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Defining “by object” restrictions

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ABSTRACT

Cet article propose une définition des restrictions par objet qui s'inscrit parfaitement dans une approche globale fondée sur les effets économiques dans le cadre de l'article 101 TFUE. La classification en tant que «restriction par objet» est justifiée si, et dans la mesure où, un type particulier de restriction entraîne généralement des effets négatifs nets, ce qui est le cas s'il est (hautement) improbable qu'un tel type de restriction soit utilisé afin d'engendrer des gains d'efficacité. Il est improbable que des restrictions soient utilisées pour produire des gains d'efficacité si celles-ci ne peuvent pas engendrer de tels gains, ou si d'autres restrictions sont mieux à même de créer les gains d'efficacité concernés. Fonder la classification des restrictions par objet sur la faible probabilité de création de gains d'efficacité fournit un principe clair de délimitation pour la définition des restrictions par objet, qui permet de s'assurer que la qualification «par objet» s'applique uniquement aux restrictions qui sont généralement utilisées afin de restreindre la concurrence au détriment des consommateurs. Dès lors qu'un type particulier de restriction est qualifié de «restriction par objet», il ne devrait plus être nécessaire de procéder à une enquête sur les conditions du marché et sur les effets d'un accord individuel contenant une telle restriction. Autrement, cela remettrait en question la finalité d'une catégorie distincte pour les restrictions par objet.

This article develops a definition of by object restrictions which fits well in an overall effects-based approach under Article 101. Classification as a by object restriction is justified if and to the extent a particular type of restriction will generally result in net negative effects, which can be expected if such a type of restriction is (highly) unlikely to be used to create efficiencies. Restrictions are unlikely to be used to create efficiencies if they are not able to create efficiencies or because other restrictions are superior to create the concerned efficiencies. Basing the classification of by object restrictions on the low likelihood to create efficiencies provides a clear limiting principle for their definition, ensuring that the by object label is only applied to restrictions that are generally used to restrict competition to the detriment of consumers. Once a particular type of restriction is defined as by object, it should not be necessary to undertake an investigation into the market conditions and the effects of an individual agreement containing such a restriction. That would defy the object of having the category of by object restrictions.

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* Principal Expert Antitrust Policy, DG Competition, European Commission. This article was written during my stay as Senior Emile Noël Fellow at the Jean Monnet Center for International and Regional Economic Law & Justice, New York University. The opinions expressed in this article are strictly personal; they do not represent the views of the European Commission, DG Competition or any other institution, entity, person, etc. I have benefited from discussions with and feedback from Ekaterina Rouseva, Anna Vernet, Cyril Ritter, Rainer Becker, Svend Albaek, Eleanor Fox, Harry First, Pietro Faraguna and Dominik Steiger. Aine Ryall improved the English. All errors and omissions are the author's. Although I do not consider that there is any conflict of interest, it may be considered useful to mention that Ekaterina Rouseva, Anna Vernet and I were the main drafters of the De Minimis Notice and the “By Object Guidance.”

I. Introduction

1. In the summer of 2014, the Commission adopted a revised De Minimis Notice.¹ The De Minimis Notice provides a safe harbour for agreements between undertakings which the Commission considers to have non-appreciable effects on competition. This safe harbour applies on condition that the market shares of the undertakings concluding those agreements do not exceed the market share thresholds set out in that Notice and provided that the agreements do not have restriction of competition as their object.

2. In addition to the De Minimis Notice, the Commission adopted a Commission staff-working document providing an overview of what are considered to be “by object” restrictions.² This “By Object Guidance” aims to assist firms by listing “the restrictions of competition that are described as ‘by object’ or ‘hardcore’ in the various Commission regulations, guidelines and notices, supplemented with some particularly illustrative examples taken from the case law of the Court of Justice of the European Union and the Commission’s decisional practice.”³

1 Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), OJ C 291, 30.8.2014, pp. 1-4.

2 Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final, found at: <http://ec.europa.eu/competition/antitrust/legislation/deminimis.html>

3 By Object Guidance, section 1.

3. In the first section of the By Object Guidance, before listing the different by object restrictions for agreements between competitors and between non-competitors, the document provides some brief statements on the definition and concept of by object restrictions. The briefness and generality of these statements could give the impression that what is a by object restriction is clear cut and uncontroversial. However, in reality this is an area that is generating renewed discussion,⁴ not least because of a number of recent judgments.⁵

4. This article deals more extensively with the concept of by object restrictions, the consequences for an agreement if a restriction is classified as a by object restriction, the factors to be taken into account for finding a by object restriction and whether hardcore restrictions defined in Commission block exemption regulations are automatically also by object restrictions.

5. While through their case law the Courts of the European Union rule on the interpretation of Articles 101 and 102 TFEU, the case law itself is not static but is continuously changing and developing. This also means that, comparing case law over time, there are (partially) conflicting judgments, indicating new directions which EU law has taken or is in the process of taking.⁶ One of the consequences is that, possibly aided by some selective citation of case law, different descriptions and visions of EU law can be defended. The aim of this article is not to defend a particular view of EU competition law as the only view possible or the “correct” reading of the case law. The aim is to develop, building further on the reasoning of the Court of Justice (ECJ) and Advocate General Wahl in *Cartes Bancaires*, a consistent application of the by object category which fits well in an overall effects-based approach under Articles 101 and 102 TFEU.

