Immoveable objects

The evolution of object restrictions after the *Cartes Bancaires* case

by ***Daniel Schwarz****

Although the judgment of the European Court of Justice (ECJ) in Case C-67/13P *Groupement des Cartes Bancaires v European Commission* clarified the approach to establishing restrictions of competition by object under article 101 TFEU, issues still remain which the European courts have since sought to address. It is in this context that Advocate General Wathelet's opinion in Case-373/14P *Toshiba Corporation v European Commission* is analysed, as it attempts to bring problematic sections of Case C-32/11, *Allianz Hungária v Gazdasági Versenyhivatal* within the framework expressed in *Cartes Bancaires.*

The ECJ judgment in Case C-286/13P *Dole Food Co and Dole Fresh Fruit Europe v European Commission* is also reviewed, as it discusses the exchange of information between competitors as a restriction of competition by object. Finally, Case C-345/14 *Maxima Latvija v Konkurences padome* is analysed, as it concerns the application of object restrictions to leases between shopping centres and their anchor tenants.

Cartes Bancaires

Cartes Bancaires concerned an association of the main French banks operating the "CB" card payment system. This system enabled a CB card issued by a member of the association to be used to make payments to all traders affiliated to the CB system through any other member of the association, and to make withdrawals from ATMs operated by all other members. Under the rules, banks had to pay a higher membership fee if their issuing activities were considerably larger than their acquiring activities, or if the stock of payment cards they had issued tripled over a defined period. The General Court upheld the Commission's decision which considered that the scheme constituted a restriction of competition by object.

In a landmark judgment, the ECJ held that, in order to determine whether a restriction of competition by object exists:

> "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".

Although the ECJ cited *Allianz Hungaria* as authority for this statement, it did not also refer to the consideration of alternative distribution channels and their respective importance and the market power of the companies concerned which was also stated to be relevant in *Allianz Hungaria* to establish anticompetitive objects, and appeared to involve an analysis of the effects of agreements. As a result, *Cartes Bancaires* clarified the distinction between anticompetitive objects and anticompetitive effects by limiting the extent to which the effects of an agreement are analysed to demonstrate an object infringement.

The ECJ also went on to criticise the General Court for stating that "it is sufficient that the agreement…has the potential to have a negative impact on competition. In other words, the agreement or decision must simply be capable" of harming competition. However, the General Court in *Cartes Bancaires* merely repeated the formulation proposed by the ECJ in Case C-8/08, *T-Mobile Netherlands BV v Raad van beestuur van de Nederlandse Mededingingsautoriteit*, and therefore the ECJ in *Cartes Bancaires* implicitly criticised the ECJ's approach in *T-Mobile*.

Accordingly, the ECJ held that the General Court had erred in law in holding that the CB payment card scheme restricted competition by object and therefore the General Court's judgment should be set aside. It referred the case back to the General Court to assess whether the scheme constituted a restriction of competition by effect.

AG Wathelet's opinion in *Toshiba*

In the *Toshiba* case, the Commission had found that Toshiba had entered into a gentlemen's agreement between producers of power transformers which constituted a restriction of competition by object. Under the agreement, European producers would not enter the Japanese market and Japanese producers would not enter the European market. Toshiba unsuccessfully argued that there were insurmountable barriers to entry preventing producers from entering into each other's regions. After the General Court rejected Toshiba's appeal (Case T-519/09 *Toshiba v European Commissio*n), Toshiba appealed to the ECJ arguing, among other grounds, that the Commission and General Court erred in law in characterising the gentlemen's agreement as an object infringement.

In his opinion, AG Wathelet provided an extensive analysis of the nature of restrictions of competition by object. He acknowledged that, in *Allianz Hungaria*, the ECJ identified a number of additional factors which it considered needed to be taken into account when assessing the economic and legal context and which resulted in "blurring the evidential consequence of the distinction between restriction by object and restriction by effect". He therefore implored the ECJ to use the appeal as an opportunity to clarify its case law.

He set out the process to be followed when ascertaining whether an agreement constitutes a restriction of competition by object. As a first step, the contents of the agreement's provisions, the objectives which it seeks to achieve and the economic and legal context of which it forms part must be assessed to establish whether, by its very nature, it causes a sufficient degree of harm (this principle also applies to concerted practices).

If this results in a finding that the agreement restricts competition by object and the agreement forms part of a category expressly referred to in article 101(1) TFEU, then the analysis of the economic and legal context may be a secondary consideration (presumably only referring to article 101(1)(a) – (c) TFEU). If, however, the agreement does not fall within a category referred to in article 101(1) TFEU, or it has features that

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make the agreement atypical or complex, then a more thorough analysis of the economic and legal context will be required.

If the thorough analysis of the economic and legal context is required, the nature of the goods or services affected and also the real conditions of the functioning and structure of the relevant market may be analysed. Additionally, in exceptional circumstances, the additional features referred to in *Allianz Hungaria* may be assessed – namely, the consideration of alternative distribution channels and their respective importance, and the market power of the companies concerned. Although it is not essential to take into account the intentions of the parties, it is not forbidden to do so.

