

OBJECT RESTRICTIONS IN SINGAPORE COMPETITION LAW

BENJAMIN WONG YONGQUAN*

Singapore competition law prohibits agreements that have as their object the restriction of competition. Recent developments, both in Singapore and abroad, have had a significant impact on this aspect of competition law. This article discusses the law on object restrictions in Singapore in light of these recent developments, and offers three recommendations on the same.

I. INTRODUCTION

Cooperation and competition are integral aspects of a functioning free market economy. In a free market, market players are generally permitted to cooperate with each other to pursue common goals. Cooperation allows two market players to accomplish what each market player in isolation cannot—promoting economic efficiency. However, certain forms of cooperation may serve to restrict competition—another key engine of economic efficiency—and are therefore regarded as “anti-competitive”. For example, agreements to fix prices on the market are generally regarded as anti-competitive. Jurisdictions with competition laws (including Singapore) typically prohibit anti-competitive agreements, inflicting penalties on market players who enter into such agreements. Doing so deters market players from engaging in anti-competitive agreements, thereby preserving competition in the market.

In determining which agreements to condemn as anti-competitive, it is necessary for a competition regulatory regime to strike a balance between (i) permitting cooperation, and (ii) protecting competition. On the one hand, lax regulation of anti-competitive agreements (*ie* under-policing) would risk harm to the competitive process in the economy; on the other hand, an overly vigorous prosecution of agreements (*ie* over-policing) would risk inhibiting efficient forms of cooperation between market players. Thus, the Singapore competition framework does not proscribe agreements that merely have a minimal impact on competition; rather, agreements are struck down only if they have an *appreciable* adverse effect on competition.¹

There are two ways by which the competition authority in Singapore can determine whether an agreement has an appreciable adverse effect on competition. The

* Teaching Assistant, National University of Singapore.

¹ Competition Commission of Singapore, *Competition Commission of Singapore Guidelines on the Section 34 Prohibition 2016* at para 2.21 [Section 34 Guidelines].

first way is for the competition authority to conduct a detailed economic analysis of the agreement, to ascertain the competitive effects of the agreement on the market in Singapore. In the event that the agreement is found to have an appreciable adverse effect on competition, then the agreement is said to be restrictive of competition by *effect*. The second way is for the competition authority to establish that the agreement has as its object the restriction of competition. Such agreements are said to be restrictive of competition by *object*, and are assumed always to have an appreciable adverse effect on competition.² Thus, in Singapore competition law, there are two types of anti-competitive agreements: (i) agreements restricting competition by effect (or “effect restrictions”); and (ii) agreements restricting competition by object (or “object restrictions”).

This article has as its focus the latter class of restrictions for two reasons. First, local infringement decisions have primarily been predicated on the finding of an object restriction, rather than an effect restriction. Second, it is apposite to review the law on object restrictions, in light of several important recent decisions.³

Part II of this article provides a brief overview of the competition law framework in Singapore, focusing in particular on the prohibition of anti-competitive agreements. Part III sets out the basic rules of object restrictions. Part IV surveys the theoretical and practical justifications for the concept of object restrictions. Part V offers three proposals for the development of law on object restrictions. Part VI concludes.

II. AN OVERVIEW OF COMPETITION LAW AND THE REGULATION OF ANTI-COMPETITIVE AGREEMENTS IN SINGAPORE

The *Competition Act*,⁴ which was enacted in 2004, is the primary legislative instrument regulating competition in Singapore. The *Competition Act* regulates competition chiefly by means of three statutory prohibitions, *viz* (i) the prohibition against anti-competitive agreements,⁵ (ii) the prohibition against the abuse of a dominant position,⁶ and (iii) the prohibition against anti-competitive mergers.⁷ While each prohibition is an important component of the competition regulatory framework, the focus of this article will be on the first prohibition (*ie* the prohibition against anti-competitive agreements).

The prohibition against anti-competitive agreements is set out in Section 34(1) of the *Competition Act* (the “Section 34 Prohibition”), as follows:

Subject to section 35, agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or

² *Ibid* at para 2.24; *Expedia Inc v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795 at paras 36, 37 [*Expedia*].

³ *Infringement of the section 34 prohibition in relation to the distribution of individual life insurance products in Singapore*, CCS 500/003/13 (17 March 2016) [*Financial Advisers*]; *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26 [*Toshiba*]; *Groupement des cartes bancaires (CB) v European Commission*, C-67/13 P, EU:C:2014:2204 [*Groupement des cartes bancaires*].

⁴ *Competition Act* (Cap 50B, 2006 Rev Ed Sing).

⁵ *Ibid*, s 34.

⁶ *Ibid*, s 47.

⁷ *Ibid*, s 54.

effect the prevention, restriction or distortion of competition within Singapore are prohibited unless they are exempt in accordance with the provisions of this Part.⁸

Simply put, the Section 34 Prohibition prohibits agreements that restrict competition by object or by effect. Section 34(2) of the *Competition Act* provides an illustrative list of the types of restrictions that may be regarded as anti-competitive:

For the purposes of subsection (1), agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they —

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.⁹

The first three types of restrictions listed above (*viz* price-fixing, output-limitation and market-sharing) are generally regarded as the ‘classical’ cartelistic arrangements – restrictions that are “obviously” anti-competitive.¹⁰

The Competition Commission of Singapore (“CCS”) is the statutory body responsible for the elimination and control of anti-competitive practices in Singapore¹¹ and enforces the Section 34 Prohibition (along with the prohibition against the abuse of a dominant position in section 47 of the *Competition Act*¹² and the prohibition against anti-competitive mergers in section 54 of the *Competition Act*¹³). CCS has, to date, been active in enforcing the Section 34 Prohibition, resulting in a number of infringement decisions issued against errant undertakings. Substantial fines have been imposed on undertakings found liable for infringement, even exceeding S\$7 million in one instance.¹⁴

⁸ *Ibid*, s 34(1).

⁹ *Ibid*, s 34(2).

¹⁰ *European Night Services and Others v Commission*, T-374, 375, 384, and 388/94, [1998] ECR II-3141 at para 136 [*European Night Services*]; European Commission, *Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice* (Brussels: European Commission, 2014) at 5; *Section 34 Guidelines*, *supra* note 1 at para 3.2. These types of restrictions are also (more evocatively) known as “hardcore cartel” restrictions: see Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials*, 6th ed (New York: Oxford University Press, 2016) at 662; OECD, *Hard Core Cartels* (2000) at 6.

¹¹ *Competition Act*, *supra* note 4, s 6(1)(b).

¹² *Ibid*, s 47.

¹³ *Ibid*, s 54.

¹⁴ *Re CCS Imposes Penalties on Ball Bearings Manufacturers involved in International Cartel* [2014] SGCCS 5 at para 529 [*Ball Bearings*].

In interpreting the Section 34 Prohibition, Singapore draws heavily on the jurisprudence of the United Kingdom (“UK”) and of the European Union (“EU”). The Section 34 Prohibition was modelled closely after the Chapter I Prohibition in the UK’s *Competition Act 1998*¹⁵ and Article 101 of the *Treaty on the Functioning of the European Union* (“Article 101 TFEU”) in the EU.¹⁶ As such, cases interpreting the Chapter I Prohibition in the UK and Article 101 TFEU in the EU generally have high persuasive value in the interpretation of the Section 34 Prohibition, although the precise value of these foreign cases depend upon their applicability to the local context and to the facts of the case at hand.¹⁷

III. THE RULES OF OBJECT RESTRICTIONS STATED

It is necessary, at the outset, to muster five of the basic rules of object restrictions in Singapore as a preface to the discussion that follows. This Part is intended to provide the general structure of the law on object restrictions, upon which further discussions can be situated.