4 See, for instance, J. Killick and J. Jourdan, *Cartes Bancaires: A Revolution Or A Reminder of Old Principles We Should Never Have Forgotten? Competition Policy International*, 19 December 2014; R. Nazzini and A. Nikpay, *Object Restrictions and Two-sided Markets in EU Competition Law after Cartes Bancaires*, *Competition Policy International*, Vol. 10, No 2, Autumn 2014; P. Harrison, *The Court of Justice’s Judgment in Allianz Hungária is Wrong and Needs Correcting*, *CPI Antitrust Chronicle*, May 2013; C. I. Nagy, *The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?* *World Competition*, Issue 4, Vol. 36, 2013; P. I. Colomo, *Market Failures, Transaction Costs and Article 101(1) TFEU Case Law*, *European Law Review*, Issue 5, 2012.

5 In particular the judgments of the Court of Justice in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline* [2009] ECR I-9291, Case C-8/08 *T-Mobile Netherlands BV* [2009] ECR I-4529, Case C-209/07 *Beef Industry Development Society (BIDS)* [2008] ECR I-8637, Case C-226/11 *Expedia* (judgment of 13 December 2012), Case C-32/11 *Allianz Hungária Biztosító Zrt and Others* (judgment of 14 May 2013), Case C-67/13 P *Groupement des cartes bancaires (CB)* (judgement of 11 September 2014) and Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe* (judgment of 19 March 2015).

6 As remarked by Advocate General Wahl in § 46 of his opinion delivered on 27 March 2014 in Case C-67/13 P *Groupement des cartes bancaires (CB)* on the difference between by object and by effect restrictions: “It is clear that the case-law of the Court and of the General Court, while pointing out the distinction between the two types of restrictions envisaged by Article 81(1) EC, could, to a certain extent, be a source of differing interpretations and even of confusion. Certain rulings seem to have made it difficult to draw the necessary distinction between the examination of the anti-competitive object and the analysis of the effects on competition of agreements between undertakings.”

II. The concept of by object restrictions

6. Article 101(1) TFEU prohibits agreements between undertakings 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. The distinction between by object restrictions and by effect restrictions arises, according to the By Object Guidance, “from the fact that certain forms of collusion between undertakings reveal such a sufficient degree of harm to competition that there is no need to examine their actual or potential effects. Such types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition. These are restrictions which in the light of the objectives pursued by the Union competition rules are so likely to have negative effects on competition, in particular on the price, quantity or quality of goods or services, that it is unnecessary to demonstrate any actual or likely anti-competitive effects on the market. This is due to the serious nature of the restriction and experience showing that such restrictions are likely to produce negative effects on the market and to jeopardise the objectives pursued by the EU Union competition rules.”⁷

7. The above text might give the impression that it is, in particular, its capacity to have negative effects that results in a certain type of restriction falling within the by object category. However, if that is true, why is a market sharing agreement between competitors considered a by object restriction while a specialisation agreement between competitors is considered a by effect restriction? Both can have the effect of carving up the market. Why is a collective boycott agreement dealt with as a by object restriction and a non-compete obligation (also called “exclusive purchase” or “exclusive dealing obligation”), preventing the buyer purchasing from competing suppliers, dealt with as a by effect restriction? Both can have the effect of excluding a competitor from the market. If the possibility of restricting competition and harming consumers is the decisive criterion for classifying a restriction as a by object restriction, every restriction of competition could and should be treated as a by object restriction, which is obviously and fortunately not the case.

8. The crux of the matter is that by object restrictions generally have net negative effects. In the words of the Court of Justice in *Cartes Bancaires*: “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.”⁸ And the reason why by object restrictions can be expected to have net negative effects is not so much, and certainly not only, because of their high potential to create negative effects

7 By Object Guidance, section 1, footnotes omitted.

8 See Case C-67/13 P – *Groupement des cartes bancaires (CB) v. European Commission*, § 51.

but, more importantly, because these are restrictions which are (highly) unlikely to be used to create efficiencies. They are unlikely to be used to create efficiencies because they are not able to create efficiencies and/or because other restrictions or conducts are superior to create these efficiencies.⁹

9. A good example is the previously mentioned pure market sharing and collective boycott agreements concluded between competitors; it is difficult to see, even in theory, what efficiencies could be obtained from carving up the market or excluding a competitor where the parties to the agreement do not integrate any assets or activities and no incentives are created or strengthened to invest or compete more fiercely. The situation is different in the case of a specialisation agreement between competitors and non-compete agreements between a supplier and its distributors. It is not that they cannot have negative effects; specialisation agreements can be used by important competitors to carve up the market or to limit competition between them and non-compete agreements can be used by a major supplier to exclude competitors from the market. However, they can also create efficiencies, by allowing parties to reach economies of scale through specialisation or by allowing suppliers to invest in the quality of their distributors.

10. This brings us to a second important aspect of by object restrictions. Because of the inability or low likelihood of creating efficiencies, by object restrictions are generally used by firms to obtain negative effects only, i.e. to limit competition and increase prices. That means that firms without market power generally have no interest in using by object restrictions. As is well known, only those with market power can restrict competition to increase their own profits at the expense of their customers, without competition punishing them for that. As a result, by object restrictions are generally used by those who have (individually or collectively) considerable market power.

