especially since no reference is made to the need to consider the underlying facts of the agreement and the characteristics of the market involved'.

economic context and the characteristics of the market, this practice should not be approached under the ‘object’ analysis.[10]

This work is primarily concerned with the question whether, in the context of the substantive assessment of information sharing activities, it is indeed pertinent to identify certain types of information exchanges as restrictions by object which automatically infringe article 101(1) of the Treaty on the Functioning of the European Union (TFEU). In order to answer this question, this analysis approaches the issue from both a legal and an economic perspective. This article is structured as follows. First, it presents an analysis of the notion ‘object restriction’, which is mainly based on the relevant case law of the European Court[11] and the Commission’s policy. This examination principally aims at providing a better understanding of the (not always simplistic) object approach, while helping us to determine whether in principle such assessment can be considered as an adequate legal standard in the complex area of information sharing. Secondly, it discusses the potential adverse effects of information exchanges on competition by drawing on economic theories of harm. Based on the implications of the economic considerations for the legal analysis of information exchange, this section also seeks to identify which types of information sharing (if any, at all) should fall within the scope of application of the object category from an economic perspective. The third section turns again to the legal discussion and examines the main principles offered by the case law on information exchanges as restrictions by object. Finally, the last section deals with the issue whether the approach adopted by the Commission in its Guidelines is consistent with economic theory and the established vision of the European Courts.

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[10] See RBB Economics Brief n. 31, ‘Catch-22: The Role of Economics in the Assessment of Information Exchanges under Article 81’, September 2008, <http://www.rbbecon-.com/publications/downloads/rbb_brief_31.pdf> accessed 12 December 2012. See also Dennis Carlton, Robert Gertner and Andrew Rosenfeld, ‘Communication among competitors: Game theory and antitrust’ (1997) 5 George Mason Law Review 423, 424. These authors argue that ‘in the absence of direct evidence to form a naked cartel to restrict output or to raise price, the appropriate standard to judge the flow of information among competitors is the rule of reason’.

[11] For the purposes of this article, the term ‘European Courts’ refers to both the General Court and the Court of Justice of the European Union (CJEU).

II. Understanding the General Concept of 'Object Restriction'

To properly understand whether the object criterion constitutes an appropriate legal standard to analyse information exchanges, the precise purpose and function of the object assessment should be first explored. This is the objective of the present section which focuses on the following aspects. First, since the concept of object restriction can only be understood within the general structure of article 101 TFEU, some attention is given to this framework, and particularly to the relationship between article 101(1) and 101(3) TFEU. Next, the function and concept of the object analysis is elucidated by distinguishing it from the effect-based approach. The last part focuses on the assessment elements that are taken into account to determine whether an agreement or practice has an anticompetitive object.

1. The Application of Article 101(1) and 101(3) TFEU: No 'Per Se' in Europe

Article 101 TFEU is principally designed to ensure that each economic operator determines the commercial policy which it intends to adopt on the marketplace independently.[12] This provision is divided into three sections, with article 101(1) and 101(3) TFEU being the relevant rules for the substantive analysis of business conduct.[13] Article 101(1) TFEU prohibits agreements[14] between undertakings which have as their object or effect the prevention, restriction, or distortion of competition within the internal market and which are apt to affect trade between Member States in an appreciable manner. Article 101(3) TFEU, on the other hand, provides a legal exception to the principal prohibition of the first section. Pursuant to article 101(3) TFEU, the prohibition may be declared inapplicable when the agreement fulfils four cumulative conditions. Namely, (*i*) it entails efficiency gains (*i.e.*, improve the production or distribution of goods or promote technical or economic progress); (*ii*) it allows consumers a fair

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[12] Case T-8/89 *DSM NV v Commission* [1991] ECR II-1833, para 209.
[13] Pursuant to article 101(2) TFEU agreements falling under the prohibition article 101(1) TFEU shall be automatically void. The CJEU has declared that the automatic nullity of an agreement only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. See Case C-56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH* (M.B.U.) [1966] ECR 235.
[14] In this article the term 'agreement' should be understood as covering agreements, concerted practices and decisions by associations of undertakings.

share of the benefit; (*iii*) it only contains indispensable restrictions to attain such benefits; and (*iv*) it does not eliminate competition.

The interaction between article 101(1) and 101(3) TFEU, and in particular the question how the analysis should be conducted under each part, has long been subject to debate.[15] One of the most contentious questions has been whether the assessment of an agreement under article 101(1) TFEU has to, or for that matter should, be conducted by applying a 'rule of reason', equivalent to the analysis carried out in the United States under section 1 of the Sherman Act of 1890.[16,17] Basically, the US 'rule of reason' requires an economic assessment of the agreement in question, in order to ascertain its possible effects in the market. In other words, it is necessary to weigh both the pro and anti-competitive effects of an agreement to establish its overall

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[15] This debate was fundamentally developed prior to the 'modernisation and economisation' of EU competition law. In this context, numerous authors generally argued that the Commission had to remodel its approach to agreements under both article 101(1) and article 101(3) TFEU by adopting a more economic and less rigid method of assessment. Diverse formulas were suggested in order to clarify and achieve consistency in the relationship between the two sections. See, for instance, Alison Jones, 'Analysis of agreements under the US and EC Antitrust Law – Convergence or Divergence?' (2006) 51(4) The Antitrust Bulletin 691, 744 *ff*. See also Okeoghene Odudu, *The Boundaries of EC Competition Law, the Scope of Article 81 EC* (Oxford University Press, 2005) chapters 5-7; Okeoghene Odudu, 'A new economic approach to Article 81(1)?' (2002) 27(1) European Law Review 100; Manzini Pietro, 'The European Rule of Reason - Crossing the Sea of Doubt' (2002) 23(8) European Competition Law Review 392.

[16] Section 1 of the Sherman Act provides that '*every* contract, combination ... or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal' (emphasis added).

[17] For an examination of the application of the US-style rule of reason, see Philip Areeda, 'The Rule of Reason - A Catechism on Competition' (1987) 55(3/4) Antitrust Law Journal 571. For different perspectives as to how the rule of reason could (or should) be applied within article 101(1) TFEU (prior to the entry into force of Regulation 1/2003) see, for example, Rene Joliet, *The Rule of Reason in Antitrust Law, American, German and Common Market Law in Comparative Perspective* (Martinus Nijhoff 1967); Ian Forrester and Christopher Norall, 'The Laicization of Community Law: Self-help and the Rule of Reason: How Competition Law is and could be applied' (1984) 21(1) Common Market Law Review 11; Ernst Steindorf, 'Article 85 and the Rule of Reason' (1984) 21(1) Common Market Law Review 639; Stephen Kon, 'Article 85, para. 3: A Case for Application by National Courts' (1982) 19 Common Market Law Review 541; Luc Gyselen, 'Vertical Restraints in the Distribution Process: Strength and Weakness of the Free Rider Rationale Under EEC Competition Law' (1984) 21 Common Market Law Review 647. Against the adoption of a US-style rule of reason in the context of article 101(1) TFEU, see Richard Whish and Brenda Sufrin, 'Article 85 and the Rule of Reason' (1987) 7(1) Yearbook of European Law 1; Wouter Wils, '"Rule of Reason": une regle raisonnable en droit communautaire?' (1990) 1(2) Cahiers du Droit Européen. 19; Pietro Manzini, 'La rule of reason nel diritto comunitario della concorrenza: una analisi giuridico-economica' (1991) 31(4) *Rivista di diritto europeo* 859.

(anti)competitiveness. However, the European Courts have made clear that within the system of application of article 101(1) TFEU, there was no room for a European equivalent to the US-type 'rule of reason'. This position was formalised in the case *Métropole Télevision v. Commission*, in which the General Court specifically stated that '[i]t is only in the precise framework of [article 101(3) TFEU] that the pro- and anticompetitive aspects of a restriction may be weighed. [Article 101(3) TFEU] would lose much of its effectiveness if such an examination had to be carried out already under article [101(1)] of the Treaty'. The Court further added:

> [i]t is true that in a number of judgments the Court of Justice and the [General Court] have favoured a more flexible interpretation of the prohibition laid down in article [101(1)] of the Treaty. Those judgments cannot, however, be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case-law according to which it is not necessary to hold, (…) that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in article [101(1)] of the Treaty.[18]

This approach, which is also consistent with the bifurcated design of article 101 TFEU, implies that the overall analysis of agreements under this provision involves two different sub-examinations, which are conducted respectively under article 101(1) and article 101(3) TFEU. To establish the

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[18] Case T-112/99 *Métropole télévision, Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA v Commission* [2001] ECR I-2459, para 74 *ff*. Furthermore, the European Commission has also clarified its position as regards the 'rule of reason' in its White Paper on Modernisation by stating that 'the structure of [Article 101(1) TFEU] is such as to prevent greater use being made of this approach: if more systematic use were made under [Article 101(1) TFEU] of an analysis of the pro and anti-competitive aspects of a restrictive agreement, [Article 101(3) TFEU] would be cast aside, whereas any such change could be made only through revision of the Treaty. It would at the very least be paradoxical to cast aside [Article 101(3) TFEU] when that provision in fact contains all the elements of a 'rule of reason'. […] Lastly, this option would run the risk of diverting Article [101(3)] from its purpose, which is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations'. EU Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, point 57; see also EU Commission, Guidelines on the application of Article 81(3) [now 101 (3) TFEU] of the Treaty [2004] OJ C101/97 (Guidelines on the application of Article 101(3) TFEU). Therefore, the shift to the present system of legal exception of Regulation 1/2003, according to which cooperation within the meaning of Article 101(1) is permissible as long as the conditions of article 101(3) are fulfilled, did not make the 'rule of reason' debate (fully) obsolete.

(in)compatibility of an agreement within the internal market, it should first be examined whether such conduct restricts competition appreciably by its object or effect. Only when this question is answered in the affirmative, economic balancing is to be conducted in order to enquire whether, within the framework laid down by article 101(3) TFEU, the agreement objectively produces procompetitive benefits that outweigh its (previously established) anticompetitive impact, and in light of which a general exemption from the general prohibition can be obtained after all.

Although object restrictions are rather frequently compared to, and confused with, the US per se illegality,[19] the possibility of conducting a defence under article 101(3) TFEU implies that under the EU system the so called 'per se' prohibition, in theory, does not exist. Article 101(3) TFEU applies to all agreements that fulfil the four conditions contained therein, but the burden will shift from the party alleging the infringement to those claiming the applicability of article 101(3) TFEU. As demonstrated beneath, these considerations have important implications for the assessment of information exchanges under the object approach.

2. Object and Effect: Alternative Assessment Methods with the Same Goal

The prohibition of article 101(1) TFEU is applicable to agreements that have a restriction of competition as their object, as well as to those that have a restriction of competition as their effect. The distinction between the object and effect approach is important because, as indicated by the conjunction 'or', these two requirements are of alternative nature. As early as 1966, the CJEU explained in *Société Technique Minière* that:

> [t]he fact that these are not cumulative but alternative requirements (…) leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. This interference with competition referred to in Article [101] (1) must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on

[19] See for instance OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Contribution by BIAC, 394. 'As noted above, there is an important distinction between so-called *per se* illegal information exchanges (also called 'restrictions by object' or 'naked restraints') and information exchanges that require a case-by-case analysis under the rule of reason, or restrictions by effect'.

> competition to be sufficiently deleterious, the consequences of the agreement should then be considered.[20]

The substantive approach to agreements under article 101(1) TFEU is, thus, a staggered one. The first step consists, in essence, of determining whether an agreement has an anticompetitive object. If it can be confirmed that this is *not* the case, it should subsequently be assessed whether the conduct has restrictive effects on competition. As it was set out in *Consten and Grundig*, this means that there is no need to take into account the concrete or actual effects of an agreement, when the party alleging the infringement has been able to demonstrate that it has as its object the restriction of competition.[21]

The fact that finding a restrictive object suffices to establish an infringement of article 101(1) TFEU makes of the object approach an extremely useful instrument for competition authorities. As the Commission advances, 'a full economic analysis of every case would be very costly and might not be justified by gains in identifying market situations (…) that were detrimental to competition. In those circumstances, competition policy may have to resort to relatively simple rules of thumb and do without a full economic analysis of every case'.[22] By qualifying certain agreements as restrictive by object, the Commission and the Courts can enhance procedural economy by avoiding certain costly proof requirements, such as proof of market power.[23]

The distinction of object and effect cases hence has significant implications for both enforcers and companies concerned. Once the anti-competitive object is found, enforcers do not have to look further to the effects. Companies found to be engaged in object cases may, however, find it quite hard to adduce (convincing) evidence that their cooperation is worthwhile.

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[20] *Société Technique Minière* (n 13), para 249. See for confirmations, *e.g.* Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] ECR 935, para 13; Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services* [1998] ECR II-3141, para 136.

[21] Joined Cases 56 and 58-64 *Établissements Consten and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 429, para 342.

[22] EU Commission, 'Green Paper on Vertical Restraints in EC Competition Policy' COM (96) 721 final, 22 January 1997, para 86.

[23] See also Olav Kolstad, 'Object contra effect in Swedish and European competition law, A Report written for the Swedish Competition Authority', 4 <http://www.kkv.-se/upload/Filer/Trycksaker/Rapporter/uppdragsforskning/forsk_rap_20093_object_contra_effect.pdf> accessed 12 December 2012; Saskia King, 'The object box: law, policy or myth?', (2011) 7(2) European Competition Journal 269, 273; Matthew Bennett and Philip Collins, 'The Law and Economics of Information Sharing' (2010) 6(2) European Competition Journal 311, 313.

