



# Cartels as restrictions by object: *Specificity, limits of the notion, consequences and international context*

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# OUTLINE

- **“By object or effect”**
- **Establishing a restriction by object**
- **Vertical restraints can be restrictions by object**
- **Establishing a restriction by effect in horizontal cooperations**
- **Exemption Art. 101(3)**
- **“Cartel”**
- **Information exchanges/disclosure between competitors**
- **Information exchange/disclosure cartels**
- **Consequences**
- **International context**

## “By object or effect”

- Either by object or by effect (Case 56/65, LTM; C-32/11 Allianz Hungária Biztosító Zrt 33, 34)
- Or both (C-231/14 P InnoLux/Comisión, 72; C-8/08 T Mobile Netherlands 31):
  - - no further impact on nullity,
  - - for the Authority to be sure before the court,
  - - possible relevance for fines and damages

## Establishing a restriction by object

- The coordination must reveal a sufficient degree of harm to competition, having regard, inter alia:
  - - to its content,
  - - its objectives and
  - - its economic & legal context, including:
    - the nature of the goods or services affected,
    - the real conditions of the functioning and structure of the market or markets in question. –
  - - the parties' intention (not necessary)



## Vertical agreements can be restrictive by object

- **Commission Guidelines on Vertical Restraints (2010/C 130/01)**
- **Example of analysis by the CJEU - C-32/11 Allianz Hungária:**
- Insurance companies make the tariff per hour paid to car repairers dependant on the number of insurance contracts arranged by them in their favour.

# Establishing a restriction by effect in horizontal cooperations

- - **Prove that competition has actually been restricted.**
- - **Commission Guidelines on Horizontal Cooperation:**
  - **Competition concerns if parties have market power**
  - **Competitive relationship between the parties**
  - **Scope of the envisaged combination of activities**



# Exemption under Art. 101(3) is possible for restrictions by object and by effect

- The burden of proof shifts from the authority to the parties (or the defendant) – Art. 2 Reg. 1/2003
- Prove that:
  - the collusion does not eliminate competition, and
  - is indispensable to produce efficiencies or technical or economic progress which revert to consumers.
- Behaviours that qualify as “cartels” are very unlikely to fulfil the conditions of Article 101(3).



## “Cartel”

- *'An agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors'* Damages Directive (2014), ECN+ Directive (2019), Reg. 2015/1348 amending Reg. 773/2004.





# Information exchanges between competitors

- Often constitute *concerted practices*
- Each economic operator must determine autonomously its behaviour in the internal market.
- Any **direct or indirect** contact between competitors is forbidden if it **aims at influencing the market behaviour of a competitor or at disclosing its own plans** and intended market behaviour when those contacts have as object or effect **altering normal competition conditions** on the market



# Information exchanges between competitors restrictive by object

- Guidelines on Horizontal Cooperation/Case law:
- Information exchanges/disclosure between competitors which are restrictive by object include exchanges:
  - Of individualised data regarding intended future prices or quantities (or other competition parameters) or that influence commercial decisions and
  - Capable of removing uncertainty between participants as regard the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market
- They are normally cartels because they generally have the object of fixing prices, quantities or other parameters.



## Consequences of being a cartel

- **Leniency available – protection of statements**
- **Choice settlement/ordinary procedure – protection of settlement submissions**
- **No possibility of resorting to commitment decisions under Art. 9 of Reg. 1/2009**
- **High fines**  
**<https://ec.europa.eu/competition/cartels/statistics/statistics.pdf>**
- **Likely international cooperation**



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## 1.6. Ten highest cartel fines per undertaking (since 1969)

Last change: ++27 September 2017++

Year	Undertaking	Case	Amount in €* of which 391 940 000 jointly and severally with LG Electronics
2016	Daimler	Trucks	1 008 766 000
++2017++	Scania	Trucks	880 523 000
2016	DAF	Trucks	752 679 000
2008	Saint Gobain	Carglass	715 000 000
2012	Philips	TV and computer monitor tubes	705 296 000 of which 391 940 000 jointly and severally with LG Electronics
2012	LG Electronics	TV and computer monitor tubes	687 537 000 of which 391 940 000 jointly and severally with Philips
2016	Volvo/Renault Trucks	Trucks	670 448 000
2016	Iveco	Trucks	494 606 000
2013	Deutsche Bank	Euro interest rate derivatives (EIRD)	465 861 000
2001	F. Hoffmann-La Roche	Vitamins	462 000 000

\* Amounts adjusted for changes following judgments of the Courts (General Court and European Court of Justice) and / or amendment decisions

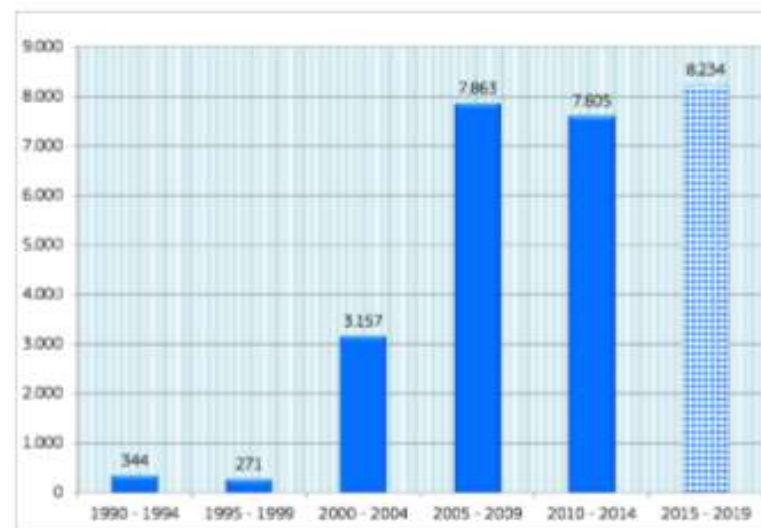


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## 1.4. Fines imposed (adjusted for Court judgments) - period 1990 – 2019

Last change: ++07 Nov 2019++

Period	Amount in €* in million €
1990 - 1994	344 282 550,00
1995 - 1999	270 963 500,00
2000 - 2004	3 157 348 710,00
2005 - 2009	7 863 307 786,50
2010 - 2014	7 604 840 879,00
++2015 - 2019++	8 234 322 023,00
<b>Total</b>	<b>27 475 065 448,50</b>



\* Amounts corrected for changes (incl. corrections following amendment decisions) and judgments of the Courts (General Court and European Court of Justice) and only considering cartel infringements under Article 101 TFEU (previously Article 81 resp. Article 85 of the Treaty). Wherever prohibitions and fines concern infringements of Article 101 TFEU (previously Article 81 resp. Article 85 and of Article 102 TFEU previously Article 82 resp. Article 86 of the Treaty), only those amounts, which concern the Article 101 TFEU infringements, have been considered.

## 1.5. Ten highest cartel fines per case (since 1969)

<http://ec.europa.eu/competition>



## NETWORKS OF COMPETITION AUTHORITIES

## WEIGHT OF SETTLEMENTS IN EU CARTEL ENFORCEMENT SINCE MAY 2010



International  
Competition  
Network



### TOTAL CARTEL

**57 cartel decisions**  
**+EUR 16 billion in fines**

### SETTLEMENT

**32 decisions**  
**(56`14%)**

**+EUR 9,5 billion in fines**  
**(59,03%)**