First, it is a fundamental rule that “object” and “effect” in the Section 34 Prohibition are alternative and not cumulative requirements.¹⁸ This means that, in establishing an infringement of the Section 34 Prohibition, it is sufficient to show that the undertakings in question had entered into an agreement that either restricted competition by object *or* restricted competition by effect. If an agreement has been found to constitute an object restriction, it is not necessary to examine its actual effects on competition. This rule is typically attributed to the seminal decision of *Societe Technique Miniere (STM) v Maschinenbau Ulm GmbH*:

The fact that these are not cumulative but alternative requirements, indicated by the conjunction ‘or’, 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 competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.¹⁹

Agreements may thus be caught either under the “object limb” or the “effect limb” of the Section 34 Prohibition. The analysis of an agreement under the “object limb”

¹⁵ *Competition Act 1998* (UK), c 41, s 2.

¹⁶ *Consolidated version of the Treaty on the Functioning of the European Union* [2012] OJ, C 326/01 [TFEU].

¹⁷ *Pang’s Motor Trading v Competition Commission of Singapore* [2014] SGCAB 1 at paras 33, 34 [*Pang’s Motor Trading*]; *Re Certain Pest Control Operators in Singapore* [2008] SGCCS 1 at para 37 [*Pest Control Operators*].

¹⁸ *Pang’s Motor Trading*, *ibid* at para 30.

¹⁹ Case 56/65, [1966] ECR 235 at 249 [*Societe Technique Miniere*].

focuses on the objectives of the agreement, whereas the analysis under the “effect limb” focuses on the actual economic effects of the agreement.

Second, there is no closed list of object restrictions. Advocate General Trstenjak, in her Opinion to the Court of Justice, argued that “the notion of restriction of competition by object cannot be reduced to an exhaustive list”.²⁰ She rejected, in particular, the view that the categories of object restrictions was confined to the specific categories listed in the EU legislation (*eg* price-fixing, market-sharing, *etc*), as the listed categories could not be interpreted as being exclusive.²¹ This view was affirmed by the Court of Justice in *Beef Industry Development Society*,²² and has been accepted in Singapore; CCS has stated as a rule that “the categories of restrictions by object are not closed”.²³

The open nature of the concept of object restrictions raises the question of how wide the concept should be. It may be construed to encompass a broad and indeterminate range of activities. Indeed, the expansion of the “object box” has been commented upon by more than one writer.²⁴ The concern is this: the larger the “object box”, the greater the number of agreements that will fall within its ambit, and the more likely it is that an agreement will be found to be anti-competitive without an assessment of its actual economic effects. This issue has been addressed in a recent decision in the EU, and is the subject of the first proposal in Part V of this article.

Third, the “essential legal criterion”, in determining whether an agreement restricts competition by object, is whether the agreement “reveals in itself a sufficient degree of harm to competition” (the “sufficient degree of harm test”).²⁵ The test has a long pedigree, having its roots in *Societe Technique Miniere* (albeit expressed in varying formulations).²⁶ The way in which the “sufficient degree of harm test” has been phrased may be apt to confuse, since it seems to suggest that it is necessary to examine the *actual* effects of the agreement on competition after all. This would, however, be a misreading of the rule: the “sufficient degree of harm test” does not look to the actual effects of the agreement, but looks rather to the *potential* for anti-competitive harm arising from the terms of the agreement.

Although the “sufficient degree of harm test” has been accepted as the “essential legal criterion” for an object restriction, there appears—quite problematically—to be a second test for object restrictions, *viz* that “in order for the agreement to be regarded as having an anticompetitive object, it is sufficient that it has the potential

²⁰ *Opinion of Advocate General Trstenjak, Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd*, Case C-209/07, [2008] ECR I-8637 at para 48.

²¹ *Ibid* at paras 48, 49.

²² *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd*, C-209/07, [2008] ECR I-8637 at para 23 [*Beef Industry Development Society*].

²³ *Financial Advisers*, *supra* note 3 at para 78.

²⁴ Richard Whish & David Bailey, *Competition Law*, 8th ed (New York: Oxford University Press, 2015) at 125; Jones & Sufrin, *supra* note 10 at 200; Burton Ong, “Catching Cartels and Other Anti-competitive Agreements in Singapore” in Thomas Cheng, Sandra Marco Colino & Burton Ong, eds, *Cartels in Asia: Law & Practice* (Hong Kong: Wolters Kluwer, 2015) 185 at 204-210.

²⁵ *Financial Advisers*, *supra* note 3 at para 89(iv); *Groupement des cartes bancaires*, *supra* note 3 at para 57.

²⁶ *Societe Technique Miniere*, *supra* note 19 at 249; *Groupement des cartes bancaires*, *ibid* at para 49.

to have a negative impact on competition”; in other words, it is sufficient “that it be capable in an individual case of resulting in the prevention, restriction or distortion of competition”.²⁷ This test (the “potential negative impact test”) arose from a recent line of cases in the EU,²⁸ and has also been adopted in Singapore.²⁹ This “potential negative impact test” will be interrogated in further detail in the second proposal in Part V of this article.

Fourth, in the process of determining whether an agreement restricts competition by object:

[R]egard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary 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.³⁰

In essence, the assessment of an agreement for object restrictions involves not only an *internal* analysis of the contents and objective of the agreement, but also a *contextual* analysis of the circumstances surrounding the agreement.

While it is clear that it is important to undertake a contextual analysis of the agreement in question, what is less clear is *how* the contextual analysis is to be undertaken. Specifically, how much context should be taken into account in the contextual analysis? Should all cases involving object restrictions be subject to the same amount of contextual analysis? These questions are discussed in the third proposal in Part V of this article.

Fifth, it is important to note that the test for object restrictions is an objective one, and the subjective intention of the parties “is not a necessary factor in determining whether an agreement is restrictive”.³¹ Nonetheless, the courts and competition authorities may take the parties’ intention into consideration.³² The relevance of intention is not confined to the determination of liability; the intention of the parties is also a factor to be considered in the assessment of financial penalties which may be imposed on undertakings who have infringed the Section 34 Prohibition.³³ In particular, CCS may only impose a financial penalty on an undertaking “if it is satisfied that the infringement has been committed intentionally or negligently”,³⁴ and if the infringement was committed intentionally, that fact is considered by CCS to be an aggravating factor, which may result in an upward adjustment of the financial penalty.³⁵

²⁷ *Financial Advisers*, *supra* note 3 at paras 89; *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal* C-32/11, EU:C:2013:160 at para 38 [*Allianz Hungária*].

²⁸ *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, [2009] ECR I-4529 [*T-Mobile*]; *Allianz Hungária*, *supra* note 27.

²⁹ *Financial Advisers*, *supra* note 3 at para 89.

³⁰ *Ibid* at paras 79, 89(iii); *Groupement des cartes bancaires*, *supra* note 3 at para 53.

³¹ *Groupement des cartes bancaires*, *supra* note 3 at para 54; *Financial Advisers*, *supra* note 3 at para 90.

³² *Ibid*.

³³ *Competition Act*, *supra* note 4, s 69(2)(d).

³⁴ *Ibid*, s 69(3).

³⁵ Competition Commission of Singapore, *Competition Commission of Singapore Guidelines on the Appropriate Amount of Penalty 2016* (1 November 2016) at para 2.14.