Yet, it is equally important to keep in mind that by prohibiting cooperation – regardless of whether it is restrictive by object *or* effect – article 101(1) TFEU seeks to safeguard competition as a 'process' and to promote consumer welfare.[24] Since both aspects of the prohibition have the same objective, this necessarily implies that they also share a common vision on what constitutes a restriction of competition. When the CJEU, in *Société Technique Minière v Commission*, ruled that 'article [101(1) TFEU] is based on an assessment of the effects of an agreement from two angles of economic evaluation',[25] it indeed confirmed that both the 'object' and 'effect' approach are designed to identify the same outcome of collusion: the restriction of competition. The key difference between 'object' and 'effect' thus resides in the method used to establish that competition is restricted.[26]

3. The Concept of Restriction by Object

As long ago as in 1966, the CJEU in *Société Technique Minière v Commission* defined the basic guidelines of the concept 'object restriction'. In this case it established that an agreement is considered to be restrictive by object when the analysis of its clauses 'reveal[s] the effect on competition to be sufficiently deleterious'.[27] More recently, in *BIDS*, the Court explained the concept by referring to the differences between object and effect cases. It held that '[t]his distinction arises from the fact that certain forms of collusion between undertakings can be regarded, *by their very nature*, as being injurious to the proper functioning of normal competition'.[28]

[24] See Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited* v. *Commission* [2009] ECR I-9291, para. 63. Along similar lines Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, paras 36-39.
[25] *Société Technique Minière* (n 13), para 248.
[26] See Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81 EC* (n 15) 160; Okeoghene Odudu, 'Restrictions of Competition by Object: what's the beef?' (2009) 9(1) Competition Law Journal 11, 13. See also Kolstad (n 23) 3. And for the view that the object and the effect approach require a different meaning of what constitutes a restriction of competition, see Oliver Black, *Conceptual foundations of Antitrust* (Cambridge University Press 2005) chapter 3.
[27] *Société Technique Minière* (n 13), para 249.
[28] Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637, para 17 (emphasis added).

The intrinsic damaging nature of certain agreements is thus presented as the main feature of restrictions by object. This aspect was also emphasized by the Commission in its Guidelines on the application of article 101(3) TFEU, in which it described ‘restrictions by object’ as ‘those that by their very nature have the potential of restricting competition’. According to the Commission, ‘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’.[29] Moreover, in *T-Mobile* the CJEU clarified that this inherent capacity or potential to have a negative impact on competition is sufficient to qualify a practice as having an anticompetitive object.[30] When, in other words, an agreement is capable, as such of resulting in a restriction of competition, it is irrelevant whether the agreement actually results in such an anticompetitive outcome.[31]

This discussion shows that the notion of ‘restrictions by object’ is exclusively reserved for agreements which are extremely likely to have a significant negative impact on competition. Because a restriction of competition will be the ‘most probable’ effect of the agreement, there is no need to conduct a fully-fledged economic evaluation of the conduct. It would, however, be inappropriate to maintain that *all* agreements which are potentially capable of harming the competitive process constitute restrictions by object, without the need to consider their effects on the market at all. As the Court recognised in its seminal case *STM*, in order to establish the damaging nature of an agreement, the object approach necessarily requires taking into account its effects, even if such consideration is limited to the finding that effects are ‘sufficiently deleterious’.[32]

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[29] Guidelines on the application of Article 101(3) TFEU (n 18) para 21.
[30] *T-Mobile* (n 24), para 31. See further section 4.
[31] ibid para 31. It should also be taken into account that the object approach entails the risk of being over-inclusive or producing the so called false positives. This risk, however, can be counteracted by applying Article 101(3) to agreements producing countervailing effects. See Jones (n 15) 761 *ff*; Kolstad (n 23) 5.
[32] *Société Technique Minière* (n 13) para 249. See also Bruno Lebrun and Thibault Balthazar, ‘Definition of Restrictions of Competition by Object: Anything New Since 1966?’ (2011) International Comparative Legal Guide Series - Cartels & Leniency 16, 17. King (n 23, 274) notes that ‘it is clear that the effects of an agreement will usually have to be considered, in one form or another, under the object criterion in any event’.

The object approach can be seen, in fact, as a presumption that certain agreements automatically produce adverse effects on competition. Once 'object' is established, the negative impact of the agreement will be presumed, regardless of whether it actually materialises.[33] A prohibition constructed upon such a presumption is justified when, based on experience and/or economic analysis, it can be inferred with a high degree of probability that certain agreements have a considerable negative impact on the market and, thus, jeopardize the objectives pursued by the European Union (EU) competition system.[34] Those invoking the infringement do not have to actually prove any concrete (negative) effects because it is assumed that when the clauses of an agreement are as such *designed* to restrict competition, the probabilities that it actually does so will be remarkably high. Put differently, a restriction of competition is extremely more likely to occur when a practice *aims* at effectively doing so, than when the agreement pursues a different (competitive) goal. Consequently, if it can be confirmed that an agreement *aims* at restricting competition, this will be enough to justify a straightforward prohibition under article 101(1) TFEU.[35] This brings us to the next question: how should an anticompetitive aim be established?

4. The Establishment of Restriction by Object

The object or aim of an agreement is not a substantive requirement that can be determined by solely referring to the subjective intention of the parties, but a criterion that should be discerned on the basis of the objective features of the agreement.[36] In this connection, since the *Société Technique Minière*-case the European Courts have frequently held that to find an object restriction, regard must be had, *inter alia*, to the provisions of the

[33] This line of reasoning has also been embraced by the Commission, which describes 'object' as a 'presumption (…) based on the serious nature of the restriction and on experience showing that restrictions of competition by object are very likely to produce negative effects on the market'. Furthermore, the Commission distinguishes the object and effect analysis based on the fact that '[i]n the case of restrictions of competition by effect there is no presumption of anticompetitive effects'. See Guidelines on the application of Article 101 (3) TFEU (n 18), paras 21 and 24. The Horizontal Cooperation Guidelines also reiterate this vision by indicating that the 'object' analysis is that applied to 'agreements (…) presumed to have negative market effects' (see Cooperation Guidelines, para 18).
[34] See *e.g.* Guidelines on the application of Article 101(3) TFEU (n 18) para 21.
[35] See for a similar reasoning King (n 23) 292.
[36] See also ibid 292.

agreement, the objectives it seeks to attain and the economic and legal context of which it forms a part.[37]

Accordingly, an anticompetitive purpose can in principle not be established by using an abstract standard. Instead, it appears that the CJEU opts for an individual or case-by-case analysis of whether an agreement aims at restricting competition, which must be assessed in its *legal and economic context*. Following this reasoning, it can be confirmed that, in essence, the object approach is not designed to invariably cover particular categories of agreements. Theoretically, any agreement can be held to have an anticompetitive object. The decisive question is actually whether an objective examination of the agreement – considering its precise background and circumstances – shows that the substantive conditions of article 101(1) TFEU are present.[38] It is, indeed, true that establishing the purpose of an agreement necessarily requires an assessment of the legal and economic context to establish the presumption of anticompetitive effects. However, very frequently the content of an agreement reveals the existence of such an inherent restriction, that this assessment can be conducted on a fairly summary basis.[39]

This abridged approach has been reflected in a number of judgements. One of the most representative cases of this trend is *Montedipe v Commission.*[40] This case concerned an appeal against a Commission decision fining a series of agreements fixing prices and controlling volume quotas.[41] The applicant submitted that the Commission should have appraised the agreement in

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[37] See e.g. *GlaxoSmithKline Services Unlimited* (n 24), para 58; Case C-551/03P *General Motors* v *Commission* [2006] ECR I-3173, para 66; *T-Mobile* (n 24), para 31. In all these cases the Court refers to the 'specific legal and economic context'. Furthermore, the list of factors set out by the Court does not appear to be exhaustive in nature.

[38] See also Jonathan Faull and Ali Nikpay 'Article 81' in J. Faull & A. Nikpay (eds), *The EC Law Of Competition* (2nd edn, Oxford University Press 2007) 223; King (n 23) 279 citing Paul Lasok QC's article presented to the Law Society on 8 October 2007, 'Recent Developments in the Rule of Reason in EC Anti-trust Law'.

[39] See Faull & Nikpay (n 38) 223. See also Case T-168/01 *GlaxoSmithKlineServices Unlimited* v. *Commission* [2006] ECR II-2969, para 119. In this case the General Court stated that the analysis of object 'may be abridged when the clauses of the agreement reveal in themselves the existence of an alteration of competition'. However, this analysis 'must, on the other hand, be supplemented, depending on the requirements of the case, where that is not so'.

[40] Case T-14/89 *Montedipe v Commission* [1992] ECR II-1155.

[41] See *Polypropylene* (IV/31.149) Commission Decision 86/398/EEC [1986] OJ L 230/1.

relation to its economic context, thereby applying a rule of reason.[42] The General Court in its examination of the object of the agreement found that

> the fact that the infringement of article [101(1) TFEU], in particular subparagraphs (a) and (c), is a *clear one* necessarily precludes the application of a rule of reason, assuming such a rule to be applicable in Community competition law, since in that case it must be regarded as an infringement *per se* of the competition rules.[43]

It is difficult to overlook the practical importance of this verdict. For the first time, the concept of object was explained by comparing certain types of agreements (these enumerated in subparagraphs (a) and (c)) with *per se* infringements under US antitrust law. According to the American *per se* rule, 'there are certain agreements (…) which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use'.[44] By making such a comparison, the Court clearly acknowledged that certain agreements will be *automatically* associated with restrictions by object and, therefore, prohibited by article 101(1) TFEU. Furthermore, since the *per se* approach only applies to agreements with a lack of redeeming virtues, the Court also clarified the scope of application of article 101(3) TFEU. A comparable interpretation of article 101(1) TFEU can be found in *European Night Services.*[45] In this case, the General Court noted that when assessing the effects of an agreement,

> account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned, *unless* it is an agreement containing *obvious* restrictions of competition such as price-fixing, market-

[42] The Commission, on the other hand, disputed the applicant's analysis of the American and Community case-law on the rule of reason. The Commission did, however, accept that the application of article 101(1) TFEU requires examination of the cartel's economic context and its probable or actual effects. In this case that examination is contained in points 2 to 13 and 89 to 94 of the Decision. See also *Montedipe* (n 40), para 261.

[43] *Montedipe* (n 40) para 265; see also Case T-148/89 *Tréfilunion SA v Commission* [1995] ECR II-1063, para 109, confirming this statement.

[44] The *per se* approach was defined by the US Supreme court in *Northern Pacific Railway Co v United States* 356 US 1, 5 (1957).

[45] See *European Night Services* (n 20).

> sharing or the control of outlets.[46] In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of article 101(3), with a view to granting an exemption.[47]

The language of the General Court in this case arguably supports the view that two paths of assessment can be followed when scrutinizing the object of an agreement. First of all, where the anticompetitive consequences of a certain agreement are not immediately apparent, it is necessary to conduct a careful and close analysis of its content appraised in its legal and economic context, in order to build a solid presumption of its negative impact. This approach differs from the second 'more abridged assessment' used for the most obvious restrictions of competition.[48]

As these judgements illustrate, the European Courts seem to accept the principle that certain categories of agreements – including practices designed to fix prices, share markets and limit output – have by definition the (almost) invariable effect of restricting competition. When a restriction of competition is the inherent consequence of a certain type of agreements, it is considered that the agreement in question restricts competition 'as such'. Once an agreement of a certain type is classified as restrictive, it may be deduced, based on the premise that similar agreements lead to similar effects, that the agreement has the natural tendency to restrict competition. In essence, the classification of the agreement as falling within a certain category will then trigger the presumption of anticompetitive effects.[49]

In the analysis of these clearest infringements, the role of the legal and economic context of an agreement will, therefore, be rather limited. The approach of the European Courts, in effect, supports the theory that 'the inherently anticompetitive object which characterizes the conclusion of certain agreements, more specifically those expressly prohibited under article 101(1)(a)-(c) TFEU, cannot be altered by an analysis of the economic

[46] Referring to *Tréfilunion SA* (n 43) para 109.
[47] *European Night Services* (n 20) para 136.
[48] See also King (n 23) 288. See for a different opinion Arianna Andreangeli, 'From Mobile Phones to Cattle: How the Court of Justice Is Refraining From the Approach to Article 101 (Formerly 81 EC Treaty) of the EU Treaty' (2011) 34(2) World Competition 234 *ff*.
[49] See *GlaxoSmithKline Services Unlimited v Commission* (n 24), Opinion of AG Trstenjak, para 91. 'This standardised approach certainly creates legal certainty. However, it is always subject to the provision that the legal and economic context of the agreement to be examined does not preclude application of this standardised assessment'. See also Kolstad (n 23) 6.

context in which the agreement is situated'.[50] In other words, an economic analysis cannot override the inescapable reality that some categories of agreements have the (almost) invariable effect of restricting competition.[51] The result is that, in contrast to more ambiguous practices, in cases which are typically seen as involving 'obvious' restrictions, an examination of the legal and economic context will only be relevant to determine whether such context excluded any possibility of effective competition. If, for instance, the national legislation in a Member State has the effect of restricting competition and companies have no margin at all to compete effectively, the infringement of article 101 TFEU cannot be established (either by object or effect) even if the agreement contained an 'evident' restriction.[52] Consequently, only on very rare occasions, if at all, will undertakings involved in such serious restrictions be able to escape the prohibition of article 101 TFEU based on an analysis of the legal and economic context in which an agreement is to be applied.

5. Conclusions on the Object Approach

Given the impossibility to distinguish beneficial exchanges of information from harmful exchanges of information, the legal assessment of this activity represents a number of difficulties. On the one hand, a *per-se* or absolute prohibition would not be recommendable, as this would lead to an exclusion of exchanges that have pro-competitive or neutral effects (Type I Errors).

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[50] Joined cases 8 to 11-66 *Société anonyme Cimenteries C.B.R. Cementsbedrijven N.V. and others v Commission* [1967] ECR 93, para 1088, citing Case T-141/89 *Tréfileurope Sales SARL v Commission* [1995] ECR II-791, para 109 and *European Night Services* (n 20) para 136.

[51] See *European Night Services* (n 20) para 136.

