Groupement des Cartes Bancaires v Commission: Shedding Light on What Is not a ‘by object’ Restriction of Competition

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Case C-67/13 P Groupement des cartes bancaires (CB) v Commission [2014] not yet reported.

The European Court of Justice, in setting aside the judgment of the General Court, endorses a narrow interpretation of ‘by object’ restrictions of competition and rules that the contested pricing measures adopted by the French Payment System ‘CB’ could not qualify as a ‘by object’ restriction.

I. Legal context

On 11 September 2014, the European Court of Justice (‘ECJ’ or ‘Court’) ruled in CB v Commission that the General Court (‘GC’) had committed several errors of law in upholding the European Commission’s (‘Commission’) decision that certain pricing measures adopted by the Groupement des Cartes Bancaires (‘CB Group’) constituted ‘by object’ restrictions of competition.

The Court provided helpful and welcome clarification to certain aspects of its prior case law in two ways. First, it rejected the standpoint that a ‘by object’ restriction is a notion to be interpreted broadly. Second, it clarified that the essential legal criterion for ascertaining a restriction of competition ‘by object’ is the finding that such coordination in itself reveals ‘a sufficient degree of harm to competition.’ The judgment should mark a significant departure from the manner in which Article 101(1) TFEU has been enforced in recent years by the Commission, namely characterised by the temptation of expanding the category of ‘by object’ restrictions, probably to avoid the more demanding and risky task of having to show likely adverse effects on competition. The Court now imposes clear limits on doing so in cases that do not involve hardcore restrictions.

II. Facts

CB Group was founded by the main banks active in France to ensure the interoperability of the systems for payment and withdrawal by bank cards issued by its members (the CB system). This system allows the use of bank cards issued by CB Group members (issuing side) for payments to all affiliated merchants and for the withdrawal from ATMs controlled by any of the CB Group members (acquiring side). The disputed measures consisted of certain fees to be paid by CB Group members depending on their card issuing/acquisition of merchants ratio, to attempt to solve a free-riding problem on the issuing side.

The CB Group notified the measures to the Commission in 2002 (under Regulation 17/62). Five years later, the Commission adopted an infringement decision finding that the purpose of the measures was to keep the price of payment cards artificially high to the advantage of the major banks of the CB Group and to the detriment of new entrants.1

CB Group brought an appeal against the Commission decision before the GC. In its 2012 judgment,2 the GC upheld the decision finding that the pricing measures indeed constituted restrictions of competition ‘by object’. CB Group filed an appeal before the ECJ arguing, inter alia, that the GC erred in law in applying the concept of restriction of competition ‘by object’. In line with Advocate General Wahl’s opinion, the ECJ upheld the appeal, set aside the GC’s judgment, and referred the case back to the GC to examine whether the measures at issue could be prohibited on account of their anticompetitive effects.

III. Analysis

Article 101(1) TFEU prohibits agreements that have as their ‘object or effect’ the restriction of competition. If it is revealed that an agreement has an anticompetitive object, anticompetitive effects are presumed and there is


no need to show the actual detrimental effects of the allegedly anticompetitive conduct on the market.

The ECJ initially recalled its well-known case law according to which ‘by object’ restrictions of competition are those that are regarded, by their very nature, as being harmful to the proper functioning of normal competition. It clarified that accordingly, only where conduct reveals a ‘sufficient degree of harm’, such as in a price-fixing cartel, is the Commission exempted from proving that the conduct has actual detrimental effects on the market. Based on ‘experience’, such an effects analysis would be redundant. This is the first time that the Court has stressed the importance of past experience in the application of the ‘by object’ concept of Article 101(1) in its case law. The Court further reiterated its prior case law by stating that all relevant aspects need to be taken into account when assessing whether conduct can be considered sufficiently harmful to form an ‘object’ restriction. This includes, mainly, the content of its provisions, its objectives, and the economic and legal context of which it forms 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, it being immaterial whether or not they relate to the relevant market. The parties’ intention may also be taken into consideration.

In its analysis of the errors of law committed by the GC, the ECJ concluded that the GC had failed to properly ascertain whether the CB Group measures in themselves revealed such a sufficient degree of harm to competition. The ECJ rejected the GC’s view that the concept of ‘by object’ restrictions should not be interpreted restrictively since ‘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 ECJ held that the GC had erred in taking the view that a restrictive object of the measures could be inferred from the wording alone and the mere possibility that the measures may restrict competition. The ECJ showed a certain level of frustration that the Commission and the GC had seemingly disregarded that the pricing measures at issue were adopted in the context of a payment system and were to be applied in a two-sided market. It held that having acknowledged that the measures sought to establish a certain balance between the issuing and acquiring activities of the members of the CB Group, the GC was entitled ‘at the most to infer […] that those measures had as their object the imposition of a financial contribution on the members which benefit from the efforts of other members for the purposes of developing the acquisition activities of the system’. This element could not, by its very nature, be considered harmful to the proper functioning of normal competition.

