# DIVORCING A *PER SE* FROM AN OBJECT VIOLATION UNDER THE PHILIPPINE COMPETITION ACT: RECONCILING THE DISSONANCE IN SEPARATING TWO SYSTEMS CUT FROM THE SAME CLOTH*

*Amos Mikhail S. Adriano***

## ABSTRACT

The *per se* standard of the United States prohibits an agreement which is patently anti-competitive on its face without the need of further inquiry. Similarly, the object standard of the European Union has the same purpose of prohibiting an agreement which has a pernicious effect on competition. Thus, it has been argued that the differences between the *per se* and object standards are grounded in theory rather than practicality given that they ultimately prohibit the same categories of horizontal agreements. Unfortunately, Section 14 of the Philippine Competition Act distinguishes the two systems as if they were not cut from the same cloth. To remedy the dissonance caused by separating the two systems under the Philippine Competition Act, there is a need to interpret the object standard similarly to how the European Union interprets it which, in actuality, closely resembles the *per se* rule of the US. However, the expansion of the object category under Section 14(c) of the Philippine Competition Act must be interpreted in a restrictive manner in order to avoid stifling legitimate pro-competitive agreements that, otherwise, might be prohibited under a vast object standard regime.

---

* *Cite as* Amos Mikhail Adriano, *Divorcing a Per Se from an Object Violation under the Philippine Competition Act: Reconciling the Dissonance in Separating Two Systems Cut from the Same Cloth*, 93 PHIL. L.J. 1, [page cited] (2020).

** Lawyer, Competition Enforcement Office of the Philippine Competition Commission (2017-Present); LL.M. (focusing on competition law), University of Melbourne (2019); J.D., Ateneo Law School (2014); Bachelor of Science in Management, Major in Legal Management, Ateneo de Manila University (2010). The views and opinions expressed in this article are those of the author and do not necessary reflect the official policy or position of the Philippine Competition Commission or any government agency.

## I. INTRODUCTION

One of the unique features which separates antitrust or competition law from the more conventional fields of law—e.g. criminal or civil law—is its lack of bright-line rules in demarcating *per se* prohibited agreements from those that should be subjected to a more effects-based analysis, otherwise known as "the rule of reason," in determining their effect on competition.[1] Treating certain agreements as a *per se* violation of competition law endeavors to alleviate this problem by creating a category of agreements which, by their very nature, are presumed to be anti-competitive. This, in turn, immediately dispenses with the need for the competition authority concerned to prove the harmful effects of such agreements in the market.[2]

In the United States, this category of agreements is evaluated under the proscriptive standard of the *per se* rule, wherein the mere fact that entities entered into a *per se* prohibited agreement (e.g. price fixing) already constitutes a presumptive violation of the antitrust law, regardless of their proffered defense.[3] The rationale behind classifying certain agreements or restraints as a *per se* violation has been explained by the US Supreme Court in *Northern Pac. Ry v. United States*:

> There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without any elaborate injury as to the precise harm they have caused or the business excuse for their use.[4]

However, compared to the restrictive list of *per se* unlawful agreements enumerated under Section 14(a) of Republic Act No. 10667 or the Philippine Competition Act (PCA),[5] the US antitrust system is flexible in a sense that the agreements classified as *per se* illegal are actually products of court decisions rather than acts of Congress. This means that the list of agreements that are *per se* prohibited changes constantly depending on how courts appreciate new developments, especially in the field of economics, which may affect their previous decisions.

---

[1] Frederic F. Brace & William J. Nissen, *Antitrust: Recent Developments in the Per Se Doctrine*, 61 CHI. B. REC. 49 (1979).

[2] Jerrold Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165-1166 (1964).

[3] Keith Hylton & Ronald Cass, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 661 (2001).

[4] N. Pac. Ry. Co. v. United States, 78 S. Ct. 514, 518 (1958).

[5] Rep. Act No. 10667 (2015), § 14(a). Philippine Competition Act.

An example of an agreement that was previously considered *per se* unlawful, but is now relegated to a rule of reason analysis, is the vertical agreement of resale price maintenance ("RPM"). In doing so, the US Supreme Court in *Leegin Creative Leather Products v. PSKS, Inc.* considered the latest developments in economic literature when it overturned its previous ruling in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* which held an RPM to be *per se* prohibited:

> Economics literature is replete with procompetitive justifications for a manufacturer's use of resale price-maintenance, and the few recent studies on the subject also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule. The justification for vertical price restraints are similar to those other vertical restraints.[6]

The *per se* rule which the US Courts developed throughout a century's worth of jurisprudence[7] is more commonly known in the European Union (EU) as the object standard, which is articulated under Article 101(1) of the Treaty for the Functioning of the European Union (TFEU).[8] Similar to the *per se* rule, Article 101(1) of the TFEU prohibits agreements that prevent, restrict, or distort competition within the internal market without need of further economic analysis.[9] In clarifying what type of an agreement falls under the object category, the European Court of Justice ("ECJ") in *Groupement des Cartes Bancaires (CB) v. Commission* held that it is one which has an obvious impact on competition having regard "to the content of its provisions, its objectives and the economic and legal context of which it forms a part."[10]

Interestingly, Section 14 of the PCA distinguishes a *per se* from an object violation by carving out agreements which are unlawful *per se* (i.e. price fixing and bid rigging) from those which are only prohibited if they have the objective of substantially lessening competition in the relevant market.[11] By separating a *per se* from an object violation, it appears that the PCA envisages that these two systems prohibit different categories of agreements. However,

---

[6] Leegin Creative Leather Products v. PSKS, Inc., 127 S. Ct. 2705, 2708 (2007).

[7] United States v. Topco Associates, Inc., 92 S. Ct. 1126, 1133-34 (1972).

[8] Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326) 47, 88.

[9] *Id.*

[10] CB v. Comm'n, Case C-67/13P, (Ct. of Just. of the Eur. Union, 2014), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CJ0067.

[11] Rep. Act No. 10667, § 14.

a closer examination of the US antitrust and EU competition law would reveal that the *per se* and object standards actually have the same goal of prohibiting agreements that are obviously anti-competitive in order to dispense with the need to conduct further economic analysis, if only to show their actual harmful effect on competition.[12] So, why did the PCA differentiate a *per se* from an object violation when it appears that they both prohibit the same category of agreements?