11. Price cartel agreements are the obvious example: collectively agreeing to increase the price will practically never create efficiencies and will thus only be used to increase prices to the detriment of consumers. However, this can only be done effectively by companies who collectively control the market. A group of producers who collectively are too small to control the market will only form a cartel by mistake, for instance because

they wrongly assume that the market is narrower than it actually is, because any price rise they initiate will be met by customers going to the non-participating competitors, resulting in a serious loss of market share for the cartel participants.¹⁰

III. The consequences of classification as by object restriction

12. Once a particular type of restriction is classified as a by object restriction, there are a number of consequences. Firstly, it is presumed that the agreement containing a by object restriction will have negative effects. This presumption has legal consequences because it implies, without the competition authority having to show anti-competitive effects, that the agreement falls within Article 101(1) TFEU. This implies that the usual order of bringing forward evidence is inverted in the case of by object restrictions. Instead of the competition authority first having to show that the agreement is having actual or likely negative effects, it is now the parties to the agreement who are asked, under Article 101(3) TFEU, to show first that the agreement will have (or has had) actual or likely positive effects and that the restriction is/was indispensable to achieve these effects. Only after such positive effects have been shown, the authority or, if in court, the plaintiff is forced to also substantiate the actual or likely negative effects on competition resulting from the agreement containing the by object restriction. As a last step, it will then be necessary to weigh the negative and positive effects.

13. Secondly, it is considered unlikely that an agreement containing a by object restriction will have positive effects or that, where efficiencies are nonetheless resulting, these will be passed on to consumers or will be sufficient to outweigh the negative effects and/or that the by object restriction will be indispensable for creating these efficiencies. In other words, there is a presumption that the agreement will not fulfil the conditions of Article 101(3) TFEU. This, it can be argued, is not a legal presumption, because it has no direct legal consequences for the burden of proof. However, it has important practical consequences.

14. In the words of the By Object Guidance: “*The fact that an agreement contains a restriction by object, and thus falls under Article 101(1) of the Treaty, does not preclude the parties from demonstrating that the conditions set out*

9 AG Wahl seems to refer to this aspect in pt 55 of his opinion delivered on 27 March 2014 in Case C-67/13 P *Groupement des cartes bancaires (CB)*, when he says that the by object category should only be applied “in the case of (i) conduct entailing an inherent risk of a particularly serious harmful effect or (ii) conduct in respect of which it can be concluded that the unfavourable effects on competition outweigh the pro-competitive effects. To hold otherwise would effectively deny that some actions of economic operators may produce beneficial externalities from the point of view of competition.” This is not a new view. In the Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, pp. 1-46, pt 47, it is made clear that by object restrictions are unlikely to fulfil the conditions of Article 101(3) TFEU, a message that was already in the previous guidelines published in 2000. For a similar view, see P. I. Colomo, Market Failures, Transaction Costs and Article 101(1) TFEU Case Law, *European Law Review*, Issue 5, 2012, who demonstrates that the case law classifies restrictions as restriction by effect in view of their potential to create efficiencies.

10 There are good reasons to expect that firms will, in general, be less inclined than final consumers to make sub-optimal choices and have behavioural biases. Firms usually operate on a larger scale and can thus make use of economies of scale to process information. In addition, it may be expected that markets discipline firms that make sub-optimal choices, by reducing their profits and market shares. See L. Peepkorn and V. Verouden, The Economics of Competition, chapter 1 and in particular section B.4 thereof, in *The EU Law of Competition*, Faull & Nikpay (ed.), third edition, 2014.

in Article 101(3) of the Treaty are satisfied. However, practice shows that restrictions by object are unlikely to fulfil the four conditions set out in Article 101(3).¹¹ And more explicitly in the Vertical Restraints Guidelines: “It is also presumed that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply.”¹² As made clear in particular by the By Object Guidance, this does not mean that Article 101(3) TFEU would not apply in full to by object restrictions. It simply means that well defined by object restrictions, being unable or having a low likelihood of creating efficiencies, will, in practice, have limited scope to fulfil the conditions for exemption.

15. The most important practical consequences are that agreements containing a by object restriction are almost always null and void and, if found, are, as a rule, prohibited with a high likelihood that the authority will impose a fine. This will normally have a strong deterrent effect on firms’ use of such restrictions. In addition, as already referred to in the introduction to this article, an agreement containing a by object restriction cannot benefit from the safe harbour provided by the De Minimis Notice. Plus, in general, agreements containing a by object restriction cannot benefit from any block exemption regulation, as these regulations exclude so-called “hardcore restrictions.” As explained later in this article (see section V.), the lists of hardcore restrictions found in the various block exemption regulations reflect what, at the time of adoption of these regulations, were considered to be the types of by object restrictions relevant for the category of agreements covered by the regulation in question.¹³

16. A final consequence is that the combination of the deterrent effect and the inversion of the order of bringing forward evidence usually allows the authority to reduce its enforcement costs and free-up resources for the investigation of other cases, for instance concerning by effect restrictions. If, as expected in a case involving a by object restriction, the parties are not able to mount a credible efficiency defence, the authority can prohibit the agreement without having to delve into the assessment of the expected negative effects and will also not be required to define the relevant market.¹⁴

¹¹ By Object Guidance, section 1, footnotes omitted.