IV. Practical significance

This ruling—the first that corrects a Commission qualification of a ‘by object’ restriction—brings about some important clarifications and contributions to the complex ‘by object’/’by effect’ dichotomy.

First, the Court expressly states that as a matter of principle, the concept of a restriction of competition ‘by object’ must be interpreted restrictively. Accordingly, the Commission must now show likely harmful effects on competition unless it can clearly and easily show (ie without having to dig on the actual impact on the structure and functioning of the market) that the restriction at issue, by its very nature, harms competition. Thus, the Court seems to espouse the notion of ‘by object’ restrictions that was initially intended by the Commission’s own Guidelines on the application of Article 101(3) TFEU (para 21).

Second, the Court clarifies that showing that a certain measure is ‘capable’ of restricting competition is not sufficient to find a ‘by object’ restriction. The essential legal criterion to meet the requisite standard of proof is that the coordination reveals ‘inherently’ or ‘in itself’ a sufficient degree of harm to competition that would make the examination of its effects redundant. The ECJ therefore distances itself from the Commission’s expansive interpretation of the notion of ‘by object’ restriction, and most importantly nuances—if not revisits—some of its own recent case law. For instance, rulings such as T-Mobile, Irish Beef, GlaxoSmithKline, and Allianz Hungária have been interpreted as meaning that the contextual assessment needed to decide whether a restriction can qualify as a ‘by object’ restriction calls for an examination of the ‘potential’ effects of the measures. Such restrictions would arguably now fall short of qualifying as ‘by object’ restrictions.

Third, the Court makes it clear that arrangements in novel or complex economic settings (eg network industries or multi-sided markets) are not subject to a ‘by object’ analysis because the latter is not suitable for determining whether such measures are caught by Article 101(1) TFEU.

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3 Case C-8/08 T-Mobile Netherlands BV, EU:C:2009:343, para 31.
4 Case C-209/07 Beef Industry Development and Barry Brothers, EU:C:2008:643.
5 Case C-501/06 P GlaxoSmithKline Services Unlimited v Commission, EU:C:2009:610.
These clarifications of the ruling should be of practical significance for companies and regulators.

For companies, a ‘by object’ characterisation of a restriction creates a strong presumption that the agreement at issue infringes Article 101 because it is extremely difficult to successfully invoke an Article 101(3) defence. The narrower scope of application of ‘by object’ restrictions in practice means that the enforcer or challenger in novel situations or complex markets must now show anticompetitive effects for being able to claim that a particular agreement or coordination is caught by the prohibition of Article 101(1).

Further, the ruling also affects the application of the de minimis rules. Restrictions ‘by object’ are now presumed to appreciably restrict competition7 and are automatically excluded from the safe harbour of the De Minimis Notice.8 To facilitate the assessment of an agreement’s eligibility to the safe harbour of the de minimis rules, the Commission issued an extensive non-binding check-list of restrictions of competition deemed to be ‘by object’ restrictions, in the form of a guidance paper.9 The restrictive interpretation of the ‘by object’ restriction notion will have to be taken into consideration when reading that guidance paper.

For antitrust enforcers, the ruling provides very valuable clarifications on what is not a ‘by object’ restriction of competition. This should prompt the Commission to reflect on the need to depart from its recent practice of applying the notion of ‘by object’ restrictions to cases and situations with no prior relevant experience revealing a sufficient degree of harm to competition.10 Instead, this ruling invites the Commission and the NCAs to (re)focus on the actual effects of the conduct, which over the last decade have received insufficient attention in novel and complex cases. While this will require more work and economic analysis, it makes perfect sense in the so-called effects-based era that sophisticated antitrust enforcers have publicly embraced. Besides, this is a fair price to pay also to avoid false positives that can result from a too formalistic application of the ‘by object’ restriction test.

It remains to be seen how regulators will interpret and apply this important ruling to future novel cases that do not clearly fall under the traditional hardcore restriction categories.

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7 Case C-226/11 Expedia Inc. v Autorité de la concurrence and Others, EU:C:2012:795.