This Article intends to answer the question posed above by examining the similarities and differences of the *per se* rule and object standard, and by determining whether distinguishing one from the other is warranted. Part II of this Article begins by discussing the development of the *per se* rule in the US antitrust system, which ends by noting that the current trend in US antitrust enforcement is to veer away from the *per se* rule, partly due to the prevalence of private antitrust suits in the US and the lack of alternative options in tempering the harsh penalty brought about by the treble damages system.

Part III discusses the object standard of the EU and enumerates the specific types of agreements under the EU regime which are considered as hardcore cartels. It also examines the bifurcated structure of Article 101 of the TFEU which makes it possible, at least in theory, to justify or excuse agreements that are unlawful by object. Finally, it discusses the EU Competition Commission's ("EU Commission") penchant for expanding the boundary of the object standard.

Part IV scrutinizes the similarities and differences between the *per se* and object systems. It argues that, despite their differences, the two systems are fundamentally similar in that, in reality, it is difficult to distinguish one from the other.

Part V discusses Section 14 of the PCA. It argues that it is a fusion between the US antitrust and EU competition law's cartel provisions, and notes that the Philippine Competition Commission (PCC) actually has the power, by law, to expand the list of agreements which may be considered an object violation in addition to those specifically mentioned in Sections 14(a) and (b).

Finally, Part VI summarizes and concludes this Article by recommending that the PCC should continue enriching Philippine

[12] Alison Jones, *Analysis of Agreements under U.S. and EC Antitrust Law—Convergence or Divergence?,* 51 THE ANTITRUST BULL. 691, 807 (2006).

competition law jurisprudence by expanding the list of object violations, while at the same time cautioning it to reserve such power only with respect to agreements which have an obvious pernicious impact on competition.

## II. THE *PER SE* RULE OF THE UNITED STATES

This Part begins by discussing the historical underpinnings behind the development of US antitrust enforcement to contextualize the way in which the US currently applies the *per se* rule. It then draws specific examples from various US cases to show the shift in the attitude of US Courts in applying the *per se* rule: from their enthusiasm in establishing lines that would easily identify *per se* unlawful agreements to their hesitance towards applying the same rule even in cases involving agreements which are patently anticompetitive on its face. Finally, it concludes by providing the author's opinion on why the US is increasingly becoming hesitant to apply the *per se* rule.

### A. From protecting small competitors to ensuring the welfare of consumers: the gradual shift in the objective of the US antitrust system

The term "antitrust" is the American equivalent of what is more commonly known in the rest of the world as "competition law."[13] Such term was coined in response to the prevalence of trusts during the late 19th century as a modality in consolidating various business interests into a single, and often huge, entity. At that time, trusts were equated with big businesses, which is why the primary intent of the US Congress in enacting the Sherman Act, the first antitrust legislation of the US, was to break up these trusts. This was done out of fear of the entities becoming so powerful that small businesses would become unable to effectively compete against them.[14] In proposing the enactment of the Sherman Act, Senator Sherman argued:

> If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any necessities in life. If we would not submit to an emperor, we

[13] Laura Philipps Sawyer, US Antitrust Law and Policy in Historical Perspective 1-2 (Harv. Bus. Sch. Working Paper No. 19-110, 2019) *available at* https://www.hbs.edu/faculty/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf

[14] *Id.* at 6-7

> should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.[15]

Thus, antitrust historians generally agree that the intent of the framers in legislating the Sherman Act was to protect small businesses from the trailblazing acts of the trusts.[16] This explains why there is no mention of "consumer welfare" in any of the congressional debates of the Sherman Act because, in the first place, it was not envisioned to be used as a tool to promote such.[17]

However, there was a stark shift in the perceived goal of antitrust in the 1970s—from preventing market concentration to promoting consumer welfare—when the Chicago School of antitrust policy ("Chicago School") was introduced and became an influential element in transforming the economic principles underpinning antitrust enforcement.[18] Proponents of this policy believed that the goal of antitrust should not be the protection of small competitors and the prevention of market concentration; rather, it should be the promotion of consumer welfare, which could ultimately be achieved if firms were to charge lower prices or produce more output.[19]

In this regard, they believed that the stringent enforcement of antitrust law was detrimental to economic progress, and that government intervention should be kept at the minimum in order to maximize the efficiency of the market system as a resource-allocation mechanism.[20] Moreover, they believed that cartels, by design, were naturally unstable given the numerous incentives for a cartel member to cheat against the other members.[21] In any case, they opined that even if competitors were to agree to the formation of a cartel, the self-correcting feature of the market would have eventually reformed their behavior and reinvigorated their competitive spirits.[22]

---

[15] JONATHAN TEPPER & DENISE HEARN, THE MYTH OF CAPITALISM: MONOPOLIES AND DEATH OF COMPETITION 136 (2018).

[16] Sawyer, *supra* note 13, at 6-7.

[17] TEPPER & HEARN, *supra* note 15, at 152.

[18] Sawyer, *supra* note 13, at 3.

[19] *Id.*

[20] Herbert Hovenkamp, *The Reckoning of Post-Chicago Antitrust*, *in* POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 1, 3 (Antonio Cucinotta et al. eds., 2002).

[21] TEPPER & HEARN, *supra* note 15, at 149.

[22] Hovenkamp, *supra* note 20, at 3.

The Chicago School had an immense impact in shaping the antitrust framework of the US.[23] Employing a conservative approach in antitrust enforcement, the Chicago School remained skeptical whenever the government used antitrust to interfere with the market[24] because of its belief that the vigorous enforcement of antitrust laws would, more often than not, result into Type I Errors (i.e. false positives or wrongfully convicting an innocent entity).[25] The Chicago School, in this regard, found Type II Errors (i.e. false negatives or wrongfully acquitting a guilty entity) less problematic because of the presence of the self-correcting feature of the market. On the other hand, Type I Errors, by stifling legitimate conduct, would send a chilling effect to the business community which market forces would not be able to fix.[26]

Although the Post-Chicago School eventually wrote off the Chicago School's teachings as a simplistic way of describing markets, the Chicago School nonetheless had an immense impact on US Courts. This is seen primarily in how US Courts have sparingly enforced antitrust laws by, more often than not, ruling in favor of the defendant.[27]

## B. The development of the per se test in the US

The wisdom behind the development of the *per se* rule has been succinctly stated and summarized by Justice Black in the case of *Northern Pacific R. Co. v. United States*, to wit:

> *There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use*. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular

[23] TEPPER & HEARN, *supra* note 15, at 148-49.