[52] In *Société anonyme Cimenteries* (n 50) para 1088, the Court held that '[t]he conformity of conduct with Article [101(1)] of the Treaty must be assessed in its economic context. However, even if the applicants' assertions were well founded, they are not of such a nature as to prove that the economic context excluded any possibility of effective competition'. This argumentation was also adopted in *Montecatini* (Case C-235/92 P *Montecatini SpA v Commission* [1999] ECR I-4539, para 127 ('[I]nasmuch as Monte's criticism is intended to show that, as a result of circumstances beyond the control of the undertakings involved, the agreements and concerted practices which were the subject of the Polypropylene Decision could not have had an anti-competitive object, it must be pointed out that, even if well founded, Monte's claims are not such as to prove that the economic context excluded any possibility of effective competition') relying on Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, para 153 and Joined cases 240, 241, 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie and others v Commission* [1985] ECR 3831, paras 24-29. This argumentation became known as the 'State action defence'. See also Ingeborg Simonsson, *Legitimacy in EU Cartel Control* (Hart Publishing 2010) 117-119.

On the other hand, if companies were simply free to engage in information exchange-activity with complete impunity, anti-competitive exchanges may be left unchallenged, leading to under enforcement (Type II Errors).[53]

Following this line of reasoning, it seems, at first sight, that an effects-based assessment may be helpful to avoid both types of errors. However, as noted by Bennett and Collins, an individual analysis places a high cost and burden on firms, as well as on competition authorities and private claimants. Companies may not be in a position to carry out complex economic analysis for every individual situation, meaning that they may be unwilling to engage in certain activities, even if they are beneficial. Furthermore, bringing in cases could become considerably more difficult for enforcement agencies and private claimants, which could result in under-enforcement. As a result, an individual approach might similarly lead to both types of errors.[54] In these circumstances, it appears opportune to examine whether the object assessment offers any advantage compared to a *per se* prohibition and the effects-based analysis.

As observed earlier, the object assessment is not to be set on the same par, nor to be confused with the more radical US *per se* approach. The finding of a restriction by object basically consists in a presumption of anti-competitiveness. The European jurisprudence suggests that this presumption can be established according to two different methods. Firstly, the most severe and straightforward types of agreements, this is, agreements which have inherently damaging effects, can be directly 'classified' as object restrictions. Secondly, agreements which have a more diffuse anticompetitive nature or are more dependent on the precise circumstances of the case, need to be appraised in their *legal and economic context* in order to confirm their anticompetitive object and, thereby, their presumed anticompetitive nature.[55] If an agreement is found to have a restrictive object according to one of these two methods, its actual effects will no longer be relevant and the presumption of illegality under article 101(1) TFEU will effectively be established. Once an agreement is found to constitute a restriction by object, the burden to prove that the practice is not anticompetitive under article 101(3) TFEU, shifts to the parties to the agreement. Taking into account this background in the field of information

[53] See Padilla (n 3) 435.
[54] Bennett and Collins (n 23) 313. See also Padilla (n 3) 435.
[55] See also King (n 23) 294-295.

exchange, as it is next examined, the object system entails a number of benefits for companies and enforcement agencies alike.

Since the object assessment is based on the inherent and predicted harm resulting from a certain type of activity, it can be an extremely useful instrument in enforcement terms because it allows competition authorities to prohibit the most likely harming kinds of agreements at a reasonable cost.[56] This approach can be considered suitable from a policy perspective because, simply said, there is little to lose by establishing a presumption of illegality when in the great majority of cases the actual effects of the type of activity in question turn out to be detrimental for competition.[57] Moreover, a system based on the probable effects of a certain category of agreements will not only enable competition authorities to enforce the competition rules in an efficient manner, but can also provide legal certainty for undertakings in this complex area.[58]

It should, however, be noted that the object assessment is not intended to be a perfect rule, designed to predict the negative effects of certain sorts of agreements with 100% certainty. In fact, while the object approach may be able to reduce type I and/or type II errors, no rule is completely capable of eliminating all errors.[59] Therefore, even if a category of agreements (e.g. price fixing) is generally classified as 'object restriction', it is of course possible that, in an individual, case one agreement within this category has a neutral effect or even leads to benefits. Still, a general classification under the object approach will make sense in policy terms when the category of agreements falling under the 'object' heading 'more often than not, turns out

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[56] Padilla (n 3) 435.

[57] Bennett and Collins (n 23) 313, referring to Matthew Bennett and others, 'Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy' in B.E. Hawk (ed), *International Antitrust Law & Policy: Fordham Competition Law* 2009 (Juris Publishing 2010). See also Padilla (n 3) 436; Kai-Uwe Kühn, 'Fighting collusion by regulating communication between firms' (2001) 16(32) Economic Policy 169, 171. Kühn adds that '[f]ocusing on communication has two advantages over focusing on the behaviour in the product market. First, it is far more frequent that we can observe communication between firms than that we have appropriate data to be able to infer behaviour on the product market. Despite its illegality, communication about future conduct often takes place in written form. Written evidence can be found by competition policy authorities and is clear evidence for communication. Even oral communication is to some extent verifiable through witness evidence in court. Secondly, (…) certain types of communication can be suppressed at little economic cost (…)' (footnotes omitted).

[58] See also King (n 23) 273.

[59] See also Padilla (n 3) 436.

to be harmful' under an individual assessment.[60] Moreover, since the agreements falling under such an assessment will frequently not satisfy the conditions of article 101(3) TFEU, the object approach enhances the preventive nature of competition law by establishing a presumption of illegality for conducts which only seldom generate benefits for the economy and consumers.

Furthermore, even if the object criterion is not a perfect rule in the economic sense, one should bear in mind that this type of assessment, in contrast with the US *per se* approach, offers two 'filters', which help to reduce the risk of false positives (Type I Errors). The first filter is implied in the object approach, and regards the possibility to examine the agreement by reference to the 'legal and economic context'. This examination is meant to elucidate whether or not, given the precise circumstances of the individual case, the anticompetitive objective of an agreement can still be confirmed. In other words: is the agreement 'designed' to restrict competition in its economic and legal context? If this question cannot be answered in the affirmative, the practice cannot be presumed anticompetitive by being qualified as restrictive by object, but should be carefully assessed under the effects-based approach.[61] The second filter regards the application of article 101(3) TFEU. More specifically, even if an agreement is qualified as restrictive by object under article 101(1) TFEU, the exemption door is still open for all information exchanges which actually produce countervailing benefits and fulfil the conditions of article 101(3) TFEU. Accordingly, it is reasonable to point out that this regime of rebuttable presumptions can, in effect, be an adequate instrument to differentiate the alarming types of information-sharing from the beneficial ones in an affordable manner.[62]

Yet, one of the major challenges in the area of information sharing is to establish which types of exchanges may and should, in principle, be considered as object restrictions. This aspect is certainly relevant because a wrong object-rule will logically lead to unjustified decisions or, at least, to a

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[60] Bennett and Collins (n 23) 314.

[61] In contrast, it is not necessary to analyse whether or not the presumption of anticompetitive effects can be correctly established in the individual case; the only relevant criterion will be whether the context of the agreement may modify its aim. This observation is consistent with the fact that once the anticompetitive object of an agreement has been found, it is not necessary to evaluate its economic effects.

[62] See also Matthias Pflanz, 'The economics of information exchange' (CRA International GCLC Lunch Talk, Brussels, 6 October 2008) 13. < http://www.crai.com/ecp/assets/(2008-10-06)_Pflanz.pdf> accessed 12 December 2012.

misguided application of the competition provisions. The first step to substantiate the more intense use of the object approach in these cases is to demonstrate that information exchanges can entail likely and significant anticompetitive risks. If the concerns about information sharing turn out to be minor, there are no reasons to adhere to the object analysis. In that case, competition authorities should no longer waste their limited resources on the detection and punishment of a trivial conduct.[63]

III. The Anticompetitive Risks of Information Sharing From an Economic Perspective

Economic analysis has become an extremely useful tool to illustrate the anticompetitive damage that can result from information sharing practices. If we were able to determine the main concerns potentially stemming from information sharing activities, it would be considerably easier to identify the types of exchanges which give rise to such concerns and which should, consequently, be analysed with more caution. Thus, setting a ranking of the most harming effects and the respective types of information exchange entailing such risks will help us to determine what forms of information sharing qualify for an assessment under the 'object' approach from an economic perspective. The following section explores the theoretical predictions on the anticompetitive effects of information exchange, and evaluates the main implications for the construction of a coherent and effective assessment of object restrictions.[64]

1. Game Theory and Collusion

Exchanges of information among competing companies increase market transparency, which can promote allocative and productive efficiencies. However, enhanced transparency in the market not only produces benefits, but can also entail significant anticompetitive risks. The primary way in which information exchange among competitors can harm the competitive process is through the creation of coordinated effects, *i.e.* when this activity

[63] Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 169-170, 181.

[64] See also among others *ibid*; Xavier Vives, 'Information sharing: economics and antitrust' in *The Pros and Cons of Information Sharing* (Swedish Competition Authority, Stockholm 2006) 83-100; Bennett and Collins (n 23); Kai-Uwe Kühn and Xavier Vives, 'Information Exchanges Among Firms and their Impact on Competition' (Institut d'Anàlisi Econòmica CSIC, Barcelona, June 1994) < http://blog.iese.edu/xvives/files/2011/09/Information-Exchanges-and-their-Impact-on-Competition.pdf>; Padilla (n 3) 424.

has the effect of facilitating collusion in the market.[65] The existence of collusion is currently mainly explained on the basis of game-theoretic[66] oligopoly theory.[67] Game theorists envision the market play between competitors as a game where the competing agents are rational players in the market, attempting to maximize their profits. The whole point is to find a possible equilibrium, that is to say, a combination of (individual) strategies that represent the best strategy for each player.[68] In non-cooperative games[69] such equilibrium will be 'competitive' only within a static setting. In effect, economic theory shows that, within a static one-shot game framework, even if companies have a collective incentive to collude and increase their joint profits, the individual interest of each firm in charging a price inferior to the collusive supra-competitive price, which allows them to significantly

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[65] Economic theory additionally indicates that anticompetitive harm can also derive from *non-coordinated effects* of information exchanges. In this context, it is recognized that information exchange can lead to foreclosure in the market. By sharing information, companies may place potential new entrants (which are not part of the information sharing scheme) at a significant disadvantage. These effects can only occur when the information shared concerns highly strategic conduct and the exchange covers a great part of the market (See *e.g*. OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 3), Executive Summary, 11. Since these effects are, however, rather unlikely and generally conceived as a minor concern, this work will only focus on the coordinated effects of information exchange.

[66] The interdisciplinary research field of game theory was first created in 1944 by Von Neumann and Morgenstern (John Von Neumann and Oscar Morgenstern, *Theory of Games and Economic Behavior* (Princeton University Press 1944). However, this work did not receive much interest until the 1970's. Since then, game theory has been evolving and today is considered the key method to study oligopolies.

[67] Oligopolistic models are used to study interaction among firms in the market because the likelihood that competitors attempt to raise prices by cooperating will be much higher in an oligopoly than in a perfectly competitive industry. See further *e.g.* John Connor, *Global Price-Fixing* (Springer 2007) 19-20.

[68] The concept of equilibrium in oligopoly theory is the Nash, non-cooperative equilibrium. This notion was firstly developed in 1950 by the American mathematician John F. Nash Jr. See John Nash, 'Non-Cooperative Games' (1951) 54 (2) The Annals of Mathematics 286; see also Luis Kaplow, 'On the Meaning of horizontal agreements in competition law' (Discussion Paper No. 69105/2011 Harvard Law School Cambridge) 85-86. <http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kaplow_691.pdf> accessed 12 December 2012.

[69] Game theory is divided into the *non-cooperative* branch and the *cooperative* branch. In cooperative games, competitors may communicate and make binding agreements. In non-cooperative games each company determines its market strategy independently, based alone on the predicted behaviour of its competitors. Since oligopolistic markets are considered problematic because firms do not (even) need to communicate to collude, oligopolies are normally analysed using non-cooperative game theory. See Sigrid Stroux, *US and EC oligopoly control* (Kluwer Law International 2004) 13. For an analysis of both branches, see James Friedman, *Oligopoly and the Theory of Games* (North-Holland, Amsterdam 1977).

increase their market share, will be the dominant strategy.[70] The equilibrium in these circumstances will be reached when none of the companies can lower their prices without incurring losses.

However, the evolution of economic theory has demonstrated that it is preferable to study oligopolistic business behaviour from a dynamic repeated game perspective, rather than from the static framework provided by one-shot games.[71] In contrast to the model within which companies interact only once and the overriding strategy is that each firm deviates, within this new dynamic framework any collectively beneficial outcome (supra-competitive pricing) can be achieved and maintained as equilibrium when agents interact repeatedly.[72] In a model of infinite interaction between competitors, the fact that firms interact frequently and repeatedly, and that they perceive this reality, may modify the player's strategies and, thereby, the final outcome.[73] If companies sense that the short-term profits resulting from an individual price reduction will not compensate for all the future losses produced by retaliation, all firms will be reluctant to deviate, and supra-competitive prices will be maintained as a result.[74] In order to secure the unprofitability of deviation and, thereby the stability of a common line of conduct, it is essential that deviations can be *detected* within a small time lapse and that a *punishment* mechanism exists that can outweigh the potential profits from deviation. This obviously implies that such

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[70] In static one shot game models each firm can only 'move once' without knowledge about the moves of the rest of the players. In the market, this means companies will only have two choices: to cooperate with their competitors or to compete independently (see *e.g.* Jonathan Baker, 'Two Sherman Act section 1 dilemmas: parallel pricing, the oligopoly problem, and contemporary economic theory' (1993) 38(1) *The Antitrust Bulletin* 143, 153). From the game theory perspective, the model of a 'prisoner's dilemma' illustrates the choices of oligopolists, and their respective pay-offs. In a 'one-shot' setting, the outcome of the dilemma will always be that each undertaking behaves independently.
[71] Repeated games can be played infinitely or finitely, but without any previous knowledge of the last game. Games which are repeated finitely and the *last game is known*, are rather comparable to one-shot games than to repeated games. See Baker (n 70) 153. See generally Drew Fudenberg and Jean Tirole, *Game Theory* (The MIT Press 1991) 145-206; David Kreps, *Game Theory and Economic Modelling* (Oxford University Press 1990) 97.
[72] An official statement of this fact is known as the Folk Theorem. The Folk Theorem states that when players are patient enough, a cooperative outcome which satisfies all the features required by a Nash equilibrium can be reached under a non-cooperative game. See further Fudenberg and Tirole (n 71) 152-154.
[73] In effect, when firms compete in a market they are well aware of the fact that they will 'keep on playing the game' repeatedly with the same opponents. See Baker (n 70) 154.
[74] See e.g. Kaplow (n 68) 98; OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Submission of France, 172.

punishment must be severe enough to make firms stick to collusion, but also that such threat of punishment is (perceived as) credible.[75, 76]

It follows from this discussion that, in order to collude, companies are confronted with three principal obstacles. First, they must reach a unanimous vision on the terms of coordination; second, they should be able to monitor the adherence to the agreed principles of coordination; and third, they must be able to effectively punish firms which deviate from the terms of coordination. Bearing in mind these observations, the next part explains how increased market transparency, achieved through information exchange, may have different functions in facilitating collusive behaviour. First, it may facilitate firms to achieve a supra-competitive pricing strategy. Secondly, it may allow firms to effectively detect and punish deviations from the collusive terms.

