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Patrick Harrison
Sidley Austin LLP

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I. INTRODUCTION

The Court of Justice's March 2013 judgment in *Allianz Hungária*[2] may constitute the single most significant development in EU competition law since the 2004 Modernization reforms. It blows apart the age-old distinction between, on the one hand, restrictions of competition "by object" (where effects on competition do **not** need to be proved) and, on the other hand, restrictions of competition by "effect" (where effects on competition **do** need to be proved). As a result of the judgment, it will be much easier for the European Commission (and national competition authorities in the EU's Member States) to classify conduct as restrictive of competition for purposes of Article 101(1) TFEU.

The judgment also raises particularly serious issues for companies operating in highly regulated sectors, such as life sciences and financial services, since it finds that a breach of a law unrelated to competition can render conduct more likely to constitute a restriction of competition by object.

The key paragraphs of the judgment on the critical objects/effects distinction, and on the relevance of breaches of laws unrelated to competition, contain no—or deeply flawed—references to prior case law. In short, the judgment is wrong and, unless corrected in subsequent cases, will be of serious concern to many companies doing business in the European Union.

II. BACKGROUND TO THE *ALLIANZ HUNGÁRIA* CASE

The *Allianz Hungária* judgment arises out of an Article 267 TFEU reference from the Hungarian Supreme Court and relates to a Hungarian Competition Authority decision finding that certain agreements in the Hungarian car insurance sector breached the Hungarian equivalent of Article 101 TFEU. There were various different agreements, decisions of trade associations, and alleged concerted practices at issue before the Hungarian Competition Authority.

Individual car dealers in Hungary had asked their trade association—GEMOSZ—to negotiate with car insurers annual framework agreements setting out the hourly labor charges that insurers would pay for repair work carried out by the car dealers. Insurers such as Allianz also had arrangements in place with the dealers pursuant to which the latter would act as intermediaries and offer Allianz car insurance to customers in exchange for a commission payment. Allianz entered into framework agreements with GEMOSZ, and related individual

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[1] Patrick Harrison is an associate in Sidley Austin LLP's London office. The author is grateful for input received from Stephen Kinsella and Ken Daly, also of Sidley Austin LLP. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP, its partners, or clients.

[2] Case C-32/11 - *Allianz Hungária Biztosító Zrt., Generali-Providencia Biztosító Zrt. and others. v Gazdasági Versenyhivatal*, judgment dated 14 March 2013 (not yet reported).

agreements with dealers, which provided that the hourly labor charges paid by Allianz would be increased where Allianz car insurance made up (more than) a certain percentage of the car insurance sold by the dealer. Allianz's fellow insurer, Generali, had agreements with GEMOSZ and individual car dealers that had a similar effect to Allianz's agreements (*i.e.* they provided for increased hourly rates to be paid to dealers where Generali car insurance made up (more than) a certain percentage of the car insurance sold by the dealer).

The Hungarian Supreme Court asked the following question of the Court of Justice:

> Do bilateral agreements between an insurance company and individual car repairers, or between an insurance company and a car repairers' association, under which the hourly repair charge paid by the insurance company to the repairer for the repair of vehicles insured by the insurance company depends, among other things, on the number and percentage of insurance policies taken out with the insurance company through the repairer, acting as the insurance broker for the insurance company in question, qualify as agreements which have as their object the prevention, restriction or distortion of competition, and thus contravene Article 101(1) TFEU?

Allianz, Generali and others argued that the answer to the question should be (in essence) "no, the agreements do not qualify as by object restrictions;" the Hungarian Government and the European Commission argued that the answer should be (in essence) "yes, the agreements do qualify as by object restrictions."

III. THE OPINION OF ADVOCATE GENERAL CRUZ VILLALON IN *ALLIANZ HUNGÁRIA*

Advocate General Cruz Villalon correctly advised the Court of Justice that the answer to the Hungarian Supreme Court's question should be "no, the agreements do not qualify as by object restrictions." He reasoned as follows.

First, the Advocate General explained (citing *Beef Industry Development Society and Barry Brothers*[3]) that 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. [...] The classification of an agreement or practice as restrictive of competition by object acts as a kind of 'presumption', since, if that agreement or practice is found to be restrictive, it will not be necessary to establish what effects it has on competition.