[24] HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 33 (2008).

[25] Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 83-85 (2010).

[26] *Id.* at 84-85.

[27] HOVENKAMP, *supra* note 24, at 38-39.

> restraint has been unreasonable – an inquiry so often wholly fruitless when undertaken.[28]

Based on this statement, one of the reasons why the *per se* rule was developed was for the administrative convenience of maintaining bright-line rules in the prosecution of antitrust violations.[29] Through this method, the harmful effect of an agreement classified as *per se* unlawful is immediately presumed, thereby prohibiting defendants from proffering pro-competitive excuses to justify their entering into a *per se* prohibited agreement.[30] Hence, the *per se* rule is comforting, in a sense, since it provides a definitive guide for the business community on what agreements they should avoid entering into with their competitors. It also dispenses with the need for the complainant to engage in an elaborate discussion on why the questioned agreement is harmful to competition.[31]

The agreements and conduct previously deemed *per se* unlawful under the US antitrust law were broad, ranging from vertical arrangements concerning resale price maintenance [32] to horizontal agreements for allocating markets and fixing prices (collectively referred to as the "Proscriptive Agreements"). [33] However, as new economic models demanding more case-specific analyses emerged, the US Courts eventually narrowed down the list of *per se* prohibited agreements and relegated the proscriptive agreements under the rule of reason analysis.[34]

It is important to note that the proscriptive agreements would only be considered unlawful *per se* under the US antitrust regime if they are a form of naked restraint or are not ancillary towards achieving a pro-competitive outcome.[35] This is because the prevailing rule in the US antitrust law is that an agreement may only be considered a *per se* violation if the restraint it

---

[28] N. Pac. Ry. Co. v. United States, 78 S. Ct. 514, 518. (Emphasis supplied).

[29] Van Cise, *supra* note 2, at 1169.

[30] Jesse Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in US Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 599 (2012).

[31] Alison Jones & William E Kovacic, *Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework* (2017), *available at* http://www.ssrn.com/abstract=2919312; *see also* United States v. Trenton Potteries, 47 S. Ct. 377, 379 (1927).

[32] Dr. Miles Med. Co. v. John D Park & Sons Co. 31 S. Ct. 376, 381-82 (1911).

[33] N. Pac. Ry. Co. v. United States, 78 S. Ct. 514, 518.

[34] Jones, *supra* note 12.

[35] Jones & Kovacic, *supra* note 31, at 8.

imposes on trade is a naked restraint: a type of restraint which has no other objective but to distort competition.[36]

For instance, if the goal of a price fixing agreement among competitors is merely to fix prices without any valid justification as to why the parties need to collude, then such restraint is a naked restraint and is therefore *per se* prohibited under the US antitrust law.[37] On the other hand, if the competing parties only fix prices in order to achieve a pro-competitive outcome, then such restraint may be considered lawful, considering that it is only ancillary towards achieving a legitimate business objective wherein, absent such restraint, the parties would not be able to survive in the market.[38]

## C. Veering away from the *per se* rule

The shift from making a blanket classification of *per se* violations to adopting a more case-specific analysis of agreements and conduct shows the US Courts' development in the resolution of antitrust cases. It is clear that the US has increasingly veered away from expanding the *per se* category, opting instead to study on a case-to-case basis the effect of an agreement on competition through the rule of reason analysis.[39]

This shift in the attitude of the US Courts is evident in *Broadcast Music, Inc. v. Columbia Broadcasting*. In this case, an association composed of competing publishing companies issued a blanket license which had the effect of standardizing the license fees its members charged.[40] Instead of automatically condemning what appeared to be a straightforward price-fixing arrangement among competing publishing companies, the US Supreme Court held that such blanket license was not a "naked restraint of trade with no purpose except stifling of competition" given that it developed "out of the practical situation in the marketplace."[41] Thus, what could have been a clear-cut price-fixing case was subjected instead by the US Supreme Court to the case-specific, rule of reason analysis.[42]

---

[36] Markham, Jr., *supra* note 30, at 603.

[37] United States v. Topco Associates, Inc. 92 S. Ct. 1126, 1133-35; *see also* United States v. General Motors Corp., 86 S. Ct. 1321, 1330-31 (1966); The White Motor Co. v. United States, 83 S. Ct. 696, 702 (1963).

[38] Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 99 S. Ct. 1551, 1562-63 (1979).

[39] Markham, Jr., *supra* note 30, at 596-600.

[40] *See supra* note 38, at 1562-63.

[41] *Id.*

[42] Markham, Jr., *supra* note 30, at 595.

Moreover, in *California Dental Association v. FTC,* the US Supreme Court reversed the decision of the US Court of Appeals for the Ninth Circuit in finding that the prohibition imposed by the California Dental Association against its members to engage in price and quality advertising is anticompetitive.[43] In this case, the US Supreme recognized that "there is no bright-line separating *per se* from Rule of Reason analysis since considerable inquiry into market conditions may be required before the application of any so-called *per se* condemnation is justified."[44] It then advocated that the standard which should be adopted in assessing the propriety of agreements scrutinized under the antitrust lens is an "enquiry meet for the case":

> As the circumstances here demonstrate, there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. *What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.* The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will from a quick (or at least quicker) look, in place of a more sedulous one.[45]

The *California Dental* case clarified that the categories of violation exist in a continuum rather than being separated by bright-line markers. It also exhibited the increasing preference of the US Supreme Court in relying on the rule of reason analysis as the default approach in assessing agreements or conduct that are subject to an antitrust investigation.

Furthermore, in *NCAA v. Board of Regents*, the US Supreme Court again refused to characterize an obvious horizontal price-fixing and output limitation[46] agreement as a *per se* violation,[47] and instead used the "quick look" or truncated rule of reason analysis in determining whether the challenged restraint is anticompetitive.[48] In using the quick look approach, the US Supreme Court only briefly evaluated the NCAA's justifications

---

[43] California Dental Ass'n v. FTC 119 S. Ct. 1604 (1999).