¹² Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, pp. 1-46, pt 47. The block exemption referred to in the quote is, of course, Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, pp. 1-7.

¹³ See, for instance, pts 23, 47 and 96 from the Guidelines on Vertical Restraints (OJ C 130, 19.5.2010, pp. 1-46), which make clear that the Commission considers that the category of by object restrictions encompasses all the hardcore restrictions listed in Article 4 of Commission Regulation (EU) No 330/2010. See also A. Gurin and L. Peeperkorn, Vertical Agreements, chapter 9 and in particular pts 9.88-9.92 thereof, in *The EU Law of Competition*, Faull & Nikpay, third edition, 2014.

¹⁴ While quite detailed examinations will be required in order to determine the possible fine, for instance concerning the turnover achieved during the period of infringement, these are not necessarily the same as the examinations necessary for the assessment of the anti-competitive effects. See also the reference to procedural economy in § 35 of AG Wahl’s opinion in *Cartes Bancaires*.

IV. How to determine whether a restriction is a by object restriction?

17. The concept of a by object restriction and the consequences of being classified as a by object restriction are obviously linked. The application of the presumptions described in the previous section to a particular type of restriction is justified if—and to the extent that—it can be credibly argued that the type of restriction in question will generally result in having net negative effects. This raises the question of how to determine whether a restriction is a by object restriction.

18. There are effectively two levels at which this question can be answered and needs to be answered. The first sub-question is how to determine whether a particular type of restriction will generally have net negative effects and should therefore fall within the category of by object restrictions. The second sub-question is how to determine in an individual case whether a restraint in a particular agreement is an example of such a type of restriction and falls within the category of by object restrictions. It is only at the level of the individual agreement that all the consequences of being classified as a by object restriction, such as receiving a fine, occur.

19. The case law does not distinguish clearly between these two levels of analysis. However, the distinction underlies the reasoning of the ECJ in *Cartes Bancaires*. In paragraphs 49-52, the ECJ first discusses 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,*” i.e. that they may be treated as by object restrictions. And that these “*types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.*” Subsequently, the ECJ, in paragraphs 53-54, describes the factors that must be examined to determine whether an individual agreement may be considered a by object restriction: the content of its provisions, its objectives, the economic and legal context of which it forms part and the parties’ intention.

20. The By Object Guidance follows implicitly the same two step approach. It first explains that “*certain forms of collusion between undertakings reveal such a sufficient degree of harm to competition that there is no need to examine their actual or potential effects. Such types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.*” And, subsequently, it focuses on the level of the individual agreement: “*In order to determine with certainty whether an agreement reveals a sufficient degree of harm to competition that it may be considered a restriction of competition by object,*’ regard

must, according to the case law of the Court of Justice of the European Union, be had to a number of factors, such as the content of its provisions, its objectives and the economic and legal context of which it forms a part. In addition, although the parties' intention is not a necessary factor in determining whether an agreement restricts competition by object,' the Commission may nevertheless take this aspect into account in its analysis."¹⁵

21. The remainder of this section addresses the two levels at which the question—how to determine whether a restriction is a by object restriction?—needs to be answered. There are some thorny issues here, but again the judgment in *Cartes Bancaires* and the opinion of AG Wahl contain sufficient indications to provide a consistent answer for both levels of analysis.

1. How to determine that a particular type of restriction is by object?

22. Classification as a by object restriction is justified if, and to the extent that, it can be credibly argued that the type of restriction will generally result in net negative effects. It would thus be prudent to base the classification of a particular type of restriction as a by object restriction on sufficient experience or other empirical evidence that the restriction in question will normally have an overall negative effect on competition and consumers. As already indicated in section II above, this approach is followed by the Court of Justice in *Cartes Bancaires*. Describing the case law, according to which certain types of coordination are considered by object restrictions, it is stated that; “[e]xperience 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.”¹⁶ AG Wahl explains along the same lines: “In my view, it is only when experience based on economic analysis shows that a restriction is constantly prohibited that it seems reasonable to penalise it directly for the sake of procedural economy. (...) Only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object.”¹⁷

23. As indicated by AG Wahl, economic analysis can be necessary to evaluate the experience gained. It is important to understand that economic analysis in this context means economic analysis of actual cases and the real

market circumstances in which restrictions are used. In theory, practically every restriction can be argued to potentially have both negative and positive effects, depending on the model conditions that are assumed. However, classification as a by object restriction should not be driven by what is theoretically conceivable, but by what effects (most likely) result in most cases.¹⁸

24. In the case of a truly new type of restriction, it thus seems prudent to first acquire sufficient experience or other empirical evidence before classifying the new restriction. This is what is currently ongoing in a number of cases concerning “retail most favoured customer” clauses (retail MFC clause), which are investigated by various (national) competition authorities.¹⁹ This new type of restriction, which seems to be used mostly by online distributors and platforms, differs from the well-known (wholesale) most favoured customer clause. The latter is a clause where a customer, usually a distributor, requires its supplier to undertake that it will not offer a lower (wholesale) price or better sales conditions to other customers. The retail MFC clause, also sometimes referred to as “retail price most favoured nation” clause or “price parity” clause, is a clause where the customer, usually an online distributor/platform, requires its supplier to guarantee that the supplier’s product is not offered by any other distributor/platform at a lower (retail) price than the price found on the website of the online distributor/platform in question and, in case the product is found at a lower price elsewhere, requiring the supplier to compensate the distributor/platform so as to allow it to also avail of the lower price. This new type of restriction can have a number of serious negative effects, in particular leading to some form of resale price maintenance (RPM), preventing price competition between incumbent platforms and making it more difficult for new platforms to enter the market.²⁰ However, because experience with this new restriction is rather limited, authorities conducting investigations are currently leaving open the question of whether this is a by object or by effect restriction and are assessing the restriction as a by effect restriction.