The Advocate General even pointed out that, in the Commission's own Article 101(3) TFEU Guidelines,[4] by object restrictions are identified as

> restrictions which [...] have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101(1) TFEU] to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that

[3] Case C-209/07, *Beef Industry Development Society and Barry Brothers* [2008] ECR I-8637, ¶¶ 15 and 17.

[4] Communication from the Commission – *Guidelines on the application of Article 81(3) of the Treaty* (OJ 2004 C 101, p. 97).

> restrictions of competition by object are likely to produce negative effects on the market […].

For the Advocate General, it therefore followed "that this category [i.e., by object restrictions] must be interpreted strictly and must be limited to cases in which a particularly serious inherent capacity for negative effects can be identified."[5]

Second, the Advocate General summarized how the Court should assess whether an agreement has an anticompetitive object; explaining, by reference to the consistent jurisprudence of the Court (in cases such as GlaxoSmithKline and Others[6]), that: "regard must be had inter alia to the content of [the agreement's] provisions, its objectives and the economic and legal context of which it forms a part."

Third, the Advocate General explained that the Allianz-car dealer agreements at issue

> are vertical agreements, to which, as a general rule and subject to exceptions, Article 101(1) TFEU does not apply. […] unlike horizontal agreements, where it is clearly easier to identify an object or effect restrictive of competition, vertical agreements are considerably more complex. […] As regards vertical agreements, the Court of Justice has hitherto classified only the following as restrictions of competition by object: the imposition of minimum resale prices, the prohibition of parallel trade between Member States through the establishment of absolute territorial protection, and, more recently, clauses prohibiting distributors from using the internet to sell certain products, unless that prohibition is justified objectively as in the context of a selective distribution network.

Having then assessed the content and objectives of the agreements, the Advocate General concluded:

1. that "the capacity of the agreements at issue to restrict competition is not as high as that of the vertical agreements which the case-law has held in the past to be restrictions by object"; and
2. that the agreements' "capacity to restrict competition also appears to be lower than that of vertical agreements which, in accordance with the case-law, do not constitute restrictions by object [such as non-compete clauses]."

Finally, the Advocate General's assessment of the legal and economic context of which the Allianz-car dealer agreements formed part did not lead him to alter his view that the agreements would not constitute by object restrictions of competition unless there was either collusion among the insurers or collusion among the car dealers.

The Advocate General's approach is entirely consistent with prior case law on the classification of vertical agreements as by object restrictions of competition. In essence, very few aspects of vertical agreements should be capable of being classified as by object restrictions and the list of clauses that can be so classified should only be expanded in exceptional circumstances.

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[5] Case C-32/11 - *Allianz Hungária Biztosító Zrt., Generali-Providencia Biztosító Zrt. and others. v Gazdasági Versenyhivatal*, Opinion dated 25 October 2012,, ¶ 65 (not yet reported).

[6] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline and others* [2009] ECR I-9291, ¶ 58.

IV. THE JUDGMENT OF THE COURT OF JUSTICE IN *ALLIANZ HUNGÁRIA*

Notwithstanding the Advocate General's advice that the referring court's question be answered in the negative, and notwithstanding the Advocate General's clear exposition of the key jurisprudence on the distinction between restrictions of competition by object and restrictions of competition by effect, the Court of Justice nonetheless concluded (in essence) that "yes, the agreements do qualify as by object restrictions."

Why is this? And why did the Court get it wrong?

A. The Reasoning of the Court of Justice

At paragraphs 33 to 38, the Court of Justice seeks to explain: (i) the distinction between by object and by effect restrictions of competition; and (ii) the way in which an assessment of whether an agreement constitutes a by object restriction should be carried out. On the second of these points, the Court of Justice states as follows at paragraph 36:

> 36. In order to determine whether an agreement involves a restriction of competition 'by object', regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part (see GlaxoSmithKline Services and Others v Commission and Others, paragraph 58; Football Association Premier League and Others, paragraph 136; and Pierre Fabre Dermo-Cosmétique, paragraph 35). When determining that context, it is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see Expedia, paragraph 21 and the case-law cited).

The first of the two sentences in paragraph 36 of the judgment finds ample support in the case law cited and also reflects the approach of the Advocate General. The second sentence does not.