2. Reaching a Point of Coordination through Information Exchange

In the vast majority of cases where collusion is viable, there is a multiplicity of possible equilibriums that can be sustained through a collusive scheme. This wide array of equilibriums, ranging from the competitive price to the monopoly price, immediately raises one of the most difficult and important questions for the involved companies: which equilibrium should be

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[75] The previous perception assumed, in contrast, that since firms are generally more interested in future profits (than in the short run profits) they would automatically charge the collusive price. The reasoning behind this assumption was that if a firm decided to cheat, its rivals would never be willing to cooperate again and, thus, the firm would *never* receive the cartel benefits in the future. Since companies will normally not be only interested in the short term profits, they will decide to never deviate. Further evolution in economic theory (since the Folk theorem) has, however demonstrated that detection and punishment mechanisms can make cooperation possible even after cheating. See Baker (n 70) 155; Carl Shapiro, 'Theories of Oligopoly Behaviour' in R. Schmalensee and R. Willig (eds), *Handbook of Industrial Organization* (Elsevier 1989) 329-414.

[76] See Stroux (n 69) 14. Stroux comments that '[a]s punishment is costly also for the punishing firms the punishing firms need to possess or be able to produce low cost excess capacity in order to lower the prices. While below cost pricing might not constitute a credible threat for punishment, as the punishing firms also have to suffer losses, the threat to return to competition instead might be convincing. This strategy is however only credible if it is more profitable for the punishing firms to return to competition than to passively accommodate, i.e. allowing the cheating firm to deviate. To enhance the credibility of punishment firms can tie their hands by making irreversible (sunk) investments, i.e. in order to acquire excess capacity, or commit themselves to most favored customer clauses or meeting competition clauses in sales contracts'.

selected?[77] This question becomes more pertinent when the equilibrium strategies among companies are not common knowledge due to the lack of communication which often results in general strategic uncertainty.[78]

If communication is absent, it is still possible that companies share the same preferences regarding the selection of equilibrium and, thus, make a choice which is considered by every company as being the most beneficial outcome from a collective point of view. Nonetheless, there is no guarantee that firms will have a common vision on the equilibrium that should be played. In fact, this situation is rather infrequent because firms generally have different cost structures as well as conceptions on demand, and may also sell dissimilar products. As a result, their individual takings of equilibriums will most likely differ among them.[79] Keeping this in mind, it can be stated that in absence of any communication, the equilibrium selection issue will be a major obstacle for firms, since selecting an equilibrium which is not considered fair or appropriate by *all* participants may trigger retaliation or result in less proficient coordination.[80] In such cases, colluding firms may find in information sharing an extremely useful instrument to eliminate or reduce the strategic uncertainty surrounding this issue, and come to a mutually advantageous and efficient equilibrium.[81, 82]

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[77] Margaret Levenstein and Valerie Suslow, 'Cartel bargaining and monitoring: The role of information sharing' in *The Pros and Cons of Information Sharing* (Swedish Competition Authority, Stockholm 2006) 44; see also Kaplow (n 68) 98; Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 174.

[78] See Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 181. Kühn also argues that communication matters for various reasons. 'The first reason stems from the problem of 'strategic uncertainty' in games that have co-ordination problems. In the definition of a Nash equilibrium it is assumed that in equilibrium the strategies played by every player are common knowledge. In many games with a unique Nash equilibrium this will not be more restrictive than assuming common knowledge of rationality (citations omitted). However, in games with multiple equilibria it cannot be assumed that, in the absence of communication about planned conduct, players can figure out what the rival will play. How can one firm be sure that the other will play the 'right' equilibrium strategy or be sure that the other firm understands that it understands what should be played?'.

[79] Levenstein and Suslow (n 77) 44; see also Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 181; Kaplow (n 68) 98-99.

[80] Bennett and Collins (n 23) 321. In this respect Motta notes that '[i]f firms cannot communicate with each other, they can make mistakes, and select a price (or a quantity) which is not jointly optimal for the firms, and might be difficult to change'. Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 141. See also Levenstein and Suslow (n 77) 45.

[81] This consideration is also coherent with experimental studies on co-ordination games which seem to indicate that 'the absence of communication seems to lead to significantly less successful collusion and a downward bias of prices' (Kühn, 'Fighting collusion by

3. Which Information Is Necessary to Reach a Focal Point?

When attempting to coordinate their behaviour, not all kinds of information available to companies have the potential to reduce uncertainty. The characteristics of the information exchanged constitute an essential factor to consider with the view to determining whether such information can – or cannot – be used by companies to achieve coordination.[83] Certain features, such as the subject matter, the age of the information or the level of aggregation, play a decisive role for this assessment, which will be further analysed in the following part.

There is a general consensus among economists on the fact that information exchanges taking place among competitors regarding future intentions on prices or quantities can have an extremely positive value for undertakings who wish to coordinate their conduct.[84] The high instrumentality of this type of information is directly linked with the issues arising from the multiplicity of equilibriums, and the consequent strategic uncertainty. When companies face a set of possible equilibriums and it is not evident for them which hand should be played, information regarding future intentions and sensitive competitive variables, such as prices or quantities, obviously constitutes the key type of information which can help them to solve the equilibrium selection dilemma.[85] The extreme usefulness of this type of exchange relies on the nature of the information itself and more precisely, on the fact that it concerns intended *future* conduct and *key competition parameters* (prices and quantities). Once companies have access to this knowledge, they will no longer have to wonder which strategy their rivals will follow or which equilibrium they should play, because the simple availability of such information automatically provides an answer to these questions. It can, therefore, be affirmed that sharing this category of information does not

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regulating communication between firms' (n 57) 183). In this context it will be irrelevant whether the information is exchanged directly among the companies in question or whether this task is conducted through an intermediary or third-party. See Bennett and Collins (n 23) 321.

[82] It could, however, be argued that undertakings could also reach an equilibrium by simple price signalling without the need of exchanging any information. Nevertheless, in this case there is more room for misinterpretations of such (at times expensive) signals. In effect an attempt to reduce the equilibrium may be seen as a deviation and accordingly, trigger a price war (Kaplow (n 68) 98-99). See also *supra* note 80.

[83] See e.g. OECD, *Policy Round Tables: Information Exchanges Between Competitors under Competition Law* (n 2) Executive Summary, at 11.

[84] ibid.

[85] See for instance Vives (n 64) 89; Bennett and Collins (n 23) 321.

diminish strategic uncertainty but simply eliminates it, thereby solving the equilibrium selection problem. Although other methods (e.g. price signalling) could be used to achieve coordination, this type of exchange offers the advantage of avoiding other inconveniences such as the possibility of triggering a price war or decreasing market share.[86]

The effectiveness of information relating to crucial competitive variables must be contrasted with information which does not directly relate to the strategies of firms, like information about costs or demand.[87] Obviously, these individual types of information sharing will not necessarily reduce uncertainty about the market behaviour of competitors. Since such exchanges are not primarily relevant to solve the equilibrium issue, it is also considerably less likely that they lead to an anticompetitive collusive impact.[88] Similarly, the crucial significance of information exchanges about *future* conduct in reaching an equilibrium must also be distinguished from the function of information regarding past and current behaviour, which is mainly used to sustain a collusive agreement, once such an equilibrium has been selected.[89] However, depending on the circumstances of the case, the

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[86] See for example OECD, Policy Round Tables: Information Exchanges Between Competitors under *Competition Law* (n 2) Note by the Delegation of the European Union, 312.

[87] See, for instance, OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Background Paper by the Secretariat, 49; Rainer Nitsche and Nils von Hinten-Reed, 'Competitive Impact of Information Exchange' (CRA, June 2004) 29. <http://ec.europa.eu/competition/consultations/2004_6_reg_4056_-86/note_on_information_exchange_en.pdf> accessed 12 December 2012). 'There is, however, a concern if information about past demand contributes to *sustaining* collusive agreements thereby determining unobservable prices or sales. In a majority of cases such concerns can be addressed by aggregating and anonymising information'.

[88] See also Kühn and Vives (n 64) 117. In addition, these types of information sharing are more likely to lead to efficiency benefits. Nonetheless, it has also been argued that information exchange about cost or demand conditions may also *contribute* to solve the coordination problem by helping to divide the market or to allocate quotas in a more efficient manner. For instance, asymmetric costs among companies represent an important difficulty to allocate production efficiently among firms. Likewise, exchanging information about uncertain demand, can be useful to coordinate on allocative firm efficiency (see Kühn and Vives (n 64) 91). Despite this supporting role, this type of exchange will not be useful – and will therefore not make much sense – if it is not conducted in combination with exchanges regarding prices or quantities. Accordingly, it is preferable to focus on the last mentioned type of exchange.

[89] Peter Møllgaard and Per Baltzer Overgaard, 'Transparency and competition policy' in *The Pros and Cons of Information Sharing* (Swedish Competition Authority, Stockholm 2006) 108-109 and 124.

harming effect of exchanging past and present data can be more tangible, if the information allows companies to infer the future conduct of rivals.[90]

In addition, it is important to note that when information concerning future prices or quantities is only being disclosed among competitors and consumers do not have any access to such data,[91] it is extremely improbable that the exchange is conducted for efficiency reasons.[92] The most probable motivation for such an exchange is to assist rivals in co-ordinating on the right collusive equilibrium. On the other hand, the pro- or anti-competitive nature of public information exchanges is more difficult to discern. The public character of an exchange does not exclude all possibilities of a collusive outcome. Still, its collusive potential may be considerably reduced because new market entrants, clients with buyer power and rivals excluded from the exchange, may undermine the success of the scheme.[93] Moreover, when information is publicly disclosed, all market players including consumers will have access to such information and will be able to benefit from enhanced market transparency. Therefore, it seems reasonable to argue that the pro-competitive effects of public disclosures can frequently offset their collusive risks.[94]

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[90] See Bennett and Collins (n 23) 322. More precisely these commentators state that 'information about past behaviour may still generate focal points through two mechanisms. First, when there is a price leader in the market, public announcements of current price information from this price leader may create a focal point around which similar price increases may be tacitly implemented by other firms. Secondly, sharing information about past or current costs or demand may make it easier for firms to come to a tacit understanding on a focal point for coordination'. It has, however, also been noted that '[w]hile it is not a logical impossibility that firms might spontaneously understand from an exchange of cost information what collusive price to coordinate on, it appears highly implausible'. Padilla (n 3) 424.

[91] That is, information of private nature.

[92] See for instance Møllgaard and Overgaard (n 89) 124; OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Note by the Delegation of the European Union 312; see also OECD, Unilateral disclosure of information with anticompetitive effects (DAF/COMP/WP3(2012) February 2012), Background Paper by the Secretariat, 33 <http://www.oecd.org/daf/competition-/cartelsandanti-competitiveagreements/49548583.pdf> accessed 12 December 2012.

[93] OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Background Paper, 33.

[94] In particular, Kühn and Vives state that '[p]rice announcements that include a commitment to (maximal) prices facilitate the comparison of prices for consumers and therefore have a pro-competitive effect. Intervention against public announcements of prices does not seem justified in this case. In contrast, when there is no public commitment to prices relative to customers it is hard to see any other purposes in the exchange of information about planned future behaviour than the intent to coordinate (or negotiate)

The effectiveness of exchanges regarding future price or sales intentions is often questioned, because they generally involve 'cheap talk', that is, non-verifiable and non-costly information. The literature suggests that when information is released with the objective of showing a focal point, companies will always have the incentive to exchange false information in order to influence and adjust the focal point to their individual interest.[95] Despite this observation, it is generally accepted that sharing information can be useful to aboard the coordination problem by avoiding that coordinating firms chose different equilibriums.[96] In addition, even if not immediately verifiable, information exchange does matter, as announced plans can be verified on a later moment and wrong announcements can be subsequently punished.[97]

4. Detecting and Punishing Deviations through Information Exchanges

As examined above, reaching a collusive equilibrium is only one of the three main obstacles that companies must surmount to successfully collude. If firms are not capable of detecting and punishing deviations, they will be unable to maintain the internal stability of their collusive behaviour which will then breakdown sooner rather than later. A major complication in this respect is that, depending on the characteristics of the market, companies

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collusive market conduct. Such private communications between producers are in their nature similar to direct negotiations about future conduct in face to face meetings'. (Kühn and Vives (n 64) 118). See also e.g. OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Background Paper, 33.

95 See OECD, Unilateral disclosure of information with anticompetitive effects (n 92) Background Paper, 10-11. See more generally Sandeep Baliga and Stephen Morris, 'Co-ordination, Spillovers, and Cheap Talk' (2002) 105(2) Journal of Economic Theory 450; Bennett and Collins (n 23) 323-324.

96 See e.g. Møllgaard and Overgaard (n 89) 108-109; P.B. Overgaard and P. Møllgaard, *Information Exchange, Market Transparency and Dynamic Oligopoly* (School of Economics and Management - Economics Working Paper 2007-3, April 2007) 8 <http://ftp.econ.au.dk/afn/wp/07/wp07_03.pdf> accessed 12 December 2012. OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Background Paper, 34 (it will be, however, necessary that the veracity of the information can be checked at a later moment).