This formulation presented by AG Wathelet may represent a way the ECJ can bring the problematic elements of *Allianz Hungaria* within a coherent body of case law by directly addressing the challenges which it creates. The additional criteria proposed by the ECJ in *Allianz Hungaria* to assess whether an agreement is a restriction of competition by object are confined to the specific facts of that case and are not to be applied generally. AG Wathelet considered that the judgment of the ECJ in *Cartes Bancaires* supports the "specific and isolated nature of the judgment in *Allianz Hungaria*" in that it refers to the importance of looking at the nature of the goods and services affected, and the real conditions of the functioning and structure of the bank, although it does not refer to the additional criteria that are now considered to be specific to *Allianz Hungaria*. It may be viewed as an attempt by AG Wathelet to limit the scope of *Allianz Hungaria*, possibly to its own facts, while being deferential to the ECJ.

The *Dole* case

In *Dole*, the ECJ considered the circumstances in which an exchange of information between competitors could amount to an object restriction. The Commission alleged that Dole Foods, Chiquita, Del Monte and Weichert engaged in bilateral prepricing communications during which they discussed factors relevant to the setting of quotations prices ,or discussed or disclosed price trends, or gave indications of quotations prices for the forthcoming week in relation to the sale of bananas in northern Europe. The General Court dismissed Dole's appeal and Dole subsequently appealed to the ECJ.

In its appeal to the ECJ, Dole argued that the finding that the prepricing communications constituted an object infringement was the result of errors in the General Court's legal characterisation of the facts. In the first part of its findings in this area, the Court referred to passages exclusively from *Cartes Bancaires* as authority for the law on the requirements for demonstrating anticompetitive objects, and replicated the formulation of the tests in that case. Following this, the Court focused on the application of the concept of restrictions of competition by object to the exchange of information between competitors, and referred extensively and predominantly to the ECJ's judgment in *T-Mobile*. The Court in *Dole* reiterated the position taken in *T-Mobile* that:

- the exchange of information between competitors is liable to be incompatible with competition law if it reduces the degree of uncertainty about the operation of the market in question, with the result that competition between undertakings is restricted;
- the exchange of information that is capable of removing uncertainty between participants as regards the timing, extent and details of the changes in conduct to be adopted by undertakings concerned must be regarded as pursuing an anticompetitive object;
- a concerted practice may have an anticompetitive object even though there is no direct link between that practice and consumer prices; and
- it must be presumed that the undertaking taking part in the concerted action and remaining active on the market took account of the information exchange with their competitors in determining their conduct on that market.

However, although both *Cartes Bancaires* and *T-Mobile* are cited extensively, as stated above, the ECJ in *Cartes Bancaires* implicitly criticised the approach taken in *T-Mobile* to establishing anticompetitive objects, and the restrictive approach advocated in *Cartes Bancaires* has subsequently been favoured by the ECJ in *Dole* and *Maxima Latvija*. Consequently, although the general approach of the ECJ in *T-Mobile* towards finding object restrictions no longer applies, its findings on information exchange between competitors is still relevant.

The *Maxima Latvija* case

Maxima Latvija was concerned whether an agreement between a shopping centre and its anchor tenant giving the anchor tenant the right to oppose the shopping centre granting leases to particular parties constituted an object restriction. On 28 June 2013, the Latvian Regional Administrative Court upheld the Competition Council's decision that the agreements had anticompetitive objects as a result of the market power of the anchor tenant, Maxima Latvija, on the retail market. This was presumably influenced by the ECJ's decision in *Allianz Hungaria* three months earlier, which referred to the market share of the parties as relevant to the establishment of anticompetitive objects.

The case was subsequently appealed to the Latvian Supreme Court, which referred a number of questions to the ECJ. The ECJ stated that although a finding of anticompetitive objects was not precluded by the agreement being vertical, the agreement was "not among the agreements which it is accepted may be considered, by their very nature, to be harmful to the proper functioning of competition". The ECJ positively stated that the concept of anticompetitive objects "must be interpreted restrictively", whereas in *Cartes Bancaires* the ECJ criticised the General Court for not interpreting it restrictively. Further, it was not demonstrated that the agreements caused a sufficient degree of harm to constitute object infringements.

Conclusion

The opinion of AG Wathelet in *Toshiba* and the judgments of the ECJ in *Dole* and *Maxima Latvija* have clarified some of the issues raised by the ECJ judgment in *Cartes Bancaires*. The General Court's judgment in *Cartes Bancaires* (T-491/07 *Groupement des Cartes Bancaires v Commission*) will be eagerly awaited to see whether the Commission is able to demonstrate that the payment card scheme restricted competition by effect. Further, the General Court's judgment in the Lundbeck case (see T-460/13 *Ranbaxy Laboratories and Ranbaxy (UK) v Commission*) is also expected to elaborate on whether pay-for-delay settlements constitute restrictions of competition by object.