The second sentence of paragraph 36 of the *Allianz Hungária* judgment suggests that a by object assessment should involve an assessment of "the nature of the goods or services affected, as well as the **real conditions of the functioning and structure of the market or markets in question**" (emphasis added). But such an assessment of the "real conditions of the functioning and structure of the market or markets in question" would appear to take the competition authority in question squarely into territory reserved for a full effects analysis. In this instance, the appearance is not deceptive.

The authority cited by the Court for its suggestion in the second sentence of paragraph 36 is twofold: (i) paragraph 21 of the *Expedia* judgment;[7] and (ii) the case law cited in the relevant part of that same paragraph 21 of the *Expedia* judgment.

However, paragraph 21 of the *Expedia* judgment does not deal specifically with by object restrictions of competition. Rather, it deals with whether a restriction—be it a by object restriction **or** an effects restriction—restricts competition "perceptibly" (*i.e.*, "appreciably"). It is in the context of the assessment of the appreciability or otherwise of a restriction that the Court in *Expedia* observed that it is appropriate "to take into consideration the nature of the goods or

[7] Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, judgment dated 13 December 2012 (not yet reported).

services affected, as well as the **real conditions of the functioning and the structure of the market or markets in question** [...]" (emphasis added). Nothing in this part of the Court's assessment of appreciability relates specifically to by object restrictions. And with good reason: after all, **both** restrictions by object **and** restrictions by effect must satisfy an appreciability threshold in order to constitute restrictions of competition for purposes of Article 101(1) TFEU.

So the first of the two authorities cited as support for the contention that a by object assessment involves looking at the "real conditions of the functioning and structure of the market or markets in question" does not, in fact, provide any support.

What about the second authority?

The second authority cited by the Court in *Allianz Hungária* as support for the second sentence in paragraph 36 is the case law cited in the relevant part of paragraph 21 of the *Expedia* judgment. The language of the *Expedia* judgment that is reproduced in the *Allianz Hungária* judgment contains only one citation—to paragraph 49 of the judgment in *Asnef-Equifax and Administration del Estado*.[8] It is there that we see why the by object assessment as set out in *Allianz Hungária* gave the appearance of being an effects analysis. Paragraphs 48 and 49 of the *Asnef-Equifax and Administration del Estado* merit reproduction in full.

> 48. As registers such as that in issue in the main proceedings do not thus have, by their very nature, the object of restricting or distorting competition within the common market within the meaning of [Article 101(1) TFEU], it is for the national court to determine whether they have the effect of doing so.
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> 49. In that regard, it should be emphasised that **the appraisal of the effects of agreements or practices in the light of [Article 101 TFEU] entails the need to take into consideration** the actual context to which they belong, in particular the economic and legal context in which the undertakings concerned operate, **the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question.** (Emphasis added.)

So the language suggesting the review, in a by object analysis, of "the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question" is actually taken from an exposition of an effects analysis.

Thus, neither of the Court's two citations for the second sentence of paragraph 36 provides any support for its novel explanation of what is involved in a by object assessment.

In short, the second sentence of paragraph 36 of the *Allianz Hungária* judgment is wrong. It confuses an effects analysis and a by object analysis. The importance of the Court's conflation of these two concepts becomes more evident later in the judgment.

At paragraph 43, the Court of Justice points out—correctly—that vertical agreements can, in certain circumstances, constitute restrictions of competition by object. At paragraph 44, however, the Court of Justice exposes something of its hostility towards the agreements in question, stating: "with regard to determining the object of the agreements at issue in the main proceedings [...], it should be noted that, by such agreements, insurance companies such as

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

Allianz and Generali aim to maintain or increase their market shares." But, surely there is nothing wrong with a company (particularly a non-dominant company) aiming to maintain or increase its market share? Indeed, is that not the very essence of competition?

After making its rather odd observation regarding Allianz's and Generali's aims of maintaining or increasing their market shares, the judgment then progresses to its most important, and most controversial, three observations. Interestingly, at no point in the key paragraphs of the judgment (paragraphs 45 to 48) does the Court of Justice cite a single authority in support of its three main observations, which will be addressed in turn in the following sections.