97 Nitsche and von Hinten-Reed (n 87) 19; see also OECD, Unilateral disclosure of information with anticompetitive effects (n 92) Background Paper, 10-11. In addition, cheap talk may also play an important role in overcoming trust issues. Once the veracity of the information disclosed by a certain firm can be corroborated, such firm will be considered reliable, which, at the same time, will reinforce the crucial personal relations among the participants. Bennett and Collins (n 23) 324; see more generally Maria Bigoniy and others, 'Trust, Salience, and Deterrence: Evidence from an Antitrust Experiment' (IFN Working Paper No. 859, 2011).

may not be able to observe and verify the past conduct of their rivals. For instance, if the general demand is unstable, or the level of transparency is low, companies will have little knowledge about their rivals' prices. It will then be extremely complicated to ascertain whether a decline in their own sales is the consequence of a deviation, or the result of a general fall in demand.[98] This situation logically hinders the detection of genuine deviations, while, at the same time, it complicates effective punishment.

Thus, by exchanging information and artificially increasing transparency, firms are able to monitor adherence to collusive schemes in a more efficient manner and, thereby, to enhance their ability to detect cheating. Simultaneously, enhanced detection enables firms to improve their punishing skills. Companies will know with more precision which firm(s) should be punished – when punishment is called for, and whether such sanctioning should be brief or sustained. Furthermore, targeted punishment satisfies a contemplated need for 'fair treatment' among colluding companies, while it also contributes to avoiding expensive costs as well as unnecessary price wars that may occur.[99] Overall, sharing information certainly constitutes an effective and efficient device in promoting the internal stability of collusion.[100, 101]

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[98] Kaplow (n 68) 99; Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 173; OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Submission by France, 175.

[99] See Bennett and Collins (n 23) 322-323. ('The more wide and indiscriminate punishments have to be (…) the less the coordinating firms will want to implement them. This means that when punishments are very unfocused firms will find it harder to coordinate.') See also Motta (n 80) 151.

[100] While the incapability of effectively detecting deviations will undermine the effectiveness of punishment devices and thereby make collusion more difficult, this obstacle – although important – will not be an absolute impediment to establish collusive conduct (see Edward Green and Robert Porter, 'Non-cooperative Collusion under Imperfect Price Information' (1984) 52(1) Econometrica 87). Nonetheless, in these circumstances, collusion will not be optimal and 'price war' behaviour, designed to eliminate the incentives to cheat, will frequently be observed. See, for instance, Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 173; see also Levenstein and Suslow (n 77) 47.

[101] This functionality of information exchanges in facilitating monitoring and punishment is illustrated in explicit cartel cases. The following decisions demonstrate that companies frequently dedicate extensive efforts to exchange information destined to facilitate the monitoring activities and, as such, reduce the motivation to deviate. See for instance *Graphite Electrodes* (Case COMP/E-1/36.490) Commission Decision 2002/271/EC [2002] OJ L 100/ 1, para. 55; *Vitamins* (Case COMP/E-1/37.512) Commission Decision 2003/2/EC [2003] OJ L 6/1, paras 577, 276 and 359; *Plasterboard* (Case COMP/E-1/37.152) Commission Decision 2005/471/EC [2005] OJ L 166/8, para462; *Sorbates* (Case

Similarly, information sharing can play an important role in supporting and increasing the *external* stability of collusion. When prices are set close to the monopoly level and there are considerable margins of profit, new competitors may be tempted to enter the market. Such entry may destabilize coordination or even keep companies from colluding in the first place. Comparable 'risks' arise when there is sufficient buyer power for the clients to simply refuse the collusive prices. In order to prevent customers or competitors from endangering the success of coordination, information exchanges leading to sufficient market transparency can be used to identify whether new entry will occur, and to determine which companies are likely to attempt entering the market.[102]

5. Information Necessary to Maintain the (Internal and External) Stability of Collusion

While information regarding future actions can be essential to reach an equilibrium, supervising the adherence to a common line of behaviour is not a task that can be performed by sharing data concerning intended actions. Instead, the exchange of information about *current* and *past* behaviour will be far more valuable and often (almost) an indispensable ingredient in detecting and punishing deviations.[103] The more or less effective nature of the information obviously depends on its potential to reveal the *strategic* behaviour of the market participants at the moment of the exchange. Therefore, exchanges of current and past information will be the most useful types of information sharing, provided that such exchanges meet a set of conditions.

COMP/E-1/37.370) Commission Decision 2005/493/EC [2005] OJ L 182/20, para 114; *preserved mushrooms* (IV/27.039) Commission Decision 75/77/EEC [1975] OJ L 29/26, para 4(e)). See also Levenstein and Suslow (n 77) 47. Based on the key role played by information sharing in cartel cases in the context of monitoring, Levenstein and Suslow draw the conclusion that, even if collusion is not completely impossible in absence of perfect monitoring (observability), firms would certainly prefer to coordinate their behaviour according to the efficient collusion model of Friedman (James Friedman, 'A Non-cooperative Equilibrium for Supergames' (1971) 38(113) Review of Economic Studies 1). In Friedman's model with perfect observation, cheating would be immediately detected and, accordingly, timely punished. In this case scenario, companies are not tempted to deviate and price wars are not necessary.

[102] In addition, information sharing could also help to organize a collective response against the new entrants. See *e.g.* OECD, *Policy Round Tables: Information Exchanges Between Competitors under Competition Law* (n 2) Executive Summary, 31, and Note by the Delegation of the European Union, 312; M. Bennett and P. Collins (n 23) 323.

[103] See e.g. Vives (n 64) 92.

In this regard, the first factor playing an important role is the age of the information. Information concerning past actions should be as *recent* as possible in order to allow companies to impose a quick and timely punishment. When information is relatively old, the collusive participants may be unwilling to implement punishment, if a deviation is detected. Such a situation, however, may in turn reduce the credibility of the punishing device. It can be deduced that, in general terms, historical information[104] does not have a decisive utility in the context of collusion.[105] However, given the great relevance of the circumstances of any concrete case to determine which information is considered too old to be effective, assessing the precise utility of old information *a priori,* is not possible. Instead, an individual assessment of each case is required.

A second relevant element concerns the fact that the information must allow companies to identify the *strategic* behaviour of relevant market participants. In order to be effective, the information must concern the sensible competitive variables. This will be frequently the case when the information shared regards the prices being charged or the quantities being sold. Given their great efficiency for monitoring purposes, exchanges of recent or current information regarding prices or quantities are generally essential to maintain the stability of collusion. [106,107]

Thirdly, the level of aggregation is also a significant consideration. Information about past prices and quantities with a high degree of disaggregation will be most effective, since it allows for the detection of any defections with more precision. Refined and early detection will, in turn, enable companies to provide an even more effective and 'fair' punishment,

[104] ie, information older than one year.
[105] Although the collusive potential of this information can be assessed only on a case-by-case basis. See e.g. OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Executive Summary, 50.
[106] Nonetheless, it should be noted that, although this type of information can be classified as the most effective for monitoring purposes, information about aggregate demand may in some cases suffice to discern whether a decrease in individual demand was the consequence of a general drop in demand or of a concrete deviation; ibid 48.
[107] In addition, it has been commented that to be most efficient, the information shared must concern a sufficiently significant share of the relevant market. If this is the case companies will be able to prevent firms not taking part in the exchange scheme from entering the market without being detected. See e.g. OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Submission by France, at 176.

while saving the costs of untargeted retaliation.[108] In addition, it seems opportune to note that the economic benefits that may result from exchanges of information of this type do not require sharing very detailed information.[109] Disclosure of aggregated data, conversely, is less problematic as such data is less prone to render the firms' strategic behaviour more identifiable.[110] Finally, if disaggregated information about recent past prices and quantities is verifiable – which is normally the case, the exchange is highly likely to enable companies to control with utmost certainty the strategy of their competitors, thereby minimizing the deviation risk and enhancing the stability of collusion.[111]

Despite the fact that this last mentioned kind of information should be considered as a highly suspicious type of exchange, judging the monitoring efficiency of a certain type of information is not a straightforward task. There are, indeed, other types of exchanges which are also effectively designed to fulfil a monitoring function, but take more discrete forms. For instance, by sharing and combining different types of (at first sight) non-problematic information, the monitoring potential of the exchange can be maximized and enable firms to identify market strategies.[112] Furthermore, the extent to which sharing information will contribute to the stability of

[108] See Bennett and Collins (n 23) 322-323.
[109] OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Executive Summary, 11; Cristina Caffarra and Kai-Uwe Kühn, 'The cost of simplistic rules for assessing information exchange: The Italian jet fuel decision' in *The Pros and Cons of Information Sharing* (Swedish Competition Authority, Stockholm 2006) 142.
[110] Nonetheless as Møllgaard and Overgaard point out 'care should be made to check the effective level of aggregation, i.e. that firms cannot 'invert' the aggregation procedure. The exchange of aggregate industry information may help firms in their planning and in the monitoring of e.g. their sales force and so has a significant efficiency potential' (n 89, 124). Additionally, is interesting to note that the more or less relevance of the level of disaggregation will also depend of the number of companies active on the market. Since each company is obviously aware of its own strategy, in a market with only two market players, an exchange of aggregated information will allow the identification of the competitors' behaviour. See e.g. OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Submission by France, 176).
[111] Vives (n 64) 92.
[112] This aspect was also emphasized by the Commission in its maritime transport guidelines, in which it stated that 'in general, it is important to assess all individual elements of any information exchange scheme together, in order to take account of potential interactions, for example between exchange of capacity and volume data on the one hand and of a price index on the other'; Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, para 57. See also OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Submission by France, at 176.

collusion is highly dependent on the market structure *i.e*. whether collusion in the market is actually possible and sustainable, and on the potential of the information exchange to facilitate market coordination.[113]

On the basis of the foregoing, it can be concluded that, although sharing aggregate information regarding past or current prices and quantities can, in principle, be considered as an effective monitoring technique, the influence on collusion of past or current information about less relevant competitive parameters or with a lower level of disaggregation is evidently not clear-cut. Therefore, the substantive analysis of information sharing activities would not be reliable if conducted only by reference to the nature or features of the information in question.

6. Which Types of Information Can Be Directly Classified as Object Restrictions From an Economic Perspective?

The foregoing discussion of the economic literature has elaborated on the widely acknowledged view that information sharing activities can be a particularly useful method for (oligopolistic) companies attempting to charge and sustain supra-competitive prices. It has been clarified that there are acceptable reasons why information exchanges should constitute a relevant subject of concern and, accordingly, should not be permitted without any kind of limitations. At the same time, the examination has demonstrated that the standard idea that 'information sharing facilitates collusion' is, as such, too broad. Not every type of exchange has the potential to result in anticompetitive effects and, when it does, the magnitude of such potential varies depending on the nature of information and the features of the market. Taking the previous economic lessons as a starting point, a number of implications for competition policy are to be

[113] Bennett and Collins (n 23) 323. The authors point out that the role of information sharing is especially important in highly fragmented markets where information exchanges directly increase transparency. In markets which are by their very essence favourable to coordination, any exchange of information augmenting transparency in a minimal manner will be decisive and lead to considerable coordination. In contrast, the same exchange may be irrelevant when the market is not prone to coordination at all. It follows that in markets where collusion is difficult to achieve and therefore unlikely, exchanges of information can be directed at addressing the obstacles of the market. In this context, it can also be noted that the competitiveness analysis of information sharing agreement is generally consistent with the assessment conducted within the context of merger analysis. In this sense, in the assessment of coordinated effects, economists firstly examine whether coordination in the market was possible before the merger and how the merger may change the situation.

explored below.[114] More precisely, it will be examined what types of information sharing are so likely to lead to restrictive effects that it is appropriate to qualify them as object restrictions. As it will be observed, while the impact of certain types of exchanges is rather uncontroversial, in many other instances, the prediction of the effects of information sharing is more complex than is usually presented. The analysis of the second section showed that the object analysis is designed to cover practices with an inherent harming nature. According to the 'object' perception, there are practices which are designed to harm the competitive process. The qualification of agreements as restrictions by object is acceptable from an economic point of view when the practice in question is, on the one hand, very likely to produce a significant anticompetitive impact and, on the other hand, unlikely to create efficiencies which may counterbalance such negative effects.

Economic theory indicates that information exchange designed to achieve a collusive equilibrium constitutes the greatest concern for enforcement agencies. In effect, if firms are not capable of reaching a consensus as regards the optimal equilibrium and there is a lack of compromise on this aspect, the coordination scheme will not be probably adopted in the first place, or at least, it will not work properly and will subside sooner or later. For instance, if the chosen equilibrium is not considered as fair by certain members, they will have greater incentives to cheat and thus, to destabilize coordination.[115] Private exchanges of individual intentions for future conduct regarding prices and quantities can be seen as the most effective mechanism to achieve a collusive outcome. Since such exchanging-activity has undoubtedly the largest anticompetitive potential, it should be consequently considered the most hazardous type of information sharing.[116]

In terms of effects, this type of exchange is clearly equivalent to a cartel, within the meaning of article 101(1) TFEU. While given its private nature this activity has the potential to significantly harm both the competitive process and consumers, it is difficult to find efficiency reasons capable of

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[114] See also Møllgaard and Overgaard (n 89) 123 *ff*; Kühn, 'Fighting collusion by regulating communication between firms' (n 57); see Bennett and Collins (n 23) 328 *ff*.

[115] Kuhn, 'Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results' (n 4) 422.

[116] ibid. In addition, Kuhn argues that 'communication that is targeted at coordination can also be much more easily distinguished from communication for efficiency purposes. It is therefore the main candidate for per se policies'.

justifying it. Moreover, even if in certain circumstances a number of beneficial aspects resulting from this type of information sharing could be claimed,[117] that consideration in itself does not deprive the exchange of its collusive potential. Put in a slightly different way: although individual information regarding future prices or quantities could eventually lead to certain advantages for individual consumers, it is far more probable that this information is used with a view to colluding.[118] In addition, pro-competitive effects claimed under 101(3) TFEU can only prevent an agreement from being prohibited, if all (four) conditions enumerated in this section are satisfied.[119]

It follows from the foregoing that, from an economic perspective, it appears acceptable to *automatically classify* private exchanges of companies' individual intentions for future conduct regarding prices and quantities as object restrictions. While under specific circumstances other types of information may possibly contribute to reaching an equilibrium, it seems impossible to identify solely based on the features of the information, another category which would, in a majority of cases, lead to reaching such equilibrium, except for information regarding future pricing intentions or quantities. Adopting the object-classification path in any other case would, therefore, not be appropriate. Nonetheless, economic theory does not stand in the way of finding a different kind of exchange restrictive by object if, following the more nuanced approach, it can be established that such activity aims at restricting competition, in its precise *economic context*. This would be adequate when the information can be used to identify the future intended behaviour of the competitors and, as a result, to reach a collusive equilibrium.[120]

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[117] For instance, it could be useful to firms to improve their sales forecasts.