IV. JUSTIFICATIONS FOR THE CONCEPT OF OBJECT RESTRICTIONS

It should be noted at this juncture that the concept of object restrictions has not been an uncontroversial one. As stated above, if it is found that a particular agreement constitutes an object restriction, then it will *ipso facto* be an infringement of the Section 34 Prohibition, and there is no need for the court or competition authority (as the case may be) to undertake an analysis of the competitive effects of the agreement. The principal question surrounding the concept of object restrictions is how this rule can be justified.

A. Theoretical Justifications

In the paragraphs that follow, this article briefly states how the *courts and competition authorities* have sought to provide theoretical justifications for the concept of object restrictions. While it is recognised that the theory underpinning the concept of object restrictions continues to be the subject of academic debate,³⁶ a more critical discussion of the theory is beyond the scope of this article.³⁷

The first theoretical justification for the concept of object restrictions is identified in *Groupement des cartes bancaires (CB) v European Commission*: that “certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition”.³⁸ This view suggests that there is something inherent in object restrictions that differentiates them from other types of agreements, and that renders them anti-competitive “by their very nature”. There is an understandable appeal to the notion that object restrictions are “naturally” or “inherently” anti-competitive, since it provides a ready justification for relieving the courts and competition authorities from performing an analysis of the effects of the agreement in question, and provides said justification without reference to the effects of the agreement.

The second theoretical justification consists in a more brutal intuition—that some types of agreements will so obviously have anti-competitive effects that it is not necessary to conduct an effects analysis on such agreements. Thus in *Groupement des cartes bancaires*, the Court of Justice held that object restrictions are “so likely to have negative effects” on the market that it is redundant to prove those negative effects in every case—experience shows that object restrictions lead to “falls in production and price increases, resulting in poor allocation of resources”.³⁹ This view is also reflected in older EU jurisprudence, notably in *European Night Services* where the General Court referred to price-fixing, market-sharing and output-limitation as “obvious restrictions of competition”.⁴⁰

³⁶ As Whish and Bailey point out, the concept of object restrictions is a concept that, “after 50 years of EU competition law, continues to be hotly debated”: Whish & Bailey, *supra* note 24 at 123.

³⁷ For further reference in this regard, see Munesh Ram Mahtani, “Thinking Outside the Object Box: An EU and UK Perspective” (2012) 8:1 ECJ 1; Saskia King, “The Object Box: Law, Policy or Myth?” (2011) 7:2 ECJ 269.

³⁸ *Groupement des cartes bancaires*, *supra* note 3 at para 50; *Financial Advisers*, *supra* note 3 at para 77; *Beef Industry Development Society*, *supra* note 22 at para 17.

³⁹ *Groupement des cartes bancaires*, *supra* note 3 at para 51; *Opinion of Advocate General Villalón, Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal*, C-32/11, EU:C:2013:160 at para 65 [*Allianz Hungária Opinion*].

⁴⁰ *European Night Services*, *supra* note 10 at para 136.

B. Practical Justifications

Quite apart from the abovementioned theoretical justifications, there are persuasive *practical* arguments in favour of the concept of object restrictions. Advocate General Wahl, in his Opinion to the Court of Justice in *Groupement des cartes bancaires*, defended the concept of object restrictions in terms of predictability, deterrence and procedural economy:

First of all, it undoubtedly provides *predictability*, and therefore legal certainty, for undertakings in that it enables them to know the legal consequences (including prohibitions and sanctions) of some of their actions, such as the conclusion of pricing agreements, and to modify their conduct accordingly. Second, identifying agreements, decisions and concerted practices which have the object of restricting competition also has a *deterrent effect* and helps to prevent anticompetitive conduct. Lastly, it furthers *procedural economy* in so far as it allows the competition authorities, when faced with certain forms of collusion, to establish their anticompetitive impact without any need for them to conduct the often complex and time-consuming examination of their potential or actual effects on the market concerned.⁴¹

In other words, the concept of object restrictions establishes clear boundaries, demarcating prohibited forms of market conduct. These boundaries serve (i) as normative signals to market players that steer them away from anti-competitive practices, (ii) to reassure market players that economic conduct within those boundaries will not generally be illegal, and (iii) as indicators to the courts and competition authorities that conduct outside of those boundaries may safely be assumed to be anti-competitive, obviating the need for a full-blown effects analysis, thus minimising regulatory costs. These reasons, it is submitted, are wholly in line with Parliament's intent to "balance regulatory and business compliance costs against the benefits from effective competition".⁴²

To achieve the abovementioned benefits, however, it is necessary that the law on object restrictions be clear, particularly in order to prevent the over-policing of anti-competitive agreements. As Advocate General Wahl puts it:

[S]uch advantages materialise only if recourse to the concept of restriction by object is clearly defined, failing which this could encompass conduct whose harmful effects on competition are not clearly established.⁴³

It is submitted, in agreement, that the concept of object restrictions remains a useful weapon for combatting anti-competitive behaviour, as long as the scope of object

⁴¹ *Opinion of Advocate General Wahl, Groupement des cartes bancaires (CB) v European Commission*, C-67/13 P, EU:C:2014:2204 at para 35 [*Groupement des cartes bancaires Opinion*] [emphasis added]. Similar views were raised in Saskia King, *supra* note 37 at 274; and in *Opinion of Advocate General Kokott, T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, [2009] ECR I-4529 at para 58.

⁴² *Parliamentary Debates Singapore: Official Report*, vol 78 at col 864 (19 October 2004) (Dr Vivian Balakrishnan).

⁴³ *Groupement des cartes bancaires Opinion, supra* note 41 at para 36.

restrictions is properly limited and its boundaries made clear. With this need for clarity in mind, this article proceeds to identify three aspects of the law on object restrictions that may benefit from elucidation and development.

V. THREE PROPOSALS ON THE LAW OF OBJECT RESTRICTIONS IN SINGAPORE

This article proceeds to address three aspects of the law of object restrictions, and offers proposals regarding the same. The three aspects, and their related proposals, may be summarised as follows. First, it does not appear to be expressly recognised, at present, that the concept of object restrictions should be restrictively defined. Indeed, the scope of object restrictions has steadily expanded over the years. In this regard, it will be proposed that the rule on the restrictive interpretation of the concept of object restrictions, as set out in *Groupement des cartes bancaires*, be adopted in Singapore. Second, there seem to be two contradictory tests for object restrictions: (i) the “sufficient degree of harm test”, and (ii) the “potential negative impact test”, and the latter test sits uncomfortably with the former test insofar as the two tests are incompatible. In this regard, it will be proposed that the latter test be wholly discarded. Third, the requirement for contextual analysis (*ie* the requirement that an agreement alleged to restrict competition by object be assessed in light of the legal and economic context of which it forms a part) is an unstructured one, leading to some uncertainty as to how this requirement is to be fulfilled in particular cases. In this regard, it will be proposed that a two-tiered approach to contextual analysis be adopted.

A. First Proposal: A Restrictive Interpretation of Object Restrictions

It has been observed that the EU has seen a constant expansion of the concept of object restrictions, such that it now encompasses a broad range of conduct beyond the ‘classical’ cartelistic arrangements (*ie* price-fixing, market-sharing and output-limitation).⁴⁴ For instance, in a recent decision on 8 September 2016, the General Court in *Lundbeck v Commission*⁴⁵ affirmed the decision by the European Commission to fine several pharmaceutical companies for engaging in pay-for-delay practices (in which a pharmaceutical company pays competing generic producers not to enter the market for a particular product for a period of time, effectively extending the monopoly of the pharmaceutical company). The pay-for-delay agreements were regarded as object restrictions. Another example of an unconventional application of the concept of object restrictions may be found in *Allianz Hungária* where the Court of Justice held that agreements involving vertical arrangements between car insurance companies and car dealers “concerning the hourly charge paid by the insurance company for repairs to vehicles insured by it, stipulating that the charge depends, *inter alia*, on the number and percentage of insurance contracts that the dealer has sold as intermediary for that company” could be deemed to restrict competition by object.⁴⁶

⁴⁴ Whish & Bailey, *supra* note 24 at 125.