25. However, it cannot be excluded that in certain cases it is clear enough, based only on investigating in theory what the effects could be, that a new type of restriction can appropriately be classified as a by object restriction. An example could be the restriction not allowing customers to test competitors’ products. While there are recognised positive reasons for a supplier to not always

15 By Object Guidance, section 1, footnotes omitted.

16 See Case C-67/13 P – *Groupement des cartes bancaires (CB) v. European Commission*, § 51. See also R. Wesseling and M. van der Woude, *The Lawfulness and Acceptability of Enforcement of European Cartel Law*, *World Competition* 35, No 4 (2012) pp. 573-598. They suggest that the category of by object/hardcore restrictions should be limited to “those practices that, according to experience, will always or almost always result in the restriction of competition” and criticise the *T-Mobile* judgment for defining by object restrictions based on the capability of resulting in the restriction of competition. In the same vein, it seems that *Cartes Bancaires* can be read as the ECJ correcting its previous judgment in *T-Mobile*.

17 §§ 55-56 of AG Wahl’s opinion in *Cartes Bancaires*.

18 For instance, resale price maintenance (RPM) can not only have a number of negative effects, but may also, at least in theory, have certain positive effects. However, the Commission decided in 2010, based on the experience with many RPM cases of, in particular, the national competition authorities, to maintain a cautious approach to RPM and to keep it in the hardcore list of Commission Regulation (EU) No 330/2010. See L. Peeperkorn, *Revised EU Competition Rules for Supply and Distribution Agreements*, *Finnish Competition Law Yearbook* 2010, in particular pp. 210-214, downloadable from: http://ec.europa.eu/competition/speeches/text/sp2011_10_en.pdf.

19 See the Commission press release of 15 December 2014 on market tests by various national competition authorities in investigations in the online hotel booking sector, at: http://europa.eu/rapid/press-release_IP-14-2661_en.htm?locale=en.

20 See, for instance A. Fletcher and M. Hviid, *Retail Price MFNs: Are they RPM ‘at its worst’?* *CCP Working Paper* 14-5, Draft of 7 April 2014.

allow customers to purchase products from competing suppliers, it is not clear what might amount to a legitimate concern or efficiency to not even allow its customers to investigate the potential offers of rival suppliers and to test their products. The only likely effect seems to be a foreclosure effect.²¹

2. How to determine that a restriction in a particular agreement is by object?

26. In *Cartes Bancaires* the ECJ restates which factors must be taken into account when determining whether an individual agreement contains a by object restriction: “(...) regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. (...) In addition, although the parties’ intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account.”²²

27. The judgment in *Cartes Bancaires* can be read as the ECJ correcting its previous judgment in *Allianz Hungária*. In the latter judgment, the ECJ blurred the distinction between by object and by effect restrictions by stretching to the extreme what would need to be looked at when having regard to the economic context. The judgment said that, in particular, the structure of the market in question, the existence of alternative distribution channels available to the otherwise foreclosed competitors and the market power of the companies concerned should be taken into account.²³

28. As stated by AG Wahl when analysing *Allianz Hungária*, “it is difficult to distinguish how the examination of the context advocated by the Court, which consists in evaluating the risk of competition on the market in question being eliminated or seriously weakened, having regard, in particular, to ‘the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned,’ differs from the examination of possible anti-competitive effects.”²⁴ And also: “In my view, consideration of the economic and legal context in order to identify an anti-competitive object must, at the risk of introducing a shift that is detrimental to a proper reading

of Article 81(1) EC (...) be clearly distinguished from the demonstration of anti-competitive effects under that provision.”²⁵

29. The requirement to have regard to the economic and legal context of the agreement could easily be misread as requiring an assessment, in each individual case, of the market conditions such as the respective market positions and the market effects. However, it would obviously be wrong if, in order to identify a by object restriction in a certain case, it was necessary to undertake an investigation into market conditions and the effects of that particular agreement. That would defy the purpose of having the presumptions, or, otherwise formulated, defy the object of having the category of by object restrictions. There would also no longer be a reduction in enforcement costs because it would require an assessment as a by effect restriction in order to conclude that the restriction is a by object restriction.