[118] See also Kuhn, 'Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results' (n 4) 422-423; Bennett and Collins (n 23) 313, 330 citing Bennett and others (n 57).

[119] It is especially important in this context that potential benefits cannot be achieved throughout a less restrictive agreement or practice. See Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 195 *ff*; Padilla (n 3) 436; Bennett and Collins (n 23) 330; See also Kuhn, 'Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results' (n 4) 422-423.

[120] For example, an exchange of current data among suppliers could help firms reaching an equilibrium in a market where a price leader makes public announces of its pricing activities. This could create a focal point around which other companies might implement similar price increase. Bennett and Collins (n 23) 321.

In contrast, exchanges of individualised information among competitors which frequently have a monitoring purpose (e.g. information regarding *current* prices or quantities), should only be considered a secondary issue from an economic perspective.[121] As examined, the problematic nature of this type of exchange resides in the fact that undertakings may use this information to efficiently monitor the market conduct of the rest of the competitors at the time of the exchange. This would allow them to provide an individualized and timely punishment for deviators, which would, in turn, diminish the individual incentive to charge prices lower than implicitly agreed. In these circumstances, the stability of coordination is guaranteed. Despite these acknowledged risks, it should be kept in mind that a mechanism to monitor the adherence to collusion and to detect deviations will only make sense, once a collusive compromise has been reached and put in practice. Consequently, when information is exchanged with the purpose of reaching an equilibrium such exchange is far more important than information exchanged with a monitoring aim. Indeed, competition authorities should pay greater attention to the different functions that information sharing may have.

Furthermore, economic theory tells us that, in the absence of an explicit cartel agreement or facilitating information exchanges designed to soften the obstacles of the market, tacit coordination along past positions on the market is only likely to occur in oligopolistic concentrated markets that are stable and relatively non-complex.[122] In order to assess whether an exchange constitutes an effective monitoring instrument, it should be first examined to which extent the exchange modifies the situation by enhancing the ability to observe the market conduct of competitors. The question whether sharing information regarding *current* prices or quantities can be considered as

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[121] Unless such information is capable of revealing the future strategic conduct of competitors, in which case it should be assessed as a restriction by object *in its legal and economic context*.

[122] The economic literature has identified a range of structural factors that tend to make collusion easier and more probable in particular industries. See e.g. Paul Grout and Siliva Sonderegger, 'Predicting Cartels' (Office of Fair Trading, Economics Discussion Paper. OFT 773, March 2005); Patrick Rey, 'On the Use of Economic Analysis in Cartel Detection' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds.) (2006) 11 *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* 69. For a more detailed analysis of the logic behind each one of these factors see Motta (n 80) 142 *ff.;* Marc Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright, and Jean Tirole, 'The Economics of Tacit Collusion' (Final Report for DG Competition, Toulouse, 2003). <http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf> accessed 12 December 2012.

dangerous in light of its monitoring potential, can, thus, only be answered by reference to the market structure concerned.

In addition, empirical studies show that, even if companies (may) have a strong collective incentive to collude and the market features are favourable thereto, when they do not explicitly negotiate the terms of coordination, it will be extremely difficult to reach a consensus to charge and maintain prices or quotas at the collusive level. While in explicit cartels open negotiations and communication are decisive to create trust among the participants, (simple) information sharing can be ambiguous and even create confusion. In this sense, economic theory advances that generally the individual interest of each firm to deviate from (or not participate in) the common policy will prevail over the joint interest of collusion.[123]

This discussion indicates that the qualification of information with a monitoring function as object restriction is more controversial. Although the principle could be established that such practice can be generally permitted as long as the exchange does not regard information that bears a connection to the business strategies of market players, such a rule can only be applied following a case-by-case approach, and by taking into account the particular market features, and how the information in question may change the situation.[124] Therefore, it is preferable to conduct the substantive assessment

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[123] See Kuhn, 'Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results' (n 4) 422. Kuhn observes that 'even in very transparent markets collusive conduct is far from automatic**.** (…) We have no good evidence that suggest that tacit collusion is pervasive in highly transparent. In fact, evidence from explicit cartels often shows how fraught with difficulty it is to get different firms to agree on common conduct'. Further, he refers to the economic literature according to which experimental evidence suggests that tacit collusion occurs with two firms but not with more. See Stephen Huck, Hans-Theo Normann and Jorg Oechssler, 'Does Information Sharing about Competitors' Actions Increase or Decrease Competition in Experimental Oligopoly Markets' (2000) 18(1) International Journal of Industrial Organisation 39.

[124] Caffarra and Kühn (n 109, 145-146) observe that while private communication about planned future prices should always be prohibited, private information sharing regarding current or past actions in the market should be assessed under a more economic approach. They suggest four criteria that should be used for this analysis. First, a 'safe-haven' should be used for the types of exchanges which should always be permitted, such as aggregated information and cost data. Second, in order to investigate an information sharing case, competition authorities should have a clear theory of the case, i.e. analyze whether collusion is possible in the market and the role of the exchange in facilitating it. Third, it should be analyzed to which extent the information exchange can improve the monitoring of coordination in the concrete case. If such impact is considerable, the investigation should continue. Fourth, the pro-competitive effects claimed by the parties should be carefully

of information exchanges with a monitoring role under the effects-based approach, and to handle any information sharing facilitating the equilibrium selection as restrictions by object, in order to prevent firms from effectively aligning their conduct in the first place.

IV. Information Exchange as Object Restrictions: Principles Stemming From the Case Law

The previous part has clarified that, from an economic angle, only private exchanges of companies' individual intentions for future conduct regarding prices and quantities should be directly *classified* as restrictions by object. This section summarizes the position of the European Courts on agreements on exchange of information considered as object restrictions, and explores the general principles established in the case law for the assessment of such practices under article 101 TFEU. Moreover, an attempt to connect the case law with the above-described economic considerations is performed.

One important preliminary observation to be made is that, in order to generally assess information exchange under article 101(1) TFEU, it is necessary to have established that the exchange constitutes an agreement, a concerted practice, or a decision by an association of undertakings. In the context of information sharing, this analysis is particularly important. In line with the European case-law, the concept of an agreement within the meaning of article 101(1) TFEU centres on the existence of a joint intention between at least two parties,[125] while the notion of 'concerted practices' has been defined as covering a form of coordination between undertakings which knowingly substitutes practical co-operation between them for the

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considered in order to determine whether they are capable of countervailing the restrictive effects.

[125] The form in which such intention is manifested is unimportant. Case T-56/02 *Bayerische Hypo- und Vereinsbank AG v Commission* [2004] ECR II-3495, para 59-61. For further discussion see e.g. O. Black, 'Agreement: concurrence of wills, or offer and acceptance?' (2008) 4(1) European Competition Journal 103; Albertina Albors-Llorens, 'Horizontal agreements and concerted practices in EC competition law: Unlawful and legitimate contacts between competitors' (2006) 51(4) The Antitrust Bulletin 837; Pais Antunes, 'Agreements and Concerted Practices under EEC Competition Law: Is the Distinction Relevant?' (1991) 11 Yearbook of European Law 57; Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81 EC* (n 15) 72, and Miguel Sousa Ferro, 'Reassessing Borders between Agreements and Unilateral Practices after Case 74/03 Volkswagen II' (2007) 28(3) European Competition Law Review 205.

risks of competition.[126] Yet, a situation in which only one company discloses strategic information to its competitors who accept it, can also constitute a concerted practice.[127]

One of the most recent and central precedents in the field of information exchange is undoubtedly the judgment of the Court of Justice in *T-Mobile*.[128] In this case, the CJEU issued a preliminary ruling in which it further developed how the assessment criteria for object-restrictions should be applied in relation to exchanges of information amounting to concerted practices. The facts of the case can be briefly outlined as follows. Representatives of five mobile telecommunications operators in the Netherlands[129] held one meeting in which they discussed, inter alia, the reduction of standard dealer remunerations for post-paid subscriptions, which was to take effect on 1 September 2001. During the meeting, the participants exchanged confidential information. The competition authority took the view that during this meeting the operators had reached a concerted practice which restricted competition and, accordingly, imposed fines on the respective undertakings. However, the referring Court (the College van Beroep voor het bedrijfsleven) was unsure whether the object of the practice could be considered to be the restriction of competition. In view of these doubts, it decided to ask the CJEU to clarify which criteria must be applied when assessing whether a concerted practice has as its object the prevention, restriction or distortion of competition.

[126] Case 48/69 *Imperial Chemical Industries Ltd. v Commission* [1972] ECR 619. The Court has also declared that 'the concepts of "agreement" and "concerted practice" are intended to catch form of collusion having the same nature and (…) only distinguishable from each other by their intensity and the forms in which they manifest themselves' (Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, para 108).

[127] *Cimenteries* (n 50), para 1849: '(…) the concept of concerted practice does in fact imply the existence of reciprocal contacts (…). That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it'. If a firm receives strategic information from a rival, unless it reacts with a clear statement that it does not wish to receive such data, there will be a presumption than it has accepted it and adapted its market conduct accordingly. See also Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, para 121. See further Albors-Llorens (n 125); Femi Alese, 'The Economic Theory of Non-Collusive Oligopoly and the Concept of a Concerted Practice under Article 81' (1999) 20(7) European Competition Law Review 379; Gerwin Van Gerven and Edurno Navarro Varona, 'The Woodpulp Case and the Future of Concerted Practices' (1994) 31 Common Market Law Review 575.

[128] *T-Mobile* (n 24).

[129] Namely, Ben (T-Mobile), KPN Dutchtone (Orange), Libertel-Vodafone (Vodafone) and Telfort / (O2).

1. The Capacity of Removing Uncertainty and the Principle of Economic Independence

After recalling its well established case law on the concept of object restrictions, the Court held that the exchange of information between competitors is liable to be incompatible with the competition rules if it *reduces or removes* the degree of *uncertainty* as to the operation of the market, with the result that competition between undertakings is restricted.[130]

Although this statement may at first sight seem complex, the problematic nature of an agreement capable of 'removing uncertainty' can easily be explained against the background of the long-standing principle that 'each economic operator must determine independently the policy which he intends to adopt on the common market'. While this principle does not deprive economic operators of the right to adapt themselves intelligently to the anticipated conduct of their competitors, it 'strictly precludes any (direct or indirect) contact between such operators, by which an undertaking may influence the market conduct of its competitors or disclose to them its intentions concerning its own market conduct, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question'.[131]

In the light of these considerations, the Court then specified the criteria for the establishment of an *anti-competitive object* in information exchange cases. In *T-Mobile,* the Court stated that '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'. More specifically, 'an exchange of information which is capable of removing uncertainties between participants as regards the *timing, extent and details of the modifications to*

[130] *T-Mobile* (n 24), para 35, citing Case C-7/95 P *John Deere Ltd v Commission* [1998] ECR I-3111, para 90; C-194/99 P *Thyssen Stahl AG v Commission* [2003] ECR I-10821, para 81.

[131] *T-Mobile*, ibid paras 32-33 citing Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission* [1975] ECR 1663, para 174; Case 172/80 *Gerhard Züchner v Bayerische Vereinsbank AG* [1981] ECR 2021, para 14; *John Deere Ltd* (n 130) para 87.

be adopted by the undertaking concerned, must be regarded as pursuing an anti-competitive object'.[132]

With this statement the CJEU clearly demonstrates the influence of economic analysis on its current approach to object restrictions. In this case the involved undertakings had exchanged (and even discussed) information regarding the remuneration which they intended to pay in the future for the services supplied to them by dealers. Therefore, the information related not only to an essential factor in establishing prices, which is a key competition parameter, but also to planned future behaviour. By exchanging this type of information, the parties had knowledge of the market strategy of their competitors and could easily determine a collusive level of remuneration. This aspect was also highlighted by Advocate General Kokott in her opinion, in which she stated that the practice resulted in coordination of market conduct.[133] The assessment of information removing uncertainty about strategic intended conduct as restriction by object represents a suitable example to illustrate the consistency of this case and economics with each other.

2. The 'Potential Effects' Test

Another important aspect which has been also clarified in *T-Mobile* is that 'in order for a concerted practice to be regarded as having an anti-competitive *object*, "it is sufficient" that it has the potential to have a negative impact on competition. In other words, a concerted practice pursues an anti-competitive object (…) where it is *capable* in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. This aspect should be assessed according to its content and objectives and having regard to its legal and economic context'.[134]

When considered in isolation, this statement may be somewhat confusing in that it seems to indicate that the mere potential of having negative effects constitutes the decisive condition ('it suffices') to qualify an exchange as restriction by object. Such a wide interpretation of object restrictions would, however, not be coherent with the general conception of the Courts (and the

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[132] *T-Mobile* (n 24) para 41 and 43.
[133] See ibid, Opinion of Advocate General Kokott, point 36.
[134] *T-Mobile* (n 24) para 31.