⁴⁵ *H.Lundbeck A/S and Lundbeck Ltd v Commission*, T-472/13, EU:T:2016:449.

⁴⁶ *Allianz Hungária*, *supra* note 27 at para 51.

A similar trend of expansion may be discerned in Singapore. While the earlier cases generally involved price-fixing (and variations thereof, such as bid-rigging⁴⁷), which is one of the ‘classical’ cartelistic arrangements, two recent cases evince a willingness by CCS to extend the ambit of object restrictions to include other forms of agreements. In 2012, for instance, CCS fined two ferry operators for “sharing sensitive information relating to pricing” of their ferry tickets.⁴⁸ More recently, in the *Financial Advisers* case, CCS imposed fines on ten financial advisers for participating in an agreement to pressurise a competitor into withdrawing from the market for the distribution of individual life insurance products.⁴⁹

There is, it is submitted, a need for restraint in applying the concept of object restrictions. As may be observed from the rules pertaining to object restriction listed in Part III of this article, the boundaries of the concept of object restrictions are indeterminate, and it can be made to ‘catch’ a wide range of commercial activities. In this regard, the Court of Justice issued a clear statement, in *Groupement des cartes bancaires*, that the concept of object restrictions should be interpreted restrictively:

Secondly, in light of that case-law, the General Court erred in finding...that the concept of restriction of competition by ‘object’ must not be interpreted restrictively. The concept of restriction of competition ‘by object’ can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the [European] Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.⁵⁰

The statement cited above mirrors an earlier view of Advocate General Villalón, that the category of 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”.⁵¹ The risks of loosely applying the concept of object restrictions are thus clearly recognised in EU jurisprudence. As Ong points out in the local context:

The [Section 34 Prohibition] has the potential to stifle a very broad range of commercial activities if the “object” limb is applied uncritically by the competition authority. This could, in turn, place unjustified restraints on the freedom of undertakings to engage in various forms of multi-party conduct that may be potential positive socio-economic effects that are not thoroughly accounted for in the legal assessment of such conduct. Not every form of multi-party conduct deserves to be scrutinized in the same way as cartels. The legal rules which

⁴⁷ *Pest Control Operators*, *supra* note 17 at paras 141, 203, 253, 311, 334, 346.

⁴⁸ *Infringement of the section 34 Prohibition in relation to the price of ferry tickets between Singapore and Batam* [2012] SGCCS 3 at para 156 [*Ferry Operators*].

⁴⁹ *Financial Advisers*, *supra* note 3.

⁵⁰ *Groupement des cartes bancaires*, *supra* note 3 at para 58.

⁵¹ *Allianz Hungária Opinion*, *supra* note 39 at para 65.

have been developed to respond to hard core cartel activities should only be invoked when the threat of harm to competition is serious enough to warrant their application.⁵²

The restrictive interpretation of the concept of object restrictions is consonant with the assumption that object restrictions appreciably restrict competition. It is *assumed* that object restrictions will appreciably restrict competition: as stated by the Court of Justice in *Expedia*⁵³ and CCS in the Section 34 Guidelines,⁵⁴ restrictions of competition by object will *always* have an appreciable adverse effect on competition. Such an assumption, however, can only be made if the concept of object restrictions is interpreted restrictively. This is because object restrictions cannot safely be assumed to appreciably restrict competition unless the concept of object restrictions is limited to the most serious forms of anti-competitive conduct. Otherwise, the assumption that object restrictions always appreciably restrict competition must be relegated to the realm of legal fiction.

The restrictive interpretation of the concept of object restrictions will mean, as a consequence, that more cases may have to be dealt with under the “effect limb” of the Section 34 Prohibition. Under the “effect limb”, a full analysis of the competitive effects of the agreement must be done in order to establish that the agreement has an appreciable adverse effect on competition. This does not necessarily render the enforcement of the Section 34 Prohibition unfeasible. Indeed, CCS has on more than one occasion conducted an effects analysis even after having concluded that the agreement in question restricts competition by object.

For example, in the *Singapore Medical Association* case, the Singapore Medical Association had developed a Guideline on Fees (“GOF”) for its registered medical practitioners, and requested for a decision from CCS on whether the GOF infringed the Section 34 Prohibition.⁵⁵ CCS found that the GOF restricted competition by object, considering that the GOF constituted a form of price recommendation,⁵⁶ which was promulgated for the purpose of influencing prices on the market,⁵⁷ and was not an objective reflection of actual price data.⁵⁸ Having found that the GOF restricted competition by object, CCS proceeded to conduct an effects analysis of the GOF, notwithstanding the fact that it was not obliged to do so.⁵⁹ CCS posited, as its theory of harm, that price recommendations like the GOF “harm the competitive process by restricting independent pricing decisions and signaling to market players what their competitors are likely to charge”, allowing market players to predict with reasonable certainty the prices of their competitors and creating a “focal point” on which fees could converge.⁶⁰ CCS then relied on a market study which showed that

⁵² Ong, *supra* note 24 at 210.

⁵³ *Expedia*, *supra* note 2 at para 37.

⁵⁴ *Section 34 Guidelines*, *supra* note 1 at para 2.24.

⁵⁵ *Re Singapore Medical Association-Guidelines on Fees* [2010] SGCCS 6 at para 1 [*Singapore Medical Association*].

⁵⁶ *Ibid* at para 58.

⁵⁷ *Ibid* at para 63.

⁵⁸ *Ibid* at paras 68-71.

⁵⁹ *Ibid* at para 81.

⁶⁰ *Ibid* at para 37.

the GOF had actually resulted in price convergence while it was in force.⁶¹ Finally, to establish that the GOF had an appreciable effect on competition, CCS noted evidence that 2,132 out of 3,032 registered medical practitioners in Singapore were members of the SMA, that doctors took the price ranges in the GOF into account when setting prices, that the GOF was used as a yardstick for processing complaints to the SMA, and that the GOF guided young medical practitioners in their pricing decisions.⁶²

Similarly, in the recent *Financial Advisers* decision, CCS undertook an effects analysis even though it was not strictly required to do so, having established that the agreement in question restricted competition by object.⁶³ In that case, iFAST (a distributor of individual life insurance products) launched an innovative offer (the “Fundsuspermart Offer”) in which iFAST would give its clients a rebate for insurance products purchased through it. Essentially, insurance companies would give iFAST commissions for selling their insurance products, and iFAST would pass on 50% of those commissions to the customers as rebate.⁶⁴ The Fundsuspermart Offer was feasible for iFAST because of certain efficiencies which it possessed,⁶⁵ and would have increased competition in the market for the distribution of individual life insurance products. In response, ten financial advisers cooperated to pressurise iFAST into withdrawing the Fundsuspermart Offer⁶⁶ by leveraging their existing commercial relationships with iFAST.⁶⁷ This conduct was found to be a restriction of competition by object.⁶⁸ Nonetheless, CCS proceeded to establish that the conduct had appreciable adverse effects on competition. In its effects analysis, CCS found that the total market share of the infringing parties fell within the range of 20% to 30%,⁶⁹ and that their conduct had resulted in the actual elimination of an innovative competitor from the market (iFAST did in fact withdraw its Fundsuspermart offer), which “prevented the market from shifting to a more competitive state”. This allowed CCS to conclude that the parties’ conduct had appreciably restricted competition.⁷⁰

The two examples cited above (*ie* the *Financial Advisers* case and the *Singapore Medical Association* case) illustrate how an effects analysis is feasible despite the heavy reliance by CCS on the “object limb” in its infringement decisions. Although an effects analysis may very well be more demanding in more complicated cases,⁷¹ it is submitted that it is precisely in these complex cases that an effects analysis is

⁶¹ *Ibid* at para 89.