30. When referring to the economic and legal context, the ECJ in *Cartes Bancaires* still mentions that “[w]hen 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.”²⁶ However, the ECJ links this to general characteristics relevant for the type of product and markets under consideration. In the *Cartes Bancaires* case, this concerned the two-sided nature of bank card systems. In order to make such a system work, banks need to have both customers who want to pay with bank cards and traders who want to be paid with bank cards. The development of the so-called issuing and acquisition activities and the issuing and acquisition markets are interdependent and this fact of interdependency, which is relevant for bank card systems in general and not just for the system under investigation, should be taken into account as part of the economic and legal context, according to the ECJ.²⁷

31. To interpret “the conditions of the functioning and structure of the market or markets in question” as implying that the individual circumstances of a market, such as the market shares of the parties involved, or the level of concentration on that market, should play a role in the assessment of the economic and legal context, would be like reverting to the unfortunate reasoning in *Allianz Hungária*. In an indirect way the ECJ seems to acknowledge this in *Cartes Bancaires*, by judging that the GC made a mistake in basing its judgment as regards the by object character of the measures at issue on the individual circumstances of the case: “(...) the General Court

21 This example, based on the *Tomra* case (Case COMP/E-1/38.113 – *Prokent-Tomra* of 29.3.2006, found at: <http://ec.europa.eu/competition/antitrust/cases/index.html>), is also mentioned as a by object conduct in pt 22 of the Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45/7 of 24.2.2009 (the Article 102 Guidance).

22 §§ 53 and 54 of Case C-67/13 P – *Groupement des cartes bancaires (CB) v. European Commission*.

23 Case C-32/11 *Allianz Hungária Biztosító Zrt and Others* (judgement of 14 May 2013), § 48.

24 See § 51 of his opinion delivered on 27 March 2014 in Case C-67/13 P *Groupement des cartes bancaires (CB)*.

25 See § 44 of his opinion delivered on 27 March 2014 in Case C-67/13 P *Groupement des cartes bancaires (CB)*. See also § 40, in which the AG states that “the more standardised assessment resulting from recourse to the concept of restriction by object requires a detailed, individual examination of the agreement in question which must, however, be clearly distinguished from the examination of the actual or potential effects of the conduct of the undertakings concerned.”

26 §§ 53 and 78 of Case C-67/13 P – *Groupement des cartes bancaires (CB) v. European Commission*.

27 §§ 74-79 of Case C-67/13 P – *Groupement des cartes bancaires (CB) v. European Commission*.

in fact assessed the potential effects of those measures, analysing the difficulties for the banks of developing acquisition activity on the basis of market data, statements made by certain banks and documents seized during the inspections, and thereby indicating itself that the measures at issue cannot be considered 'by their very nature' harmful to the proper functioning of normal competition."²⁸

32. The above described narrow interpretation of what should be considered under the economic and legal context is also consistent with the ECJ's ruling in *Cartes Bancaires* that the concept of by object restrictions should be interpreted restrictively.²⁹ In the words of AG Wahl: "Only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object (...) An uncontrolled extension of conduct covered by restrictions by object is dangerous having regard to the principles which must govern evidence and the burden of proof in relation to anti-competitive conduct."³⁰ In other words, restriction by effect is the rule, and restriction by object is the exception.³¹

33. This brings us to examine what constitutes a restrictive approach to the factors relevant for determining whether an individual agreement contains a by object restriction.

34. It is clear why, in order to determine whether an agreement contains a by object restriction, regard must be had to the content of its provisions and to its objectives. The content and objectives of the agreement help to assess whether a restriction falls within a certain type of restriction that has been classified as a by object restriction. While the wording of every agreement and its clauses may be different, an investigation of its content and objectives will usually make clear whether the agreement in question, for instance, is a price fixing agreement.

35. There is also a logical explanation why the Courts of the European Union have found it justified that the intention of the parties can be taken into account when determining whether an agreement restricts competition by object, even though the parties' intention is not a necessary factor in the analysis. Because by object restrictions are, in general, not used to create efficiencies, it can be expected, to the extent that companies behave rationally, that the intention will be to harm competition and therewith increase profits at the expense of consumers. In that context, an investigation into the intentions of the parties can help to classify a particular type of restriction

²⁸ § 82 of Case C-67/13 P – *Groupement des cartes bancaires (CB) v. European Commission*.

²⁹ § 58 of Case C-67/13 P – *Groupement des cartes bancaires (CB) v. European Commission*. See also §§ 115-116 of Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe* (judgment of 19 March 2015).

³⁰ See §§ 56 and 57 of his opinion delivered on 27 March 2014 in Case C-67/13 P *Groupement des cartes bancaires (CB)*.

³¹ On the need for a similar restrictive approach to by object conduct under Article 102 TFEU, see L. Peepkorn, Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates, *Concurrences* n° 1-2015, in particular section VII.3-4 thereof.

as a by object restriction and can, in an individual case, help to determine whether a particular agreement, where the content and wording is ambiguous, is a by object restriction.

36. While it is clear why, in order to determine whether a restriction is a by object restriction, regard must be had to the content of the provision and its objectives and may be had to the parties' intentions, it is less clear why regard must be had to the economic and legal context of which it forms part. However, various good explanations can be offered that fit a restrictive approach to by object restrictions.