[44] *Id.* at 1617.

[45] *Id.* at 1617-18. (Emphasis supplied.)

[46] The plan was to reduce the adverse effects of live televised games on actual football game attendance by exclusively offering the license to two television networks thereby eliminating the negotiating power of the Universities in bargaining the price for telecasting their games.

[47] NCAA v. Bd. of Regents Univ. of Oklahoma 104 S. Ct. 2984, 2959 & 2962 (1984).

[48] *Id.* at 2969; Markham, Jr., *supra* note 30, at 599-600.

without delving into the usual full-blown and extensive analysis required under the rule of reason approach.[49] In the end, it struck down the restraint imposed in televising live games as anti-competitive, which it arrived at without declaring the horizontal price fixing and output limitation as a *per se* unlawful agreement.[50]

In addition to providing a more accurate diagnosis on an agreement's effect on competition, adopting the rule of reason approach allows the US Courts to prevent the potential deluge in the filing of private antitrust suits should the *per se* approach be adopted.[51] This is because, unlike in a rule of reason analysis where the inquiry is basically one which "meets for the case,"[52] *per se* rulings draw bright-line rules which prospective plaintiffs may rely on when filing their antitrust complaints.

Moreover, the private enforcement system of antitrust law is uniquely powerful in the US because of the rule on mandatory trebling of damages, wherein the actual damages a plaintiff can recover in an antitrust case is three times the value of what he or she actually suffered from the implementation of the anti-competitive agreement.[53] Thus, the private sector has an immense role in shaping up antitrust enforcement in the US, wherein, as John Connor noted, "private damages recoveries worldwide between January 1990 and August 2012 totaled USD 41.8 billion (in nominal dollars), of which USD 38.7 billion (or 93%) were settlements in the United States."[54]

In fact, the dissenting justices in *Eastman Kodak Co. v. Image Technical Services, Inc., et al.* opined that defining a narrow relevant market to the plaintiff's advantage may invite private parties to indiscriminately file private antitrust suits that would inevitably clog court dockets.[55] This is why some scholars believe that the mandatory trebling of damages discouraged US

[49] Markham, Jr., *supra* note 30, at 609.
[50] *See supra* note 47.
[51] Markham, Jr., *supra* note 30, at 597.
[52] *Id.* at 596.
[53] Sawyer, *supra* note 13, at 6.
[54] John M. Connor, *Private Recoveries in International Cartel Cases Worldwide: What do the Data Show?* (2012), *available at* http://www.ssrn.com/abstract=2165431
[55] Jonathan Gleklen, *The ISO Litigation Legacy of Eastman Kodak Co. v. Image Technical Services: Twenty Years and Not Much to Show for It*, 27 ANTITRUST 56 (2012).

judges from ruling in favor of private plaintiffs, thus making it nearly impossible for them to win an antitrust suit.[56]

## III. THE OBJECT STANDARD OF THE EUROPEAN UNION

This Part discusses the object standard of the EU. It starts by examining the historical context of the EU's competition law, particularly from its previous use of a form-based approach in evaluating the propriety of an agreement to its reliance on economic analyses to assess the effects of an agreement on competition. It then cites specific EU cases defining what an object violation is under EU competition law and shows that it is conceptually similar with the *per se* rule of the US, especially with regard to its application to horizontal agreements.

Moreover, it discusses the bifurcated structure of Article 101 of the TFEU, wherein the prohibition of agreements–"which have as their object or effect the prevention, restriction or distortion of competition within the internal market"–is separated from the exempting conditions under Article 101(3) of the TFEU.[57] Finally, unlike in the US where the *per se* doctrine is less frequently applied, the EU Commission appears to be increasingly expanding the boundaries of the object standard in order to capture various new forms of object restraints.[58]

### A. The evolution of the EU's form-based approach in assessing the propriety of agreements

The Treaty Establishing the European Economic Community, the predecessor of the current TFEU, was signed in 1957 by all six European member states at the time.[59] Most of these member states had civil law backgrounds and were, thus, formalistic in their approach of identifying conduct or agreements prohibited by the TFEU.[60] Compared to the sparse and broad language of the Sherman Act, which the US Courts were expected

[56] Donald I. Baker, *Revisiting History – What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others*, 16 LOY. CONSUMER L. REV. 379, 384-86 (2004).

[57] *See supra* note 8.

[58] Jones & Kovacic, *supra* note 31, at 36.

[59] Eleanor M. Fox, *Monopolization and Abuse of Dominance: Why Europe Is Different*, 59 THE ANTITRUST BULL. 129, 232 (2014).

[60] Interview with Eleanor M. Fox, Module 1 – US v. EU Approach to Unilateral Conduct, Univ. of Melbourne (Mar., 2017).

to develop and elaborate through jurisprudence, Article 101 of the TFEU is detailed to the point that even agreements that would *likely* be prohibited were specified (e.g. the hard-core cartels).[61]

The detailedness of the TFEU led to the rigid approach adopted in its application, as exemplified by how the EU Commission had prohibited certain categories of agreements without first examining their actual effects on competition.[62] As a result, complying with the EU competition law at the time became an exercise in ticking checkboxes which, arguably, had the unfortunate effect of stifling legitimate pro-competitive conduct for being too broad.

During the 1990s, however, the EU Commission realized that there was a need to rely on a more economics-based approach in evaluating the propriety of agreements.[63] Thus, in its *White Paper on Modernisation of the Rules Implementing Arts. 85 and 86* (now Arts. 101 and 102 of the TFEU, respectively), the EU Commission proposed to adopt an approach that would assess the "pro- and anti-competitive aspects of some restrictive practices under the provision prohibiting anticompetitive agreements."[64]

In its *Guidelines on the Application of Art. 81(3)* (now Art. 101(1)) *of the Treaty* ("Guidelines"), the EU Commission clarified that weighing the pro- and anti-competitive effects of an agreement, if found to have the effect of distorting or lessening competition under Art. 101(1), should be conducted under Art. 101(3) instead given the TFEU's bifurcated structure and the separation of Art. 101(1) from Art. 101(3).[65] In this regard, the assessment under Art. 101's bifurcated structure involves two steps: (1) determining whether the agreement concerned has an anti-competitive object or effect; and (2) if said agreement did indeed have an anti-competitive object or effect, assessing whether it satisfies the cumulative conditions set forth under Art. 101(3) of the TFEU.[66] Hence, the EU Commission was emphatic in stating that the analysis under Art. 101(1) is not synonymous to the rule of reason of the US, given Art. 101's bifurcated structure wherein the

[61] Fox, *supra* note 59, at 133.