⁶² *Ibid* at para 91.

⁶³ *Financial Advisers*, *supra* note 3 at para 221.

⁶⁴ *Ibid* at paras 26, 27.

⁶⁵ *Ibid* at para 28.

⁶⁶ *Ibid* at para 181.

⁶⁷ *Ibid* at para 195.

⁶⁸ *Ibid* at para 220.

⁶⁹ *Ibid* at para 225. The total market shares of the parties are relevant to the determination of whether the agreement has an appreciable adverse effect on competition. Generally, the higher the combined market shares of the parties, the greater the market power of the parties, and the more likely it is that their agreement will appreciably affect competition. In particular, CCS sets out market share thresholds that assist in determining whether an agreement has an appreciable adverse effect: see *Section 34 Guidelines*, *supra* note 1 at paras 2.25, 9.2.

⁷⁰ *Financial Advisers*, *supra* note 3 at paras 229-242.

⁷¹ See *eg*, the negative clearance decision in *Re Notification for Decision by Visa Worldwide Pte Ltd of its Multilateral Interchange Fee system* [2013] SGCCS 5. See also Ong, *supra* note 24 at 208.

most crucial, allowing the eventual decision to take into account all the relevant circumstances influencing the competitive effects of the agreement.⁷²

In conclusion, it is submitted that the rule that the concept of object restrictions should be interpreted restrictively, as stated in *Groupement des cartes bancaires*, should be adopted in Singapore. Admittedly, simply stating that the concept of object restrictions should be “interpreted restrictively” is somewhat uninformative in the practical sense: what does a “restrictive interpretation” of the concept of object restrictions mean, in practical terms? It is submitted that only the most seriously anti-competitive agreements should be caught under the “object limb”. Outside of the ‘classical’ forms of cartelistic conduct (*viz* price-fixing, market-sharing and output-limitation), the courts and competition authorities should be slow to find that an agreement restricts competition by object, and should carefully assess the agreement in its particular context before concluding that it restricts competition by object. The practical distinction between ‘classical’ cartelistic arrangements and other types of object restrictions will be discussed in greater detail in the third proposal below.

B. *Second Proposal: A Single Test for Object Restrictions*

The “potential negative impact test” is of recent vintage, arising as it did from the 2009 Court of Justice decision of *T-Mobile*.⁷³ The *T-Mobile* case was a reference to the Court of Justice for a preliminary ruling in proceedings between several mobile telecommunications operators and the Raad van bestuur van de Nederlandse Mededingingsautoriteit (the “Netherlands competition authority”). On the facts, the mobile telecommunications operators had held a meeting on 13 June 2001, at which they discussed the “reduction of standard dealer remunerations for postpaid subscriptions” and exchanged confidential commercial information among themselves.⁷⁴ The Netherlands competition authority consequently found that the mobile telecommunications operators had infringed Article 6(1) of the Mededingingswet (the competition law of the Netherlands) along with Article 101 TFEU (the then-Article 81 EC), and accordingly imposed fines on the mobile telecommunications operators.⁷⁵ Actions were subsequently brought against the Netherlands competition authority’s decision in the national courts of the Netherlands by several of the mobile telecommunications operators,⁷⁶ which ultimately led to the reference to the Court of Justice in *T-Mobile*.

In *T-Mobile* three questions were referred to the Court of Justice, but only the first question is of relevance here, *viz* “which criteria must be applied when assessing whether a concerted practice has as its object the prevention, restriction or distortion of competition within the common market?”⁷⁷ The crucial part of the Court of

⁷² It is, however, recognized here that the balance between procedural economy and decisional depth is not an easy one to manage, and competition authorities like CCS must optimise regulatory outcomes within resource constraints.

⁷³ *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, [2009] ECR I-4529 [*T-Mobile*].

⁷⁴ *Ibid* at para 12.

⁷⁵ *Ibid* at para 13.

⁷⁶ *Ibid* at paras 16, 17.

⁷⁷ *Ibid* at para 22.

Justice's reply comes at paragraph 31, where it was held:

With regard to the assessment as to whether a concerted practice, such as that at issue in the main proceedings, pursues an anti-competitive object, it should be noted, first, as pointed out by the Advocate General at point 46 of her Opinion, 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, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages.⁷⁸

In thus holding, the Court of Justice in *T-Mobile* set out an extremely wide test for object restrictions⁷⁹—as long as an agreement has the “potential to have a negative impact on competition”, it may be regarded as having an anti-competitive object. This test was repeated in the later Court of Justice case of *Allianz Hungária*,⁸⁰ as well as in the CCS decision of *Financial Advisers*.⁸¹

The first difficulty with the “potential negative impact test” is that it renders the “effect limb” otiose. As noted by Advocate General Wathelet in his Opinion in *Toshiba*, “the judgement in [*Allianz Hungária*]...was perceived as being capable, if not of eliminating, at least of blurring the distinction between restriction by object and restriction by effect”.⁸² The “potential negative impact test” allows the “object limb” to completely subsume the “effect limb”. This is because any agreement that has been found to have an actual appreciable adverse effect on competition (thus qualifying as an effect restriction) necessarily must also have had a potential to have a negative effect on competition (thus qualifying as an object restriction). The consequence of the “potential negative impact test” is, therefore, that it will never be necessary to apply the “effect limb”, because any agreement that can be found to be an effect restriction can, with less, be shown to be an object restriction: there is no need to prove an *actual appreciable adverse effect* when it will suffice to prove a *potential negative effect*.

Second, the “potential negative impact test” is inconsistent with a restrictive interpretation of the concept of object restrictions. This view is borne out in *Groupement des cartes bancaires*. In that case, the court below (*viz* the General Court) had held that the “concept of infringement by object should not be given a strict interpretation”, and then affirmed the “potential negative impact test” for object restrictions.⁸³ The General Court's view was unequivocally *rejected* by the Court of Justice on

⁷⁸ *Ibid* at para 31 [emphasis added]. See also the first of the Court of Justice's rulings at the end of the judgment.

⁷⁹ Whish & Bailey, *supra* note 24 at 125.

⁸⁰ *Allianz Hungária*, *supra* note 27 at para 38.

⁸¹ *Financial Advisers*, *supra* note 3 at para 79.

⁸² *Opinion of Advocate General Wathelet, Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26 at para 60 [*Toshiba Opinion*].

⁸³ *Groupement des cartes bancaires*, *supra* note 3 at para 55.

appeal. According to the Court of Justice, the General Court failed to have regard to the fact that the “sufficient degree of harm test” was the “essential legal criterion” for ascertaining whether an agreement restricted competition by object. The Court of Justice then affirmed the “sufficient degree of harm test” *in light of* the need for a restrictive interpretation of the concept of object restrictions.⁸⁴ In contrast with the “sufficient degree of harm test”, it is difficult to see how the “potential negative impact test” could be said to be a “restrictive” one, given that virtually any agreement could be argued to have *some* potential negative effect on competition.

Third, the “potential negative impact test” is inconsistent with the assumption that object restrictions will always appreciably restrict competition. This is because the “potential negative impact test” lacks a threshold of harm. If all it takes for an agreement to be an object restriction is that it has the potential to have *some* negative impact on competition (regardless of the *degree* of that negative impact), then it cannot be assumed that all object restrictions appreciably restrict competition.