37. It may be necessary to look at the economic and legal context to establish whether the agreement concerns an agreement between competitors or between non-competitors. As indicated in the By Object Guidance, "[t]he types of restrictions that are considered to constitute restrictions 'by object' differ depending on whether the agreements are entered into between actual or potential competitors or between non-competitors (for example between a supplier and a distributor). In the case of agreements between competitors (horizontal agreements), restrictions of competition by object include, in particular, price fixing, output limitation and sharing of markets and customers. As regards agreements between non-competitors (vertical agreements), the category of restrictions by object includes, in particular, fixing (minimum) resale prices and restrictions which limit sales into particular territories or to particular customer groups."³²

38. To establish whether parties to an agreement are competitors, it will be necessary to investigate in which markets the parties to the agreement are currently active or could be expected to enter. An example is the General Court's analysis of whether Ruhrgas and GDF were potential competitors at the time of their (market sharing) agreement in *E.ON Ruhrgas*.³³ Another example would be an agreement involving recommended sales prices. The assessment of such an agreement depends on whether the agreement is between competitors or between non-competitors. While it may often be acceptable between non-competitors to discuss a recommended (re)sale price, it is entirely different if competitors start recommending sales prices to each other; the latter would be a by object price fixing agreement.

39. Investigation of the economic and legal context may also be necessary to establish whether or not, for instance, a price agreement between competitors is a naked price cartel and thus a by object restriction, or is part of a wider cooperation agreement, possibly even a joint venture, in which context a price restriction is no longer a by object restriction. Under a restrictive approach, price agreements between competitors are dealt with as by object

³² By Object Guidance, section 1, footnotes omitted.

³³ Case T-360/09 – *E.ON Ruhrgas AG and E.ON AG v. Commission*. See, on this point, R. Nazzini and A. Nikpay, Object Restrictions and Two-sided Markets in EU Competition Law after *Cartes Bancaires*, *Competition Policy International*, Vol. 10, No 2, Autumn 2014, p. 160.

cartel restrictions where there is no meaningful integration of assets and/or activities between the parties to the agreement, i.e. where it concerns naked price agreements.

40. The *Cartes Bancaires* case is a good example. The question the ECJ addressed in *Cartes Bancaires* was not whether there was an agreement between competitors, which was obviously the case, but whether a measure known as “MERFA” was a naked cartel agreement or a functional part of a wider agreement to set up and maintain a bank card system. While the Commission applied an elaborate effects analysis to come to its overall negative assessment, it also classified the MERFA as a by object restriction. The ECJ overruled the General Court and the Commission on the latter point. It considered that the economic and legal context of the agreement made it clear that it did not concern a naked cartel agreement, taking into account the meaningful integration of activities and the two-sided nature of bank card systems, and that the measure could therefore not be dealt with as a by object restriction. It is now for the General Court to assess the MERFA as a restriction by effect and to judge whether the Commission’s decision demonstrates convincingly that the agreement had likely and/or actual negative effects that were not redeemed by efficiencies.

41. The test that comes out of this judgment is that, when a price or market sharing or collective boycott element is found in a wider agreement, it can only be dealt with as a by object restriction if the competition authority can credibly argue that that element cannot be expected to be a functional part of that type of wider agreement. It is not sufficient to show that in the case at hand the intention was to fix prices, etc. It needs to be shown that in general that element cannot be expected to be a functional part of such wider agreement and that its insertion in a wider agreement is thus a priori artificial and possibly intended to cover up a cartel agreement.

V. Is a hardcore restriction automatically a by object restriction?

42. The distinction between the two levels of analysis—concerning type of by object restriction and finding a by object restriction in an individual agreement—is also important in the context of assessing hardcore restrictions.

43. In section III it was stated that the lists of hardcore restrictions found in the various block exemption regulations reflect what, at the time of adoption of these regulations, were considered to be the types of by object restrictions relevant for the category of agreements covered by

the regulation in question.³⁴ For instance, RPM is defined in Article 4(a) of BER 330/2010 as a hardcore restriction, which reflects the case law that also has held that RPM is a typical by object restriction in case of vertical agreements.

44. The next question is the relationship between by object and hardcore restrictions at the level of the individual agreement. If it is established, based on an analysis of its provisions and its objectives, that a particular agreement contains a hardcore restriction, that agreement automatically cannot benefit from the safe harbour created by the block exemption regulation in question. In view of the analysis of its provisions and its objectives, this is normally also sufficient to conclude that the agreement contains a by object restriction.

45. However, there may be exceptional circumstances which mean that there is an objective necessity for a particular hardcore restriction. In case of such an objective necessity, the hardcore restriction would fall outside Article 101(1) TFEU and would therefore not be a restriction of competition and therefore also not a by object restriction. As the objective necessity test does not affect the hardcore classification, if a restriction is objectively justified, the restriction would still be a hardcore restriction and the agreement would technically not be able to benefit from the relevant block exemption regulation, but because the restriction would fall outside Article 101(1) TFEU, that has no practical relevance.