Commission) of the object approach.[135] As the Court has held in a long line of cases including *T-Mobile*, 'the distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition'.[136] This implies that the object criterion is not designed to cover practices based *only* on their likelihood of negative effects; the magnitude of the impact is also a key factor in such assessment.[137] In addition, this aspect is also recognized by the European Courts when they state that the object analysis should 'reveal the effect on competition to be sufficiently deleterious'.[138]

Rather than adopting a broad perception of the 'object category' for information exchanges, the CJEU appears to advocate a sort of capability test.[139] In effect, the Court maintains that a concerted practice should be *capable in an individual case* of resulting in the restriction of competition. In order to interpret this statement correctly, it is necessary to emphasise the particular nature of information exchanges. As explained earlier, the anticompetitive character of information sharing resides in the *reduction of strategic uncertainty*. When undertakings exchange information regarding essential competition parameters on intended future conduct privately, they automatically eliminate – or at least considerably diminish – a key type of uncertainty, that is, uncertainty concerning *intended* conduct. Accordingly, it is reasonable to affirm that such information exchange (*i.e.*, private information concerning future prices and quantities) has the inherent capacity of reducing uncertainty,[140] and thus, it must be considered

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[135] See also Bernd Meyring, 'T-Mobile: Further confusion on information exchanges between competitors, Case C-8/08 *T-Mobile Netherlands and others* [2009] ECR 0000' (2010) 1(1) Journal of European Competition Law & Practice 30, 31. According to Meyring such interpretation 'would do away with restrictions by effect altogether because practices that are not even capable of having anticompetitive effects will not produce such effects in any event—and all other restrictions would be restrictions by object'.

[136] *T-Mobile* (n 24), para 28.

[137] See also *supra* section 2.

[138] *T-Mobile* (n 24) para 28, citing *Competition Authority v Beef Industry Development Society* (n 28), para 15.

[139] See Aleksandra Ossowska, 'Chapter on information exchange in the EC guidelines on horizontal agreements & How the policy fits with European case law' (Conference organized by the University College of London and IMEDIPA in Cyprus, May 2010) <http://www.ucl.ac.uk/laws/cyprus/docs/Ossowska_Cyprus2.pdf> accessed 12 December 2012.

[140] The reference to 'an individual case' is, in this sense, closely connected to the relevance of 'the legal and economic context'. Just like the most straightforward categories of agreements are considered as such designed to restrict competition (and the relevance of the

anticompetitive by its very nature.[141] This does not detract from the fact that other (less evident) types of information may also be capable of having such effect.

It is interesting to comment that, in practice, these kinds of exchanges can be seen as 'underdeveloped' illegal cartels. The substantive analysis of cartels is practically uncontroversial: they are considered the object restrictions *par excellence*. The main difference between cartel agreements and information exchanges facilitating collusion is that in cartels undertakings frequently negotiate the terms of their market behaviour with the purpose of reaching a collusive consensus and maintaining their coordinated conduct. In contrast, simple exchanges of information do not necessarily amount to explicit discussions intended to reach an agreement, but they can obviously be conducted with the same (collusive) purpose.[142] Although it is true that it may turn out more complex for firms to coordinate their conduct only by sharing information, nonetheless, if they are successful, these exchanges have the same detrimental impact as hardcore cartels.

It is well accepted that cases of explicit coordination, resulting from (naked) cartel agreements to fix prices or to share markets, are prohibited (almost) under any circumstances. In such cases, it is completely irrelevant whether the agreement succeeded in raising prices and/or restricted competition. Moreover, the role of the economic context is similarly significantly limited.[143] It thus seems reasonable to wonder whether in cases of information sharing regarding future prices or quantities, any consideration of the 'economic context' amounts only to a 'quick look' analysis – like in the case of the most serious infringements – or, conversely, whether a more

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economic context will be rather limited), when a certain category of information reduces uncertainty by its very nature, such category will be considered *as a whole* capable of reducing uncertainty in (all) individual cases. On the relevance of the legal and economic context in information exchange cases see the next subsection.

[141] See also Anna Gerbrandy, 'C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Judgment of the Court of Justice of 4 June 2009' (2010) 47(4) Common Market Law Review 1199, 1206 *ff* (note).

[142] See also, OECD, Unilateral disclosure of information with anticompetitive effects (n 92), Background Paper by the Secretariat 3.

[143] See above Section 2.4. See also Meyring (n 135) 31, 'it is indeed common sense that [practices are hardcore cartels] are prohibited, whether or not they actually turn out to be effective in the individual case'.

careful examination of that economic context is required to correctly appraise information exchanges.

3. The Role of the Economic Context

Finding that a certain practice constitutes a restriction by object under article 101(1) TFEU generally requires an assessment of the economic context. This requirement was also stressed by the CJEU in *T-Mobile* where it held that, to establish that a practice has an anticompetitive object, it must be capable of restricting competition having regard to its legal and economic context.[144] This statement suggests that when an agreement is designed to restrict competition, but certain economic or regulatory circumstances make this impossible, the conduct in question should, conversely, not be qualified as an object restriction.[145]

While the need to consider the regulated nature of a given market appears to be less controversial, and the State action defence is commonly considered being a valid argument (even in the context of the most serious infringements), the precise role and relevance of the economic context in the area of information sharing remains somewhat blurred.[146] One of the most contentious issues is whether an information exchange may be deemed anti-competitive (by object) in a non-oligopolistic and non-concentrated market. This matter seems particularly acute when the concept of object restriction is understood as a presumption of anticompetitive effects: can such an assumption be correctly established in a market which is unfavourable to collusion? The answer to this question may have a profound impact on the method to assess object restrictions. If establishing a restriction by object requires a confirmation of the oligopolistic and concentrated nature of the market, this would imply that the qualification of information exchanges as object restrictions could only be made on a case-by-case basis, after a careful examination of the market structure. Hence, a general classification of information exchange based on the type and nature of the information as object infringements would not be correct.

The relevance of market concentration in the general assessment of (anti)competitiveness under article 101(1) TFEU has been illustrated by the

[144] *T-Mobile* (n 24) para 31.
[145] See also Meyring (n 135) 31.
[146] ibid.

economic analysis and the European case-law. First of all, economic theory suggests that highly concentrated markets are more likely to lead to collusive conduct. In fact, predictions based on game economic theory take as their starting point the existence of oligopolistic markets. In addition, this same consideration was brought to attention by the CJEU in *T-Mobile* where the Court held that 'on a *highly concentrated oligopolistic market*, (such as the market in the main proceedings), the exchange of information was such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders'.[147,148]

Some have argued that the Court's reference to the concentrated and oligopolistic nature of the market is the 'turning point' in the analysis of *T-Mobile*, based upon which it developed its legal reasoning to assess information exchanges.[149] Accordingly, the standard set out in the operative part of the judgement should only be applied, when the economic context of the exchange is a highly concentrated oligopolistic market.[150] This view should, however, be questioned. Although the Court does refer to the highly concentrated oligopolistic nature of the market, that reference is actually intended to elucidate the general context in which the competitive assessment of information exchange is conducted under article 101(1) TFEU, and does not specifically refer to the assessment of object restrictions. In effect, after referring to the highly concentrated nature of markets, the Court states that 'it follows that the exchange of information

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[147] *T-Mobile* (n 24), para 34 citing *John Deere Ltd* (n 130), para 88 *ff*. In *John Deere* (the landmark ruling regarding the structure of the market when analyzing information exchange), the CJEU firmly stated that while in truly competitive markets, transparency between agents 'may enhance and intensify competition, if other suppliers and of consumers may also benefit from such transparency. Conversely, 'on a highly concentrated oligopolistic market, the sharing of information concerning the operation of the market has the effect of revealing to all the competitors the market positions and strategies of the various individual competitors' (*John Deere Ltd*, ibid para 51).

[148] In effect, in the *T-Mobile* case the market was oligopolistic and highly concentrated. The market share held by the five operators amounted, respectively, to 10.6%, 42.1%, 9.7%, 26.1% and 11.4%. In addition, the market could be considered closed because no further licences had been issued. *T-Mobile* (n 24) para 10.

[149] Peter Camesasca, Anna Schmidt and Michael Clancy, 'The EC Commission's Draft Horizontal Guidelines: Presumed Guilty when Having a Chat' (2010) 1(5) Journal of European Competition Law & Practice 405, 414.

[150] ibid. These authors argue 'more precisely that 'the Court provides the general standard applicable to the exchange of information, whereby it is necessary to consider the 'nature of the products or services offered, the size and number of the undertakings involved and the volume of that market'.

between competitors is liable to be *incompatible with the competition rules* if it reduces or removes the degree of uncertainty'.[151] The criterion of the reduction of uncertainty remains thus the crucial element to examine the (anti)competitiveness of information exchange under the general framework of article 101(1) TFEU and, henceforth, it is not meant to establish by definition a restriction by object. It can be inferred that certain types of information exchange may have the object of reducing uncertainty, while other exchanges may (only) have this effect. After discussing this explanatory background about the anticompetitive concerns of information exchange, the Court specifies the precise circumstances under which information sharing can constitute *object* restrictions, namely 'when the information is capable of removing uncertainties concerning the *intended* conduct'.[152]

The distinction between the 'object' and the 'effects-based' approach becomes evident in the following context. Whereas the assessment of object restrictions is principally based on the fact that certain exchanges aim at reducing uncertainty, with respect to the effects-based analysis, the frequent emphasis placed on the market structure insinuates that the oligopolistic character of any market generally plays a significant role in the evaluation of information sharing. European practice, however, seems to indicate that this consideration (albeit generally significant) is not always indispensable to examine the effects of an agreement. For instance, in the *UK Agricultural Tractor Registration Exchange* decision, the European Commission did not exclude the possibility that collusive outcomes resulting from communication may materialize even in non-oligopolistic/fragmented markets.[153] Furthermore, in *Thyssen,* the CJEU confirmed that, even if in an oligopolistic market information exchange increases transparency and removes hidden competition, 'an information exchange may constitute a breach of competition rules even where the relevant market is not a highly concentrated oligopolistic market'.[154] This statement suggests that while a

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[151] *T-Mobile* (n 24), para 35 (emphasis added).
[152] ibid, para 43.
[153] *UK Agricultural Tractor Registration Exchange* (IV/31.370 and 31.446) Commission Decision 92/157/EEC [1992] OJ L 68/19.
[154] *Thyssen Stahl* (n 130), paras 86-88. 'It is true that, in its judgment in *John Deere*, cited above, which was upheld in this regard by the Court's judgment in John Deere, the Court of First Instance concluded that the tractors market was such a market. However, those judgments take into consideration a number of criteria in that regard, the only general principle applied in relation to the market structure being that supply must not be atomized.

highly concentrated oligopolistic market is not a necessary condition,[155] a *certain level of concentration* is required within the effects-based analysis.

This reasoning appears to have been embraced by the Commission who, in order to determine the level of concentration of the market, not only considers whether there is a low number of companies active in the market, but also takes into account whether a majority of the active firms are participating in the coordination scheme and their cumulative market shares.[156] In addition, this 'aggravating' but non-indispensable nature of the *highly concentrated* markets to judge the restrictive effects of agreements can be justified given the imperfect evidentiary value of the market structure.[157] While in certain cases markets characterized by high concentration can be very competitive, the practice of the Commission illustrates that, given the extreme efforts made by companies to surmount the obstacles deriving from the nature of the market cartels can turn out to be stable agreements in markets which are not strictly oligopolistic and with differentiated products.[158]

The previous reflections concerning the higher likelihood of collusion in highly concentrated markets can shed some light on the predictable anticompetitive *effects* resulting from an agreement. In this sense, it is reasonable to accept that, depending on the market structure, a given exchange may or may not lead to a reduction of uncertainty. However, turning back to the method to establish *object restrictions*, it should be borne in mind that, even if this approach does not disregard the likely

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(…) It follows that, in choosing the oligopolistic structure of the relevant market as one of the criteria of assessment, without seeking to establish whether the market was highly concentrated, the Court of First Instance did not infringe Article 65(1) of the ECSC Treaty as it must be interpreted in the light of the Court's case-law relating to exchanges of information'.

155 High concentration should thus rather be seen as an aggravating factor. See Wagner-von Papp, 'Information Exchange Agreements' (n 1) 20.

156 See also OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Submission by France, 185. For instance, in the *Wirtschaftsvereinigung Stahl* case the assessment of the level of concentration of the market to into account that 16 of the 20 undertakings active on the market were taking part in the exchange, and the market shares of the four largest companies amounted to half of the production in the market (*Wirtschaftsvereinigung Stahl* (IV/36.069) Commission Decision 98/4/ECSC [1998] OJ L 1/10). Similarly, in *Thyssen Stahl* (n 130), 12 of the 19 market operators participated in information exchanges.

157 See also OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Background Paper, 47.

158 ibid.

effects of agreements, in contrast to the effects-based method, it does not require an examination of their actual impact or of the market structure. When assessing whether an information exchange has an ‘anti-competitive aim’ or is ‘designed’ to reduce uncertainty, we are, in effect, confronted with a different query: whether the non-oligopolistic/concentrated character of the market actually obstructs the reduction of uncertainty to the extent of taking away the ‘by object’ qualification of the exchange. Once again, the answer to this question is rather apparent with respect to information exchanges relating to individual future prices and quantities. The mere fact that companies exchange this type of information, which undertakings should keep confidential in order to preserve their independent economic behaviour, is clearly sufficient to reveal the planned market strategy and, consequently, to show that the practice pursues an anti-competitive object. Whether the market in question was of an oligopolistic nature or not, seems to be rather irrelevant in this context.[159]

This interpretation is coherent with the European jurisprudence. For instance, in *Rhône-Poulenc,*[160] the claimant had been accused of taking part in meetings where competitors exchanged information concerning, *inter alia*, the prices which they intended to charge. In its judgment, the General Court held that ‘an undertaking, by its participation in a meeting with an anti-competitive purpose, not only pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors but could not fail to take into account, directly or indirectly, the information obtained in the course of those meetings in order to determine the policy which it intended to pursue on the market’.[161] Comparably, in *Tate & Lyle*, the Court declared that ‘one reason for participating in meetings, during which an important competitor reveals its future price intentions, was always to eliminate in advance the uncertainty concerning the future conduct of competitors. Moreover, by merely participating in the meetings, each participant could not fail to take account, directly or indirectly, of the

[159] Nevertheless, it is noteworthy that even if an analysis of the concentration in the market may not be decisive to establish the aim of the most straightforward types of information exchanges, the Commission’s practice does generally take into account whether the companies taking part in such information exchanges collectively hold a substantial share of the market.
[160] Case T-1/89 *Rhône-Poulenc SA v Commission* [1991] ECR II-867
[161] ibid paras 122-123.

information obtained during those meetings in order to determine the market policy which it intended to pursue'.[162]

In the analysis of certain types of information exchanges, the more or less concentrated nature of the market is simply incapable of altering the conclusion that some exchanges are clearly 'designed' to reduce uncertainty. If such a purpose can be established, further considerations will be trivial and the agreement will be presumed illegal under article 101(1) TFEU. In line with the case-law, information exchanges which *directly* reveal future pricing intentions or quantities pursue this objective independently of the concentrated nature of the market and, accordingly, they should primarily qualify for a *classification* as object restrictions.