[62] Jones, *supra* note 12, at 748.

[63] *Id.*

[64] White Paper on Modernisation of the Rules Implementing Articles 85 and 86, at 23, E.C. Doc. Comm'n Programme No. 99/027 (1999), *available at* https://europa.eu/documents/comm/white_papers/pdf/com99_101_en.pdf

[65] Official Journal of the European Union, Guidelines on the Application of Article 81(3) of the Treaty, at ¶ 12, E.U. Doc., C 101/97 (Apr. 27, 2004), *available at* https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0097:0118:EN:PDF

[66] *Id.*

exempting conditions under Art. 101(3) are separated from Art. 101(1).[67] However, it appears that the EU Commission has nonetheless repeatedly weighted the pro- and anti-competitive effects of an agreement under an Art. 101(1) analysis.[68]

### B. The EU's object standard: evoking a sense of déjà vu

The *Guidelines* have defined the meaning of "restrictions of competition by object":

> *Restrictions of competition by object are those that by their very nature have the potential of restricting competition.* These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) [now Art. 101(1)] to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to prejudice negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demand by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.
>
> The assessment of whether or not an agreement has as its object the restriction of competition is based on a number of factors. *These factors include, in particular, the content of the agreement and the object aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behavior of the parties on the market. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the*

[67] *Id.*

[68] Jones, *supra* note 12, at 787.

> *part of the parties to restrict competition is a relevant factor but not a necessary condition.*[69]

Based on the Guidelines, it is clear that proof of the anticompetitive intent of the parties serves only as additional evidence, rather than as an indispensable element, for a finding that the agreement has an object of restricting competition. In *European Night Services v. Commission*, the EU Court of First Instance held that agreements which restrict competition by object are those which have a pernicious impact on competition:

> Before any examination of the parties' arguments as to whether the Commission's analysis as regards restrictions of competition was correct, it must be borne in mind that in 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 1-4515, 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 procompetitive 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) [now renumbered to Art. 101 (1)].[70]

In characterizing an agreement as one that has as its object the restriction of competition, the EU Court of Justice in *Groupement des Cartes Bancaires (CB) v. Commission* held:

> In that regard, it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects […]

---

[69] *See supra* note 65, at ¶¶ 21-22. (Emphasis supplied.)

[70] European Night Services, Ltd. v. Comm'n of the European Communities, T-374/94, Sept. 15, 1998. (Emphasis supplied.)

> *That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition* […]
>
> Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market […] *Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.*
>
> Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent […]
>
> According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 81(1) EC, *regard 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 […][71]

It is therefore apparent that the EU's standard of prohibiting agreements, which is the object standard, resembles the standard which the *per se* rule adheres to under the US antitrust regime. Similar to the *per se* rule, agreements which restrict competition by object are those that, without having to inquire into its possible effects, have an obvious deleterious impact on competition. Moreover, under the object standard, the experience of the court in evaluating the propriety of the questioned agreement also plays an

---

[71] CB v. Comm'n, Case C-67/13P, (Ct. of Just. of the Eur. Union, 2014) *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CJ0067 (Emphasis supplied.)

important role in determining whether there is sufficient basis to presume the negative effects of said agreement on competition. This is why the EU's object standard evokes a sense of *déjà vu*, given its substantial similarities with the *per se* rule of the US.

### C. The bifurcated structure of Art. 101 of the TFEU

The bifurcated structure of Art. 101 of the TFEU makes it unique since the analysis arising from such structure is divided into two distinct steps. To recall, these are: (1) determining whether the agreement concerned has an anti-competitive object or effect; and (2) if the answer is in the affirmative, assessing whether it satisfies the cumulative conditions set forth under Art. 101(3) of the TFEU.[72] The effect of separating said analysis into two parts can be further elaborated by way of illustration.

Suppose there is a vertical agreement of RPM between Firms *A* (manufacturer) and *B* (distributor). Under this agreement, *B* is duty bound to sell *A*'s products at a certain price, otherwise, *A* could ultimately refuse supplying *B* with its products altogether. Under Art. 101(1) of the TFEU, the assessment begins by determining whether the RPM agreement in question has an object or effect of distorting competition.

The resulting efficiency gains arising from said agreement (e.g. prevention of free-riding instances) would not be considered under this step. If the EU Commission finds that the RPM agreement restricts competition by object or effect, only then would it weigh its pro- and anti-competitive effects in order to determine whether it satisfies the four cumulative conditions under Art. 101(3). These conditions are that the agreement: (1) improves the production or distribution of goods or promotes technical or economic progress; (2) allows consumers a fair share of the benefits of any of the said improvements; (3) does not contain dispensable restrictions on competition; and (4) does not substantially eliminate competition in the relevant market.[73]

The two-step analysis arising from the bifurcated structure of Art. 101 is what primarily differentiates the EU object standard from the US *per se* rule. Theoretically speaking, an object violation can be exempted under

---

[72] *See supra* note 65, at ¶ 11.

[73] *See supra* note 8, at 88.

Art. 101(3), while pro-competitive justifications cannot be proffered by a defendant in the US to justify a per se agreement.[74]

### D. The expansion of the list of agreements which restrict competition by object under EU Competition Law

Another unique feature of Art. 101(1) of the TFEU is its provision of a list of agreements which restrict competition by object:[75]

> The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (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;
> (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.[76]

It must be emphasized, however, that the ECJ has clarified in the *Groupement Case* that such list is not exhaustive.[77] Thus, similar to the *per se* rule of the US, the EU Commission and the courts also have free reign to classify new categories of restraints or agreements as an object violation (e.g. multilateral interchange fees, most favored nation clauses, patent settlement agreements, and/or no-poach agreements).[78] In this regard, the EU Commission has recently been aggressive in testing the boundaries of the object standard by characterizing new forms of agreements as object

---

[74] Jones & Kovacic, *supra* note 31, at 28.
[75] *Id.*
[76] *See supra* note 8.
[77] *See supra* note 10, at 9-10.
[78] Jones & Kovacic, *supra* note 31, at 36.