B. The Obliteration of the Object/Effect Distinction

At paragraphs 46 and 48, the Court of Justice builds on its earlier, erroneous citation of the judgments in *Expedia* and *Asnef-Equifax* (at paragraph 36) and proceeds to obliterate the age-old distinction between by object and effects restrictions of competition under Article 101(1) TFEU. At paragraph 46, the Court of Justice states that, even if there were no horizontal agreement between Allianz and Generali:

> it will still be necessary to determine whether, taking account of the economic and legal context of which they form a part, the vertical agreements at issue in the main proceedings are sufficiently injurious to competition on the car insurance market as to amount to a restriction of competition by object.

As is evident on its face, this paragraph gets very close to suggesting that the vertical agreements in question will be by object restrictions if they have restrictive effects on competition.

Paragraph 48 goes even further, stating that the

> agreements would […] amount to a restriction of competition by object in the event that the referring court found that it is likely that, having regard to the economic context, competition on [the] market would be eliminated or seriously weakened following the conclusion of those agreements" and that "[i]n order to determine the likelihood of such a result, that court should in particular take into consideration the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned.

This is the crux of the judgment. In essence, having (at paragraph 36) erroneously imported the methodology from the *Asnef-Equifax* judgment on how to assess when a restriction **by effect** arises, the Court in *Allianz Hungária* then applies that same methodology when determining whether there is a restriction of competition by object. The Court of Justice therefore advises that an enquiry as to whether a restriction constitutes a restriction by object be made by following the steps set out in the jurisprudence for determining whether there is a restriction by effect. The potential ramifications of the Court of Justice's error in this regard are discussed in Section V., below.

C. Breach of a Law Unrelated to Competition Makes an Agreement More Likely to Constitute a By Object Restriction

The judgment also notes, in paragraph 47, that the vertical agreements at issue could "in particular" be sufficiently injurious to competition to amount to restrictions of competition by object if they breached a law unrelated to competition (in this case, a law regarding the independence of insurance brokers from insurers). This observation could also constitute a new and significant precedent, with serious consequences (which are discussed in Section V., below) for companies in highly regulated sectors, such as life sciences and financial services.

D. Vertical Agreements Concluded in Order to Implement a Horizontal by Object Restriction are Also Void Ab Initio

Although the Court of Justice rightly points out, at paragraph 45 that, "if there was a horizontal agreement or a concerted practice between [Allianz and Generali] designed to partition the market, such an agreement or practice would have to be treated as a restriction by object…" the Court goes on to state that such a finding: "would also result in the unlawfulness of the vertical agreements concluded in order to implement that agreement or practice." In the context of Article 101 TFEU, a finding of "unlawfulness" in relation to an agreement generally means that that agreement is void *ab initio*.

There are two principal interpretations of what the Court is saying in this paragraph: one narrow and one broad. On a narrow interpretation, the only vertical agreements that would be void *ab initio* would be those in cases in which the very purpose of the alleged horizontal collusion was to adopt a given distribution system. But on a broader interpretation, **any** distribution agreement concluded in relation to a cartelized product would be seen as implementing the cartel and thus, potentially, void *ab initio*. (Such a distribution agreement would provide, one would assume, for the sale of the cartelized products at the cartelized prices). The potential consequences of this latter, broader interpretation of paragraph 45 are discussed in Section V., below.

V. THE POTENTIAL CONSEQUENCES OF THE COURT OF JUSTICE'S JUDGMENT IN *ALLIANZ HUNGÁRIA*

A. The Judgment Will Make It (Even) Easier for Competition Authorities in the EU to Classify Agreements as Restrictive of Competition

Analyses of whether agreements have restrictive effects on competition are notoriously complex. As a result, competition authorities in the European Union far prefer to take cases where they can classify agreements as constituting by object restrictions of competition under Article 101(1) TFEU. Where a competition authority in the European Union can successfully classify an agreement as a by object restriction of competition, it need not delve into—or prove to the requisite standard—the alleged restrictive effects of the agreement in question.

The terms of the Court's judgment in *Allianz Hungária* appear to provide an easy way out for EU competition authorities wanting to sanction an agreement whose effects on competition are unclear. Instead of going through a full effects analysis and proving (for example) that an agreement has brought about an increase in price or a decrease in output, the competition authority could invoke *Allianz Hungária*, conduct what amounts to a kind of "sniff test" (briefly looking at the "nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question" without having to prove anything in concrete terms), and then conclude that the agreement constitutes a restriction of competition by object. By proceeding in this manner, the competition authority would be able to sanction an agreement of a kind that has not previously been considered a by object restriction without needing to conduct a full analysis and proving that that the agreement could actually have restrictive effects.