Fourth, the “potential negative impact test” is incompatible with the “sufficient degree of harm test”. The “sufficient degree of harm test” imports an element of seriousness that is absent in the “potential negative impact test”; in other words, the “sufficient degree of harm test” sets a higher threshold for object restrictions, requiring not merely that the agreement in question has a potential to cause harm to competition, but that it has “an inherent risk of a particularly serious harmful effect”.⁸⁵

It may be counter-argued that the two tests are reconcilable.⁸⁶ There are two possible ways to attempt to reconcile the “potential negative impact test” with the “sufficient degree of harm test”. However, neither way is persuasive. One tempting approach would be to reconcile the two rules as follows: the “potential negative impact test” is not really an alternative test to the “sufficient degree of harm test” but simply an affirmation that the *actual* anti-competitive effects of an agreement need not be proved once it is found that the agreement constitutes an object restriction. This reading of the “potential negative impact test” would, however, render it quite redundant—it would simply be a rephrase of the established rule that “object” and “effect” are “alternative and not cumulative requirements” under the Section 34 Prohibition.⁸⁷ It would, therefore, add nothing. The second possible approach would be to equate the two tests—in other words, the fact that an agreement has the potential to have a negative impact on competition (satisfying the “potential negative impact test”) means that it also reveals a sufficient degree of harm to competition (satisfying the “sufficient degree of harm test”). This reading of the two tests effectively negates the “sufficient degree of harm test”, and would be subject to all the criticisms made against the “potential negative impact test” set out in the paragraphs above.

In view of the four difficulties explained above, it is proposed that the “potential negative impact test” should be excised from Singapore competition jurisprudence.

⁸⁴ *Ibid* at paras 56-58.

⁸⁵ *Societe Technique Miniere*, *supra* note 19 at 249; *Toshiba Opinion*, *supra* note 82 at para 70.

⁸⁶ In this regard, it is of interest to note that in all three cases adopting the “potential negative impact test”, (*ie T-Mobile, Allianz Hungaria and Financial Advisers*), the court or competition authority (as the case may be) also affirmed the “sufficient degree of harm test”. This was done despite the apparent inconsistency of the “sufficient degree of harm test” with the “potential negative impact test”.

⁸⁷ *Financial Advisers*, *supra* note 3 at para 70; *Pest Control Operators*, *supra* note 17 at para 49; *Pang’s Motor Trading*, *supra* note 17 at para 30.

The elimination of the “potential negative impact test” would clarify that the “sufficient degree of harm test” is indeed the sole “essential legal criterion” for an object restriction to be established,⁸⁸ avoiding any future misunderstanding in this regard. It is relevant to note that CCS appears to regard the “sufficient degree of harm test” as the appropriate benchmark for object restrictions, in practice.⁸⁹ Furthermore, eliminating the “potential negative impact test” would bring the local law on anti-competitive agreements into closer alignment with current EU jurisprudence,⁹⁰ and also, it is submitted, into a state of greater internal coherence (in light of the rule on the restrictive interpretation of the concept of object restrictions, the assumption that object restrictions always appreciably restrict competition, and the very existence of the “effect limb”).

C. Third Proposal: A Two-tiered System of Contextual Analysis

It is settled law that, in examining an agreement alleged to be an object restriction, the legal and economic context should be taken into consideration. The idea that an agreement should be read in its context is not a novel one,⁹¹ nor is it unique to competition law.⁹² The context assists in the interpretation and evaluation of the agreement. According to Advocate General Wathelet:

[T]he examination of the question whether a contract had a restrictive object cannot be *divorced* from the economic and legal context in the light of which it was concluded by the parties.

The economic and legal context is there to assist the authority responsible for examining the alleged restriction by object to *understand* the economic function and the real significance of the agreement.⁹³

However, different types of object restrictions demand different degrees of contextual analysis. For example, where the agreement involves price-fixing, market-sharing or output-limitation, very little context is required for one to conclude that the agreement restricts competition by object; such agreements obviously limit or eliminate competition in the market. On the other hand, arrangements that are less unambiguous in their competitive effects would require contextual analyses that are more detailed.

The point that different types of object restrictions demand different degrees of contextual analysis is borne out in the decisional practice of CCS and in the CCS Guidelines (as will be further discussed in Part V.C.3 below). However, it is not a point that has been made explicit or developed. Consequently, there is little

⁸⁸ *Financial Advisers*, *supra* note 3 at para 89(v).

⁸⁹ *Ibid* at para 197.

⁹⁰ *Groupement des cartes bancaires*, *supra* note 3 at paras 55-58; *Toshiba*, *supra* note 3 at paras 24-27.

⁹¹ *Societe Technique Miniere*, *supra* note 19 at 249.

⁹² See, with regard to contractual interpretation, *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 (CA) and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 (CA) at paras 27-75.

⁹³ *Toshiba Opinion*, *supra* note 82 at paras 66, 67 [emphasis in original].

guidance as to the appropriate degree of contextual analysis in particular cases of object restrictions.

Interestingly, recent developments in the EU evince a shift towards an expressly bifurcated (or two-tiered) system of contextual analysis. In other words, there has been a discernable shift towards a system wherein there are two tiers of object restrictions, and wherein a different degree of contextual analysis is required for each tier of object restrictions. This article proceeds to discuss (i) the two-tiered system of contextual analysis in the EU, (ii) which object restrictions should fall into each tier, and (iii) the application of the two-tiered system of contextual analysis in Singapore.

1. Recent developments in the EU: a two-tiered system of contextual analysis

The two-tiered system is derived from a line of EU cases,⁹⁴ culminating in the recent *Toshiba* decision by the Court of Justice. In *Toshiba*, the European Commission found that the appellant had participated in a cartel spanning the entire European Economic Area and Japan. The cartel involved an oral agreement among Japanese and European producers of power transformers to share markets on a territorial basis (the “Gentlemen’s Agreement”).⁹⁵ The appellant appealed to the General Court, which rejected its appeal.⁹⁶ Subsequently, the appellant appealed to the Court of Justice. The appellant argued, *inter alia*, that the General Court had erred in law in characterising the Gentlemen’s Agreement as a restriction of competition by object,⁹⁷ because there was no potential competitive relationship between the Japanese and European producers.⁹⁸ The appellant argued that General Court should have examined the context to determine whether the Japanese producers had “real and specific possibilities of entering the EEA market and that such entry constituted an economically viable strategy for them”.⁹⁹

The Court of Justice rejected the appellant’s argument. Even though the agreement had to be assessed in its context, the contextual analysis was a limited one:

The Court’s case-law has also established that, in order to determine whether an agreement between undertakings reveals a sufficient degree of harm that it may be considered a ‘restriction of competition by object’ within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part (judgment in *ING Pensii*, C172/14, EU:C:2015:484, paragraph 33).

Thus, the Court has already held that market-sharing agreements constitute particularly serious breaches of the competition rules (see, to that effect, judgments

⁹⁴ *Cimenteries CBR v Commission*, T-25, 26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87, 88, 103, and 104/95, [2000] ECR II-491; *Sumitomo Metal Industries Ltd and Nippon Steel Corp v Commission*, C-403 and 405/04 P, [2007] ECR I-729; *Siemens AG, Mitsubishi Electric Corp and Toshiba Corp v Commission*, C-239, 489 and 498/11 P, EU:C:2013:866 [*Siemens*].

⁹⁵ *Toshiba*, *supra* note 3 at para 10.

⁹⁶ *Ibid* at para 16.