violations.[79] This led to the ECJ cautioning the EU Commission to avoid indiscriminately expanding the object standard without any sufficient basis:

> Secondly, in the light of that case-law, the General Court erred in finding, in paragraph 124 of the judgment under appeal, and then in paragraph 146 of that judgment, 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 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.* The fact that the types of agreements covered by Article 81(1) EC do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant.[80]

It is interesting to note that, unlike in the US where courts have slowly veered away from the bright-lines brought about by the *per se* rule, the EU appears to be moving in the opposite direction by expanding the boundary of the object standard. As the ECJ reiterated in the *Groupement Case*, however, expanding the scope of the object standard must be done in a restrictive manner. In other words, categorizing a new form of agreement as an object violation should only be made if its pernicious effect on competition is so obvious that there is no need to conduct further inquiry to show its actual effect on competition.

## IV. THE SIMILARITIES AND DIFFERENCES OF THE *PER SE* AND OBJECT SYSTEMS: DO THEY MATTER?

Part III has already touched on the similarity between the US's *per se* rule and the EU's object standard, noting that both systems aim to dispense with the need for the competition authority to conduct an elaborate inquiry to show the harmful effect of an agreement on competition.[81] Moving forward, this Part aims to further scrutinize the similarity and differences between the two systems and examine whether there is a need to distinguish one from the other.

---

[79] *Id.* at 36-37.

[80] *See supra* note 10, at 10. (Emphasis supplied.)

[81] *Id.*; Jones, *supra* note 12, at 723.

First, it begins by arguing that both the *per se* and object standards prohibit agreements which are obviously anti-competitive without the need to conduct lengthy economic analyses. It then highlights the differences between the two systems, with particular focus on how an object violation, unlike a *per se* prohibited agreement, may still be exempted under Art. 101(3) of the TFEU. Finally, it concludes that despite their differences, the two systems are ultimately similar in nature, rather than being the opposites of each other.

The obvious similarity between the two systems is how the *per se* and object standards prohibit the same categories of horizontal agreements.[82] For instance, a straightforward price fixing agreement between competitors would be *per se* prohibited in the US, but it would also be prohibited in the EU for having as its object the restriction of competition. Thus, it has been argued that there has been a convergence of the US and EU's systems at least with respect to the *per se* and object standards.[83] Further, the category of agreements that are *per se* prohibited as well as those prohibited under the object standard is non-exhaustive, which means that both the US and EU can still expand the types of agreements under their "*per se*" or "object" lists in order to cover new form of restraints.[84]

On the other hand, the obvious difference between the two systems is that, given the bifurcated structure of the TFEU's Art. 101, object violations can theoretically still be exempted under Art. 101(3).[85] The possibility of exempting an object violation under Art. 101(3) of the TFEU is absent under the *per se* rule because a defendant under the US regime is prevented from justifying a *per se* prohibited agreement.[86] However, as explained by Kovacic and Jones, the difference between the two systems is grounded more on theory than practicality considering the innate difficulty in exempting an object violation under Art. 101(3) of the TFEU:

> An argument is often made that object restraints can, and should, be treated in a different way to rules of illegality as they are not per se infringements (as in the US); rather, it is possible for parties to justify such agreements under Article 101(3). *Because there is a stark difference between this theory and the practical realities, however, it is submitted that object restraints should be approached in a similar way to*

[82] Jones, *supra* note 12, at 807.
[83] *Id.*
[84] Jones & Kovacic, *supra* note 31, at 17-18, 21; *See supra* note 10, at 9-10.
[85] *See supra* note 8.
[86] N. Pac. Ry. Co. v. United States, 78 S. Ct. 514, 518 (1958).

> *restraints caught by a per se rule (and for that reason we discuss them in this section). First, there is very little existing jurisprudence which provides comfort to suggest that the presumption of illegality can ever be overcome, that is as to when agreements found to restrict competition by object may satisfy the four onerous conditions of Article 101(3) in practice. Further, it seems most unlikely that such guidance will emerge in the future.* Second, the pass-on requirement of Article 101(3) essentially requires a balancing of anti- and procompetitive effects and it is unclear how parties can establish that demonstrated beneficial effects offset anticompetitive effects the nature and magnitude of which has not been established under Article 101(1) but only assumed. Third, as the chance of benefiting from Article 101(3) is remote and there is a risk of fines or other serious consequences if such an agreement is found to be incompatible with Article 101, firms generally perceive this conduct to be prohibited or at least extremely risky to pursue. *It seems crucial therefore that the concept of a restriction of competition by object is approached with this reality in mind. If it not confined to agreements which have a high risk of harming consumer welfare, there is a clear danger that, as is the case for overinclusive rules of per se illegality, procompetitive arrangements will be prohibited and deterred.*[87]

Moreover, Art. 101(1) also provides for certain types of agreements which are more likely to be considered an object violation by the EU Commission. This is not provided by the *per se* rule. Despite this difference, it must be noted that the hardcore cartels specifically mentioned under Art. 101(1) are also likely to be prohibited in the US under the *per se* rule if their sole purpose was to restrict competition.[88] An exception to this is with respect to vertical agreements because the US antitrust system does not share the objective of the TFEU in integrating a single market, and a number of vertical agreements (e.g. RPM) may hinder the EU from achieving a single market across member-states.[89]

Despite their differences, it can be argued that the object and *per se* rule are fundamentally the same. This is because both systems ultimately prohibit the same category of horizontal agreements and dispense with the need for the rule of reason or effects-based analysis. Considering the foregoing, it can be argued that the *per se* and object systems are actually interchangeable, and whatever differences they have are not substantial enough to distinguish one from the other.[90] The author believes that the

---

[87] Jones & Kovacic, *supra* note 31, at 32. (Emphasis supplied.)
[88] Jones, *supra* note 12, at 807.
[89] Jones & Kovacic, supra note 31, at 33-34.
[90] *Id.* at 32.

actual difference between the two systems lies more in the degree of willingness by which the US and EU competition authorities and courts apply their respective standards.