In a distribution context, the competition authority could simply "take into consideration the structure of [the] market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned" and then find the agreement to be a by object restriction of competition, even if the competition authority would have faced great difficulty, or been incapable of, demonstrating restrictive effects.

The judgment may also be of some significance to the way in which external counsel advise clients doing business in the European Union. Although by object restrictions of competition would tend to attract regulatory scrutiny and fines, agreements that are only potentially restrictive of competition by effects would be much less likely to attract regulatory scrutiny and much less likely to result in fines. This object/effect distinction is of crucial importance in a number of areas in which companies routinely seek expert EU competition law advice, including distribution agreements, information exchange arrangements, and patent settlement agreements.

In sum, the obliteration of the object/effect distinction as provided for in the *Allianz Hungária* judgment risks making the EU competition law enforcement environment: (i) too uncertain; and (ii) too enforcer-friendly.

B. The Judgment Will Make It Particularly Easy for Competition Authorities in the EU to Classify as Restrictive of Competition Agreements Entered Into by Companies Operating in Highly Regulated Sectors

Much of the recent competition law enforcement activity in the European Union has focused on highly regulated sectors, such as life sciences and financial services. Life sciences companies are subject to strict obligations in relation to many aspects of their operations, including, for example, their monitoring of issues such as drug safety as well as their marketing and commercial interactions with wholesalers, pharmacies, physicians, and Member State purchasing entities. Financial services companies are also subject to strict obligations regarding issues such as independence and commission-reporting (*e.g.* in relation to brokers and insurers), mis-selling, and market abuse.

The judgment of the Court in *Allianz Hungária* states that agreements can "in particular" constitute by object restrictions of competition for purposes of Article 101(1) TFEU where those agreements breach laws unrelated to competition. Given the plethora of regulatory obligations arising out of laws unrelated to competition that are imposed on companies operating in the life sciences and financial services sectors, the chances of an agreement under competition law scrutiny also involving an (arguable) breach of a law unrelated to competition are not inconsiderable. When added to the Court's obliteration of the object/effect distinction as discussed above, and the resultant flexibility the *Allianz Hungária* judgment affords EU competition authorities, this aspect of the judgment appears to make it even more likely that a distribution (or other) agreement entered into by a life sciences company, or financial services company, would be classified as a restriction of competition by object.

C. The Potential Consequences of Vertical Agreements Concluded by Cartelists Being Void Ab Initio

At paragraph 45, the Court asserts that the existence of an agreement between competitors constituting a by object restriction of competition "would also result in the unlawfulness of the vertical agreements concluded in order to implement that agreement or practice." As set out above, there are two principal interpretations of this section of the judgment, one narrower and one rather broader.

For current purposes, the broader interpretation is of more interest. It implies that any vertical agreement concluded by a cartelist in relation to a cartelized product would be void *ab initio* in its entirety. In essence, the rationale would be that the agreement through which the cartelist distributes the cartelized product constitutes the "tainted fruits" of the cartel and so, like the cartel agreement itself, the distribution agreement must also be void.

This may not be as radical a departure from the accepted norms of EU competition law as other parts of the Court's judgment—purchasers of cartelized products would of course have an action in damages for any overcharge, thereby effectively voiding the original prices as set out in the distribution agreement—but it could give rise to some rather odd remedies. For example, if the distribution agreement were void *ab initio*, the victim could perhaps return the products to the cartelist and request a full refund. Or, perhaps more shockingly, if the value of the cartelized products had rocketed since the time of the cartel, the cartelist might elect to reimburse the full purchase price to the victim and then request recovery of the goods.

VI. CONCLUDING REMARKS

It is rare indeed to see a Court of Justice judgment that is quite so clearly wrong. The Court's reliance on *Expedia* and *Asnef-Equifax* as authorities for its obliteration of the age-old object/effect distinction is as extraordinary as it is misguided. While some of the Court's other observations may be capable of being distinguished, or interpreted in a less controversial manner going forward, the Court's fundamental misunderstanding of how a by object assessment should be conducted creates so much uncertainty that it needs addressing—and correcting—at the first available opportunity. Companies doing business in the European Union will be hoping that that opportunity will come sooner rather than later.