⁹⁷ *Ibid* at para 19.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

in *Solvay Solexis v Commission*, C449/11 P, EU:C:2013:802, paragraph 82, and *YKK and Others v Commission*, C408/12 P, EU:C:2014:2153, paragraph 26). The Court has also held that agreements which aim to share markets have, in themselves, an object restrictive of competition and fall within a category of agreements expressly prohibited by Article 101(1) TFEU, and that such an object cannot be justified by an analysis of the economic context of the anticompetitive conduct concerned (judgment in *Siemens and Others v Commission*, C239/11 P, C489/11 P and C498/11 P, EU:C:2013:866, paragraph 218).

In respect of such agreements, the analysis of the economic and legal context of which the practice forms part may thus be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object.¹⁰⁰

First, it should be noted that the Court of Justice adopted a *categorical* approach in respect of market-sharing agreements, as it did in the earlier case of *Siemens*.¹⁰¹ In other words, the Court of Justice was of the view that market-sharing agreements “have, in themselves, an object restrictive of competition”. Once it has been established that an agreement has the object of market-sharing, the particular economic context of the agreement is irrelevant, and cannot be used to justify the market-sharing agreement.

Second, and notwithstanding the categorical approach adopted by the Court of Justice in respect of market-sharing agreements, the requirement for contextual analysis was affirmed in *Toshiba*, even in respect of market-sharing agreements. The question then arises: what role can contextual analysis play in the assessment of market-sharing agreements? If it is the case that market-sharing agreements necessarily restrict competition by object, then contextual analysis is irrelevant *after* it has been determined that the agreement has the object of sharing markets. However, contextual analysis may still be relevant *before* it has been determined that the agreement has the object of sharing markets. Specifically, contextual analysis may be relevant to determining whether the agreement is, in fact, a market-sharing agreement.

Thus, where market-sharing agreements are concerned, contextual analysis plays a limited role: that of ascertaining whether the agreement in question falls within the category of “market-sharing”. This, it is submitted, is a plausible reading of the Court of Justice’s statement that “[i]n respect of such agreements, the analysis of the economic and legal context of which the practice forms part may thus be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object.”¹⁰²

If this reading of *Toshiba* is accurate, then it would, in effect, mean that there are two tiers of object restrictions. For an agreement falling within the first tier (which includes market-sharing agreements), the contextual analysis is limited to what is necessary to fit the agreement in a pre-defined category (*eg* market-sharing). Once it is found that the agreement fits a pre-defined category, then it may be concluded that the agreement restricts competition by object, and it is not necessary to further

¹⁰⁰ *Ibid* at paras 27-29.

¹⁰¹ *Siemens*, *supra* note 94 at para 218.

¹⁰² *Toshiba*, *supra* note 3 at paras 28, 29.

consider the particular context of the agreement. For an agreement falling within the second tier, the contextual analysis must be more comprehensive, as it must be ascertained whether the agreement *in its particular context* reveals a sufficient degree of harm to competition.

It is notable that a similar two-tiered system was explicitly proposed by Advocate General Wathelet in his Opinion to the Court of Justice in *Toshiba*:¹⁰³

Following those preliminary general observations on the definition of a restriction of competition by object, I distinguish two hypotheses.

The principle is the same in both cases: in order to determine whether an agreement between undertakings (or a decision by an association of undertakings) reveals, by its very nature, a sufficient degree of harm to be considered a restriction of competition ‘by object’ within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, to its object, that is to say, to the objectives which it seeks to achieve, and to the economic and legal context of which it forms a part. *Mutatis mutandis*, that principle also applies to concerted practices.

If the outcome of that analysis is positive and the agreement, decision by an association of undertakings or concerted practice forms part of a category expressly referred to in Article 101(1) TFEU, the analysis of the economic and legal context may be a secondary consideration.

If, on the other hand, it follows from that analysis that the agreement, decision by an association of undertakings or concerted practice does not come within one of the situations referred to in Article 101(1) TFEU or has features that render the agreement, decision by undertakings or concerted practice atypical or complex, the analysis of the economic and legal context will have to be more thorough.

In essence, in the view of Advocate General Wathelet, the first tier should comprise those agreements falling within the five categories expressly set out in Article 101(1) TFEU.¹⁰⁴ Once it is shown that the agreement in question falls into one of those categories, then the contextual analysis “may be a secondary consideration”. However, if the agreement does not fall within the first tier, then a “more thorough” contextual analysis would be required.

2. *Categories of agreements falling within the first tier*

If it is accepted that the two-tiered system should be adopted, it becomes pertinent to ascertain which categories of agreements fall within the first tier. One possibility would be to simply regard, as Advocate General Wathelet did, the five categories of agreements set out in Article 101(1) TFEU (and Section 34(2) of Singapore’s *Competition Act*) as falling within the first tier.

It is submitted, however, that a narrower definition of the first tier is preferable. Specifically, the first tier should comprise only of the three ‘classical’ cartelistic arrangements (*viz* price-fixing, output-limitation and market-sharing, corresponding

¹⁰³ *Toshiba Opinion*, *supra* note 82 at paras 87-90.

¹⁰⁴ The five categories of agreements listed in Article 101(1) TFEU are replicated in s 34(2) of Singapore’s *Competition Act*.

with subsections (a), (b) and (c) of Article 101(1) TFEU). This narrower definition of the first tier is consistent with the Court of Justice's reasoning in *Toshiba*. To reiterate, the Court of Justice reasoned in *Toshiba* that market-sharing agreements "fall within a category of agreements expressly prohibited by Article 101(1) TFEU" and are "particularly serious breaches of the competition rules", and such agreements cannot be justified by contextual analysis.¹⁰⁵ Out of the five categories of agreements listed in Article 101(1) TFEU, only price-fixing, output-limitation and market-sharing (corresponding to subsections (a), (b) and (c) respectively) clearly constitute serious breaches of the competition rules; the same cannot be said of the other two types of agreements listed (in subsections (d) and (e)) of Article 101(1) TFEU.

Indeed, the categorical rejection of the 'classical' cartelistic arrangements has roots in the earliest cases of the European courts. In particular, reference may be made to three early cases from the General Court, viz *Montedipe*,¹⁰⁶ *Tréfilunion*¹⁰⁷ and *European Night Services*.¹⁰⁸ These cases identify price-fixing, market-sharing and output-limitation as a distinct class of restrictions, and adopt a categorical approach to the prohibition of these restrictions.

In *Montedipe*, the European Commission found that Montedipe SpA had been involved in an agreement and concerted practice to restrict output, fix prices and share markets in the polypropylene market.¹⁰⁹ On appeal to the General Court, Montedipe SpA argued that the European Commission should have examined the restrictive practices in their economic context.¹¹⁰ It argued that the European Commission should have adopted a "rule of reason" approach, in which the key question was whether a restrictive practice "merely regulates competition, or even encourages it, or whether it has the effect of suppressing competition".¹¹¹ In answering that question it was necessary to examine "the facts specific to the sector of activities concerned by the restriction, its situation before and after the restriction was imposed, the nature of the restriction and its actual or probable effects".¹¹² According to Montedipe SpA, a "rule of reason" analysis would have shown that the agreements had the effect of "safeguarding competition, not restricting it".¹¹³ The General Court unequivocally rejected Montedipe SpA's argument:

It should be recalled that the Commission has proved to the requisite legal standard that the agreements and concerted practices held to have existed had an anti-competitive object for the purposes of Article 85(1) of the EEC Treaty. The question whether they were anti-competitive in effect is therefore relevant only to assessment of the amount of the fine, and must accordingly be examined along with that issue.

¹⁰⁵ *Toshiba*, *supra* note 3 at para 28.