## V. SECTION 14 OF THE PCA: A FUSION BETWEEN THE US AND EU SYSTEMS

This Part discusses Section 14 of the PCA and argues that it is a fusion between the US and EU models. It begins by citing the relevant congressional debates of both the House of Representatives and the Senate of the Philippines to show that they relied on the US and EU models in crafting Section 14 of the PCA. It then notes that the PCA separates the *per se* rule from the object standard, thereby implying that the two systems are different from each other. In this regard, it argues that despite separating the two systems, the interpretation of what an object violation is should be the same as the *per se* rule, given that both systems effectively prohibit the same categories of horizontal agreements such that an object violation in the EU would likely be found as a *per se* violation in the US.[91] Finally, similar to the US and EU competition regimes, it notes that the PCC also has the power to expand the list of object violations to capture new forms of restraint that may not be specifically mentioned under Section 14 of the PCA.

### A. Section 14 of the PCA is a fusion between the US's *per se* rule and the EU's object standard

Section 14 of the PCA fuses the US's *per se* rule and the EU's object standard.[92] A perusal of the relevant congressional debates on the PCA

---

[91] Jones, *supra* note 12, at 807.

[92] Rep. Act No. 10667, § 14, defining "Anti-Competitive Agreements": (a) The following agreements, between or among competitors, are *per se* prohibited:

(1) Restricting competition as to price, or components thereof, or other terms of trade;

(2) Fixing price at an auction or in any form of bidding including cover bidding, bid suppression, bid rotation and market allocation and other analogous practices of bid manipulation;

(b) The following agreements, between or among competitors which have the object or effect of substantially preventing, restricting or lessening competition shall be prohibited:

(1) Setting, limiting, or controlling production, markets, technical development, or investment;

(2) Dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means;

would reveal that the House of Representatives as well as the Senate of the Philippines borrowed the terms and concepts used by both US and EU competition law in crafting the PCA. During the deliberations of the House of Representatives on House Bill No. 5286, Rep. Anthony G. Del Rosario explained that Section 5 thereof, which prohibits anticompetitive agreements, is based on both the US and EU models:

> **Rep. Del Rosario.** As mentioned earlier, Section 5(a),[93] Anti-Competitive Agreement, is based on the US Model, while Section 5(b)[94] is based on the European Union model; same thing with Section 6, and Section 9, Mr. Speaker. The ASEAN model is actually based on the EU Model. So, whenever I say EU, that also refers to ASEAN, Mr. Speaker.[95]

The influence of both the US and EU models in the PCA is also apparent in the Senate deliberations of Senate Bill No. 5286, two separate sessions of which are quoted hereunder:

---

(c) Agreements other than those specified in (a) and (b) of this section which have the object or effect of substantially preventing, restricting or lessening competition shall also be prohibited: *Provided,* Those which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of this Act.

An entity that controls, is controlled by, or is under common control with another entity or entities, have common economic interests, and are not otherwise able to decide or act independently of each other, shall not be considered competitors for purposes of this section.

[93] Section 5(a) of H. No. 5286 provides: (a) The following agreements, between or among competitors, are *per se* prohibited: (1) Restricting competition as to price, or components thereof, or other terms of trade; (2) Setting, limiting, or controlling production, markets, technical development, or investment; (3) Dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means; or (4) Fixing price at an auction or in any form of bidding including cover bidding, bid suppression, bid rotation and market allocation and other analogous practices of bid manipulation.

[94] Section 5(b) of H. No. 5286 provides: (b) An entity is likewise prohibited to enter into any agreement other than those specified in Section 5(a) hereof which has the object or effect of unreasonably and substantially preventing, restricting or lessening competition in the relevant market: *Provided,* That any agreement which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress while allowing consumers a fair share of the resulting benefit, may not necessarily be considered an anti-competitive agreement.

[95] Transcript of Stenographic Notes, House of Representatives Session (House Deliberations on H No. 5286) Mar. 3, 2015, 67.

> **Senator Angara.** Thank you. What would be the applicability of U.S. precedents in general, Mr. President, would these have persuasive effect, controlling effect?
>
> **Senator Aquino.** I guess just persuasive, Mr. President, because at the end of the day the commission will have to rule based on our current milieu of a U.S. case which, of course, happened at another time and with another market. But, I am sure that the commission may decide to use some of these precedents to help inform their decisions but they are not bound, obviously we are not bound by any of these U.S. precedents, Mr. President.[96]
>
> * * *
>
> **The President (Senator Drilon).** All right. May we know for the record why there was a change in the policy thrust on the part of the Sponsor making predator behavior towards competitors no longer a criminal offense which it is under the Revised Penal Code?
>
> **Senator Aquino.** Mr. President, there were some suggestions early on coming from our colleagues in the House and DOJ that we limit the criminal acts to those on horizontal agreements. So, we kept the criminal acts to monopolies, to cartel-like behavior, specifically and basically tried to narrow down on the acts which are truly criminal. But, for acts which are vertical in nature, these are currently already finable offenses, Mr. President. This, actually, Mr. President, mirrors the European regime in terms of dealing with competition.[97]

Given the above-cited congressional debates, it is clear that Section 14 of the PCA was inspired by both US and EU competition law. This can be seen from the fact that Section 14(a) incorporates the *per se* prohibition of the US while Sections 14(b) and (c) borrows the object standard of the EU.[98]

Unfortunately, it is apparent that said provision distinguishes the *per se* rule from the object standard, thereby implying that the two systems prohibit different categories of agreements.[99] This implication contradicts

---

[96] Transcript of Stenographic Notes, Senate Session (Bill on Second Reading S. No. 2282 – Fair Competition Act), Sept. 1, 2014, 46.

[97] Transcript of Stenographic Notes, Senate Session (Bill on Second Reading S. No. 2282 – Fair Competition Act), Sept. 15, 2014, 28.

[98] Rep. Act No. 10667, § 14.

[99] Rep. Act No. 10667, § 14.

the observation made under Part IV of this Article, where it has been argued that, despite their differences, the *per se* and object systems actually prohibit the same types of horizontal agreements.[100]

Thus, the author submits that the object standard under Section 14 of the PCA should be interpreted similarly to the EU's interpretation of what an object violation is which, in actuality, closely resembles the *per se* rule of the US. In effect, an agreement which has as its object the sharing of markets or the allocation of output, for instance, should also be summarily condemned without the need for an elaborate inquiry—similar to a price-fixing agreement which is *per se* prohibited under Section 14(a) of the PCA.