4. Summary of Conclusions

The assessment of information exchanges by the European Courts is based on two crucial principles: the principle of economic independence and the criterion of reduction of strategic uncertainty. If an undertaking exchanges information which is *capable* of removing uncertainties concerning the *intended* conduct of the participating entities, there is a presumption that such information will be taken into account and will influence the conduct of any market competitors. As a consequence, the exchange of information will prevent them from determining the business policy in an independent manner. Although this approach differs from the economic analysis, it is clear that the European jurisprudence has been influenced by this economic thinking, an influence which makes these two visions consistent. Information capable of revealing intended future behaviour is the category of information which is most valuable to reach an equilibrium. Therefore, from an economic point of view, it entails the highest likelihood of significant negative effects. It is then reasonable to accept that this type of information restricts competition by its very nature; that is, by 'object' in competition legal terms.

A key issue is whether the economic context and, more precisely, the level of concentration of the market, allows disregarding the reality that certain categories of information have the inherent effect of reducing uncertainty as regards intended strategies. With respect to information regarding future

[162] Joined cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* [2001] ECR II-2035, para 67.

prices or quantities – which reduce such uncertainty by their very nature – the relevance of the concentration factor is rather limited. This approach, albeit somewhat controversial from the economic angle, perfectly reflects the essence and function of ‘object restrictions’: when an agreement pursues an anticompetitive object, there is no need to demonstrate its effects. It is, however, equally important to stress that the position of the European Courts is not such, as to only include information exchange regarding future prices and quantities under the object heading. As the Court itself stated, the crucial element of the object assessment is whether the information is capable of reducing uncertainty regarding intended strategic conduct. If other types of information satisfy this condition, they should be also considered as object restrictions. Given the decisive influence of the particular circumstances of the case on this question, this less straightforward assessment should be conducted by reference to the precise ‘legal and economic context’ of the agreement.

V. Is the Approach Adopted by the Commission in its Guidelines Consistent With Economic Theory and the EU Case-Law?

Without further clarification, the above analysed case-law does not seem to provide straightforward guidance as to the present standard of assessment of information exchange under EU competition law. Given the absence of a clear approach and the great demand from stakeholders, on 14 January 2011 the Commission published its *Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements* in which, for the first time, it also included a separate chapter on information exchange.[163] This new section can be seen as an attempt to codify and further clarify the general principles of case-law on the assessment of information exchange as well as the Commission’s decisional practice.

The adoption of these Guidelines has been generally seen as a welcome initiative to provide further clarity, with regard to horizontal cooperation in general and information exchange in particular. However, the Commission's explicit view that certain types of exchanges fall within the object category

[163] These guidelines replace the previous Commission guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements [2001] OJ C 3/2. Besides information sharing agreements, the Guidelines also cover other common types of horizontal co-operation agreements: i.e. research and development agreements, production agreements including subcontracting and specialisation agreements, purchasing agreements, commercialisation agreements and standardisation agreements including standard contracts.

has not been applauded by all. What has been specifically pointed out is that this Commission's position goes much further than what can be deduced from the European Courts' case-law and economic theory.[164] This last section deals with this issue. After summarizing the position of the Commission as expressed in its 2011 Guidelines, it will attempt to answer the question whether this approach is in effect consistent with economic analysis and the relevant principles of the EU case-law.

On the up-side, the Commission recognizes that exchanging information can produce numerous benefits for both companies (for example, by reducing their inventories, firms can diminish costs) and consumers (for instance, by improving choice and reducing search costs).[165] However, it also stresses that, when it enables companies to be aware of their competitors' strategies, information exchanges can have a negative impact on competition. In particular, the Commission firmly states that communication of information among competitors may constitute an agreement with the *object* of restricting competition on the market.[166] In its view, this will be the case when the information exchange, by its very nature, leads to a restriction of competition. According to the Commission, such exchanges include information sharing between competitors of *individualised data regarding intended future prices or quantities.*[167]

In order to justify the classification of such types of information as object restrictions, the Guidelines only mention that exchanging information on companies' individualised intentions concerning future conduct with regard to prices or quantities is particularly likely to lead to a collusive outcome. Informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market

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[164] See e.g. Camesasca, Schmidt and Clancy (n 149) 405. For a more general critical assessment of the Guidelines see e.g. ECLF Working Group on Horizontal Agreements, 'Comments on the Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (2010) European Competition Journal 507, 509; Thomas Rosch, 'Antitrust issues related to benchmarking and other information exchanges' (Remarks before the ABA Section of Antitrust Law, May 2011) <http://www.ftc.gov/speeches/rosch/110503roschbenchmarking.pdf > accessed 12 December 2012. See also more generally Padilla (n 3). See also *supra* notes 10 and 11.
[165] Cooperation Guidelines, para 57.
[166] ibid para 58.
[167] ibid para 74.

share; or without triggering a price war during the period of adjustment to the new prices.[168]

Although in the introductory paragraphs the Guidelines set out that the competitive outcome of information exchange depends on the characteristics of the market (such as concentration, transparency, stability, complexity etc.) as well as on the type of information that is exchanged (which may modify the market environment towards one liable to coordination),[169] such market features, essential as they are under the effects-based analysis, do not seem to be relevant in the context of object restrictions. This view is consistent with the well-established case-law according to which, once the anti-competitive object of an agreement has been established, there is no need to look at the actual effects it produces on the market.

Still, it could be argued, as the Commission itself acknowledges in the Guidelines, that particular attention should be paid to the *legal and economic context* in which the information exchange takes place to find whether it pursues a restrictive object.[170] In this context, it is suitable to briefly recall that, in order to establish a restriction of competition by object, two different paths can be followed. On the one hand, there is a path for the most serious and obvious violations. Following this path implies that a certain agreement can be classified based on its predicted (harming) effects. The role of the economic context is then very limited. On the other hand, a more elaborated analysis can be conducted for those agreements whose effects are more ambiguous. Such assessment can only be carried out considering the economic context.

Although the Commission does not delve into the relevance of the economic context for the object analysis in the Guidelines, it does seem to fully embrace the first mentioned 'abridged' path for specific types of information exchange. Particularly, in the Guidelines, the exchange of information on future prices and quantities is considered to be a serious and obvious infringement of the competition rules and, accordingly, it can be directly classified as object restriction without need to conduct a thorough analysis of the economic context. This standpoint is further confirmed by

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[168] ibid para 73. This paragraph also adds that 'it is less likely that information exchanges concerning future intentions are made for pro-competitive reasons than exchanges of actual data'.
[169] ibid para 58.
[170] ibid para 72

the Commission in the Guidelines, when it states that 'private exchanges between competitors of their individualised intentions regarding future prices or quantities (…) have the object of fixing prices or quantities'.[171]

Even if this construction has been criticized by a number of commentators[172] – frequently on the side of companies, choosing the 'abridged approach' certainly seems suitable given the nature of the Guidelines. When the Commission publishes Guidelines, its main objective is simply to bring together the established and at times complex case-law and its own practice, and translate their principles into relatively workable rules for businesses. In short: the purpose of the Guidelines is generally to offer companies the demanded legal certainty. Rather than including more ambiguous types of information which may also reveal future intentions, such as current pricing and quantities, by specifying which types of information exchange will be (almost) always, and independently of their economic context, classified as object restrictions, the Commission's Guidelines are not only consistent with the general concept of object restriction as confirmed by the European case-law. In addition, they are intended to provide useful clarification regarding the types of information sharing which should, almost invariably, fall under the object categorization, in both the Commission's and the Courts' vision.

In view of the legal consequences of the object assessment, the *classification* of information on future prices and quantities as practices with an anticompetitive object cannot be carried out without taking into account its economic perspective. The influence of economic analysis is clearly reflected in the Guidelines, in which the Commission itself highlights that exchanges of strategic information artificially increase transparency in the market and thereby facilitate coordination of companies' competitive behaviour and result in restrictive effects on competition.[173] 'By exchanging information companies can create mutually consistent expectations regarding the uncertainties present in the market and, by this means, reach a common understanding on the terms of coordination of their competitive behaviour. Exchange of information about intentions concerning future conduct, in contrast to past and present information, constitutes the most

[171] ibid para 74.
[172] See *supra* note 164.
[173] ibid para 65.

likely means to enable companies to reach such a common understanding'.[174]

Given the general consistency of the Commission's Guidelines with the concept and function of 'object restrictions' and the economic theory, the only question left is whether the main principles stemming from EU jurisprudence as regards information exchange and object restrictions are also respected by the Commission's guiding principles.

In the CJEU's view, the crux in finding that information sharing has an anticompetitive object is its *capability of removing uncertainties* concerning the intended conduct of the participating undertakings. If such capability can be established in an individual case (*i.e.*, the agreement tests positive on the capacity examination in the concrete case), the activity will be presumed illegal under article 101(1) TFEU. If there is one category of information about which such statement can be made without any need to make further reflections on the economic context, this is undoubtedly information about intended future conduct on essential competition parameters, such as prices and quantities. Such exchanges restrict competition by their very nature since, by having access to the mutually immediate and relevant data, undertakings directly eliminate uncertainty about future conduct. Other considerations are, however, more superfluous.

Despite the consistency of the Commission's position in its Guidelines with economic theory and the principles of case-law, it cannot but be emphasized that while such information exchanges can, and should indeed, be considered *object* restrictions, the double conception of the object analysis, suggests that the door of the object assessment is still open for other types of exchanges, provided that in individual cases they are capable of removing uncertainty concerning the planned future conduct. For instance, if information sharing in relation to present pricing or quantity data is capable of revealing intentions on future pricing or output behaviour; or in cases where the combination of different types of data enables the direct deduction of intended future strategic behaviour.[175] Although this observation is not explicitly stated in the Guidelines, this perception would

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[174] ibid para 66.

[175] This vision was indeed originally expressed in the Commission's draft Horizontal Guidelines. See Commission, 'Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Brussels' (Communication) SEC(2010) 528/2, para 68.

still be consistent both with economics, which indicate that information that is used to reach an equilibrium should be prohibited, and with the European jurisprudence. Yet, for these more ambiguous and complex cases, a more conscious examination of the economic context should be undertaken.

VI. Final Conclusions

Almost fifteen years ago, the Commission initiated a long series of reforms with the objective of modernising the application and interpretation of the EU competition rules. One central goal of the multiple initiatives was to ensure that the competitiveness assessment of agreements under article 101 TFEU was grounded on solid economic analysis. It is unquestionable that during this period the application of article 101 TFEU has gradually changed, making this provision to evolve into a more economic-based rule. Despite the clear impact of the initiatives, it has been commented that the reformed system did not modernize the application of one of the basic elements of article 101(1) TFEU, namely the concept of object restrictions[176]. The legal treatment of agreements containing restrictions by object is considered rather formalistic and is even seen as an exception to the increasing economic influence.[177] This general reluctance of economists to scrutinize agreements on the basis of the object approach becomes most evident in the area of information sharing agreements, which very frequently lead to varying effects.

This article examined the concept of object restriction and relied on that examination to assess whether this approach can constitute an appropriate standard of analysis for information exchange agreements. It was showed that the European Courts (and the Commission) have two different readings of this substantive element. The most straightforward and serious types of agreements can be directly classified as object restrictions, while an 'in context' examination should be conducted when the anticompetitive nature of a certain practice is less obvious. This double-sided approach can be considered adequate from an economic perspective; first, because it allows competition authorities to suppress any potentially harming agreements at low cost; and second, because the possibility to appraise an agreement in its

[176] See *e.g.* Alison Jones, 'The Journey Towards an Effect Based Approach Under Article 101 TFEU – The Case Of Hardcore Restrains' (2010) 55(4) The Antitrust Bulletin 783, 792.
[177] See RBB Economics Brief (n 10) 4.

legal and economic context, on the one hand, and the legal defence under article 101(3) TFEU on the other, are also suitable means of minimizing false positives.

Consequently, the question emerged whether there is a category of information exchange that can be *directly classified* as object restrictions from an economic perspective. Building upon the economic predictions on the likelihood of collusion, there is a concrete type of exchange which must be automatically categorised as object restriction, that is to say, exchanges among competitors regarding future conduct on prices and quantities. The presumption of anti-competitiveness should be restricted to this type of exchange because, solely based on the features of the information, it is not possible to identify other exchange categories that are very likely to have an anti-competitive effect (in the sense of reaching a collusive equilibrium), and are very unlikely to have an efficiency justification. Whether other exchanges can be also used to identify future conduct with the aim of reaching an equilibrium, can only be assessed within the earlier described object assessment on a case-by-case basis by analysing the exchange in its respective economic context.

Thereafter, the article examined the latest developments in EU jurisprudence as regards the assessment of information exchange (considered as restrictions by object), and tested the compatibility of economics and the existing case law. The European Courts' focus on the *capacity to remove uncertainty concerning intended conduct* on the market, as the key principle to establish the anticompetitive object of information sharing agreements, illustrates that by now the case-law is clearly affected by economic theory on collusion. It was also argued that this criterion perfectly guarantees consistency with the (double) legal appraisal of object restrictions. Exchanging information concerning precise future market conduct is clearly sufficient to reveal the planned strategy and, consequently, to show that the practice pursues an anti-competitive object. Considerations regarding the economic context, including the oligopolistic nature of the market, do not seem to have a decisive relevance.

Relying on the previous examinations, it is concluded that the legal conception of object restrictions and the economic theoretic approach, albeit different, are not as inconsistent with each other as they may appear at first sight. As both the Commission's Guidelines and, in a more general manner, the recent judgment of the CJEU in *T-Mobile* demonstrate, the *apparent* conflict can be most definitely resolved.