¹⁰⁶ *Montedipe v Commission*, T-14/89, [1992] ECR II-1155 [*Montedipe*].

¹⁰⁷ *Tréfilunion v Commission*, T-148/89, [1995] ECR II-1067 [*Tréfilunion*].

¹⁰⁸ *European Night Services*, *supra* note 10.

¹⁰⁹ *Montedipe*, *supra* note 106 at para 15.

¹¹⁰ *Ibid* at para 257.

¹¹¹ *Ibid* at para 258.

¹¹² *Ibid*.

¹¹³ *Ibid* at para 259.

Furthermore, the fact that the infringement of Article 85(1) of the EEC Treaty, in particular subparagraphs (a), (b) and (c), is a clear one 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.¹¹⁴

The General Court thus rejected Montedipe SpA's call for a more contextual analysis, pointing out that there was a "clear" infringement of Article 85(1) of the EEC Treaty (now Article 101(1) TFEU), and in particular subparagraphs (a), (b) and (c) which proscribe price-fixing, output-limitation and market-sharing. This view was repeated by the General Court in *Tréfilunion*.¹¹⁵

In the *European Night Services* case, the General Court restated the rule in somewhat different terms. In that case, a number of applicants applied to the European Commission for a declaration that certain agreements would not be caught by the competition rules.¹¹⁶ The European Commission held that the agreements would restrict competition,¹¹⁷ but exempted the agreements for eight years on the basis of their economic benefits.¹¹⁸ The applicants appealed the European Commission's decision to the General Court, arguing, *inter alia*, that the agreements did not restrict competition.¹¹⁹ The General Court set out its analytical approach as follows:

[I]n assessing an agreement under Article 85(1) of the Treaty, 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 (judgments in *Delimitis*, cited above, *Gottrup-Klim*, cited above, paragraph 31, Case C-399/93 *Oude Luttikhuis and Others v Verenigde Coöperatieve Melkindustrie* [1995] ECR I-4515, paragraph 10, and Case T-77/94 *VGB and Others v Commission* [1997] ECR II-759, paragraph 140), unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets (Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, paragraph 109). In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 85(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 85(1).¹²⁰

This time, the General Court did not refer to the expressly prohibited categories of agreements in Article 85(1) of the EEC Treaty (now Article 101(1) TFEU). Instead, it simply held that a contextual analysis was not required when the agreement contained "obvious restrictions of competition", which include "price-fixing, market-sharing or the control of outlets".

¹¹⁴ *Ibid* at paras 264, 265.

¹¹⁵ *Tréfilunion*, *supra* note 107 at paras 107-109.

¹¹⁶ *European Night Services*, *supra* note 10 at para 7.

¹¹⁷ *Ibid* at paras 22-25.

¹¹⁸ *Ibid* at paras 26, 27.

¹¹⁹ *Ibid* at para 106.

¹²⁰ *Ibid* at para 136.

3. *The two-tiered system in the Singapore context*

While the two-tiered system may, at first glance, appear to be a significant change to the law on object restrictions, it is submitted that the two-tiered system is, in fact, consistent with the current practice of CCS. As such, the express adoption of the two-tiered system in Singapore would not represent a fundamental shift in the practice of competition law in Singapore; rather, it would serve to clarify said practice. This point is elaborated upon in the paragraphs below.

The first tier comprises of the ‘classical’ cartelistic arrangements. Where such agreements are concerned, contextual analysis is limited to that necessary to establish that the agreement in question is in fact a ‘classical’ cartelistic arrangement. In other words, the context of the agreement in question is needed to ascertain whether the agreement falls within the categories of price-fixing, market-sharing or output-limitation; but once the “objective meaning and purpose of the agreement considered in the economic context in which it is to be applied”¹²¹ is found to be one of these three restrictions, no further contextual analysis is necessary to establish an infringement of the Section 34 Prohibition.

This is generally consistent with the practice of CCS. In its *Section 34 Guidelines*, CCS mentions price-fixing, bid-rigging, market-sharing and output-limitation as *examples* of object restrictions, essentially adopting a categorical approach with respect to these ‘classical’ cartelistic arrangements.¹²² This categorical approach is also borne out in CCS decisions. In *Ball Bearings*, for example, CCS held that “an agreement or concerted practice whose aim is to fix prices is an object infringement”.¹²³

The second tier comprises other object restrictions (*ie* restrictions other than the ‘classical’ cartelistic arrangements). For such agreements a more detailed contextual analysis is required. Unlike for cases in the first tier, it is not sufficient (or indeed, necessary)¹²⁴ to ‘slot’ the agreement in question into a pre-defined category of restriction of competition, but it must be shown that the agreement *in its particular legal and economic context* reveals a “sufficient degree of harm”¹²⁵ to competition.

Again, this is consistent with the practice of CCS. For example, in *Ferry Operators*, CCS found that the sharing of sensitive price information between two ferry operators restricted competition by object.¹²⁶ However, such a finding was made in the context of (i) the fact that “price [was] an important parameter of competition in the market under consideration”,¹²⁷ (ii) the “homogeneous nature of the product” in question,¹²⁸ and (iii) the fact that there were “no other practical alternatives” for the product.¹²⁹

¹²¹ *Pest Control Operators*, *supra* note 17 at para 49; *Infringement of the section 34 prohibition in relation to the provision of air freight forwarding services for shipments from Japan to Singapore* CCS 700/003/11 (11 December 2014) at para 134 [*Freight Forwarding*].

¹²² *Section 34 Guidelines*, *supra* note 1 at para 2.24.

¹²³ *Ball Bearings*, *supra* note 14 at para 69. See also *Re Price fixing of monthly salaries of new Indonesian Foreign Domestic Workers by Employment Agencies* [2011] SGCCS 4 at para 62.

¹²⁴ *Financial Advisers*, *supra* note 3 at para 79.

¹²⁵ *Ibid* at para 89(iv).

¹²⁶ *Ferry Operators*, *supra* note 48 at para 163.

¹²⁷ *Ibid* at para 157.

¹²⁸ *Ibid* at para 159.

¹²⁹ *Ibid* at para 158.

In *Financial Advisers*, CCS found that an agreement to pressurise a competitor to retract a competing offer was a restriction of competition by object,¹³⁰ and the relevant context of this finding was that (i) the competing offer was innovative and efficient, and (ii) the parties were in a “position to exert pressure”.¹³¹

The two-tiered system proposed above reconciles the categorical approach to ‘classical’ cartelistic arrangements with the general requirement for agreements to be assessed in their context. In doing so, it preserves the certainty provided by a categorical prohibition of the ‘classical’ cartelistic arrangements’, and increases the efficiency of prosecuting parties engaged in these obviously anti-competitive practices. At the same time, it ensures that agreements alleged to constitute the more ‘unconventional’ object restrictions are subject to a greater degree of scrutiny, to mitigate the risks of over-policing—consistent with the need for a restrictive interpretation of object restrictions. Finally, the two-tiered system proposed is consistent with the extant case law, and may be said to be suggested from the decisional practice of CCS.

VI. CONCLUDING REMARKS

The “object limb” is likely to continue to be a controversial aspect of competition law. Its flexible boundaries will stretch and shrink in accord with judicial attitudes and the repeated tug-of-war between competition regulators and alleged infringers. While indeterminacy at the penumbra is inevitable, steps may be taken to render it more internally coherent and systematic, such that the law on object restrictions remains an effective tool in curbing anti-competitive coordination despite its disputed boundaries. It is to this end that the three proposals in this article are made.

¹³⁰ *Financial Advisers*, *supra* note 3 at paras 181, 194.

¹³¹ *Ibid* at para 195.