## B. Expanding the boundaries of the object standard in a restrictive manner

Section 14(c) of the PCA is the "catch-all provision" because, unlike Sections 14(a) and (b), the former does not specify what type of agreement it prohibits. This is because Section 14(c) only provides that an agreement, either entered into among competitors or among entities operating in different levels, would be prohibited if it has the object or effect of substantially lessening, preventing, or restricting competition.[101] Thus, similar to the US and EU,[102] Section 14(c) of the PCA also enables the PCC to expand the list of prohibited agreements, which would then be considered object violations, even if such agreements are not specifically mentioned under Sections 14(a) and (b).

For example, consider a scenario in which *Entity A* holds a patent for manufacturing *Drug Z*, and that *Entity B* already wants to manufacture a generic version of *Drug Z* despite the fact that *A*'s patent has not yet expired. Thus, *B* sought to invalidate *A*'s patent by filing the appropriate legal action. Instead of challenging *B*'s claim on the merits, *A* just agreed to compensate *B* and, in exchange, *B* dropped its suit and undertook not to compete with *A* until the latter's patent expires.

This type of agreement is commonly called a "pay for delay" settlement and, if successful, has an effect of artificially extending *A*'s patent which would enable it to continue reaping monopoly profits by selling *Drug*

[100] Jones, *supra* note 12, at 807.
[101] Rep. Act No. 10667, § 14(c).
[102] Jones & Kovacic, *supra* note 31, at 17-18, 21; *See supra* note 10, at 9-10.

*Z* without any close substitutes.[103] In this regard, even if a pay for delay arrangement between *A* and *B* is not expressly prohibited under Sections 14(a) or (b) of the PCA, the PCC may still prohibit and declare it an object violation under Section 14(c). Thus, by virtue of Section 14(c), it becomes apparent that the PCC can expand the list of object violations in addition to those expressly mentioned under Sections 14(a) and (b) of the PCA.

The author argues, however, that the expansion of the boundaries of the object standard must be interpreted in a restrictive manner. This is because making blanket prohibitions without conducting an effects-based analysis raises the risk of potentially declaring unlawful certain types of agreements which may actually be pro-competitive in the operational context of the industry concerned.

Following the ruling of the ECJ in the *Groupement Case*, where the ECJ held that the concept of an object violation must be interpreted restrictively,[104] the PCC should also resist the urge to expand the boundary of the object standard if it is only done to dispense with the need to conduct an effects-based analysis. Moreover, the PCC should only use such power in relation to declaring patently anti-competitive agreements as an object violation when, due to the obviousness of the harm resulting from such agreement, conducting an effects-based analysis becomes a redundant exercise.[105]

## V. SUMMARY AND CONCLUSION

Based from a cursory reading of Section 14 of the PCA, one might have an impression that both *per se* and object systems prohibit different categories of agreements. However, this Article has argued that the differences between the two are more theoretical than real, such that a *per se* prohibited agreement in the US would likewise be considered an object violation in the EU.[106]

In doing so, the Article first discussed the *per se* rule of the US which arose from the need to summarily prohibit agreements having an obviously pernicious effect on competition without the need of further economic

[103] European Commission, 7th Report on the Monitoring of Patent Settlements, at 3 (Dec. 13, 2016).

[104] *See supra* note 10, at 10.

[105] Jones & Kovacic, *supra* note 31, at 36-37.

[106] Jones, *supra* note 12, at 806-07.

inquiry to show their actual harmful effect.[107] The bright-line categorization resulting from the *per se* rule, which is further intensified by the system of trebling damages, [108] encouraged US plaintiffs to indiscriminately file antitrust cases that are anchored on *per se* violations. Thus, one of the reasons the US has increasingly veered away from the *per se* rule is to temper the deluge of antitrust cases resulting from having too many *per se* prohibited agreements.[109] This is clearly manifested by the US Courts' validation of the "quick look test", which they applied to agreements normally considered prohibited *per se*.[110]

Secondly, it examined the object standard of the EU regime. Under this Part, it was noted that the object standard closely resembled the US's *per se* rule considering that a horizontal object violation under the EU would most likely be found to also be a *per se* violation under the US.[111] However, contrary to the US, the current trend in the EU is to expand the object category in order to include new forms of agreements or restraints.[112] In response to this trend, the ECJ has cautioned the EU Commission to restrictively use its power of expanding the boundaries of the object category and reserve it only for agreements that have an obviously pernicious effect on competition.[113]

Thirdly, the similarities and differences between the *per se* and object systems have also been scrutinized. This Article argued that despite their differences, both systems ultimately prohibited the same categories of horizontal agreements, which is why distinguishing or differentiating one from the other presented a challenge.

Finally, the historical context of Section 14 of the PCA was examined. It was discussed that both the House of Representatives and the Senate of the Philippines used the US and EU models as their basis in crafting the PCA. Thus, this Article argued that Section 14 of the PCA was actually a fusion of the US and EU regimes. This creates a problem, considering that it distinguishes the *per se* and object systems as if they were two concepts that are not cut from the same cloth. Because of this, the

---

[107] N. Pac. Ry. Co. v. United States, 78 S. Ct. 514, 518.

[108] Sawyer, *supra* note 13 at 6.

[109] Markham, Jr., *supra* note 30 at 597.

[110] NCAA v. Bd. of Regents Univ. of Oklahoma 104 S. Ct. 2984, 2959 & 2962.

[111] Jones & Kovacic, *supra* note 31, at 32.

[112] *Id.* at 36-37.

[113] *See supra* note 10, at 10.

author proposes that the object standard be interpreted similar to how the EU interprets what an object violation is. This, as previously discussed, closely resembles the *per se* rule of the US.

Moreover, it was made apparent that the PCC also has the power under Section 14(c) to expand the list of object violations in order to cover new forms of agreements. Similar to the EU, however, the PCC should cautiously use such power by only categorizing as an object violation those agreements that have an obviously pernicious effect on competition. This is to ensure that a more accurate diagnosis and treatment under the effects-based analysis be promoted—rather than the sweeping generalizations brought about by the object characterization—in deciding cases involving agreements that simultaneously generate both pro- and anti-competitive effects.

**- o0o -**