46. This test of objective necessity is referred to in the By Object Guidance: “*In exceptional cases, a restriction by object’ may also be compatible with Article 101 of the Treaty not because it benefits from the exception provided for in Article 101(3) of the Treaty, but because it is objectively necessary for the existence of an agreement of a particular type or nature or for the protection of a legitimate goal, such as health and safety, and therefore falls outside the scope of Article 101(1) of the Treaty.*”³⁵ In a footnote in the quoted text, reference is made to the Article 101(3) Guidelines³⁶ and the Vertical Restraints Guidelines.³⁷

47. In the Article 101(3) Guidelines, the Commission explains that: “*(...) certain restraints may in certain cases not be caught by Article 81(1) [now 101(1)] when the restraint is objectively necessary for the existence of an agreement of that type or that nature. Such exclusion of the application of Article 81(1) can only be made on the basis of objective factors external to the parties themselves*

34 Until now, in case a hardcore restriction was litigated, the Courts of the European Union have confirmed that the hardcore restriction in question is also a by object restriction. See, for instance, the judgment of the Court of Justice of 13 October 2011 in Case C-439/09 *Pierre Fabre Dermo-Cosmétique*, which confirms that a ban on using the Internet, a hardcore restriction under Commission Regulation (EU) No 330/2010, was also a by object restriction in the case concerned.

35 By Object Guidance, section 1, footnotes omitted.

36 Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 24.4.2004, p. 97, in particular pt 18.

37 Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, pp. 1–46, in particular pts 60–62.

and not the subjective views and characteristics of the parties. The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether given the nature of the agreement and the characteristics of the market a less restrictive agreement would not have been concluded by undertakings in a similar setting.”³⁸

48. The Vertical Restraints Guidelines provide the following examples, confirming that such objective necessity only applies in exceptional circumstances, not linked to the characteristics of the firms involved in the agreement or their position on the market, but linked to general characteristics of the economic and legal context: “*Hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature and therefore fall outside Article 101(1). For example, a hardcore restriction may be objectively necessary to ensure that a public ban on selling dangerous substances to certain customers for reasons of safety or health is respected. (...) In the case of genuine testing of a new product in a limited territory or with a limited customer group and in the case of a staggered introduction of a new product, the distributors appointed to sell the new product on the test market or to participate in the first round(s) of the staggered introduction may be restricted in their active selling outside the test market or the market(s) where the product is first introduced without falling within the scope of Article 101(1) for the period necessary for the testing or introduction of the product.*”³⁹

49. As made clear in the quote above from the By Object Guidance, this test of objective necessity should not be confused with an Article 101(3) TFEU exemption. The test under Article 101(3) TFEU is based on the individual effects of a case, taking into account the individual circumstances and positions of the parties on the market concerned, while the objective necessity test only asks whether there are generally applicable reasons, for instance linked to the nature of the product, which mean that a restriction which is normally considered to be a by object restriction should be allowed for all firms in that line of business.⁴⁰ If a by object/hardcore restriction is exempt under Article 101(3) TFEU, it is still a by object/hardcore restriction and the test under Article 101(3) TFEU is thus not investigated further in this article. On the contrary, as explained earlier, if a hardcore restriction is objectively justified, it is no longer a by object restriction.

50. The objective necessity test thus provides a last reason why it may be necessary to examine the economic and legal context. When assessing an individual agreement

³⁸ Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 24.4.2004, pt 18, footnotes omitted.

³⁹ Guidelines on Vertical Restraints, pts 60 and 62, footnotes omitted.

⁴⁰ For this distinction, see the Guidelines on the application of Article 81(3) of the Treaty, pts 18-20 and 29-30, and Guidelines on Vertical Restraints, pt 60. See also, for the same distinction under Article 102 TFEU, the Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45/7 of 24.2.2009, pts 28-30.

which contains a hardcore restriction (and thus apparently a by object restriction), it may be necessary to look into the economic and legal context to test whether there is an objective necessity for that restriction. While the consequences in case an objective necessity is established are important, as it would bring the restriction outside Article 101(1) where it is no longer a restriction of competition and therefore also not a by object restriction, in practice this scenario is not very important because a hardcore restriction is rarely found to be objectively necessary. For instance, arguments about public health and safety will generally not be sufficient because, as made clear in the Article 102 Guidance, it is not the task of (dominant) firms to protect and set standards for public health and safety as this is normally the task of public authorities.⁴¹

51. It is thus fair to conclude that, while a hardcore restriction is not automatically a by object restriction, for practical purposes hardcore restrictions can be equated to by object restrictions. That is why the By Object Guidance uses the word “generally” in the following text: “*Types of practices that generally constitute restrictions of competition by object’ can be found in the Commission’s guidelines, notices and block exemption regulations. These refer to restrictions by object or contain lists of so-called ‘hardcore’ restrictions that describe certain types of restrictions which do not benefit from a block exemption on the basis of the nature of those restrictions and the fact that those restrictions are likely to produce negative effects on the market. Those so called ‘hardcore’ restrictions are generally restrictions by object’ when assessed in an individual case.*”⁴²

VI. Some further implications

52. From the previous two sections, a number of implications follow for classifying a restriction in a particular case. Taking them into account will help to improve enforcement.

53. While by object restrictions are expected to generally lead to net negative effects, it would be wrong to conclude that a restriction in a particular agreement should be classified as a by object restriction because the assessment of the agreement in question has shown it leads to net negative effects. For instance, a non-compete obligation does not (and should not) suddenly become a by object restriction if, in a particular case, it leads to anticompetitive foreclosure. Doing so would mean that one would conclude on the existence of a by object restriction in an

⁴¹ Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45/7 of 24.2.2009, pts 29. See also Case T-30/89 *Hilti v. Commission* [1991] ECR II-1439, §§ 118-119; Case T-83/91 *Tetra Pak International v. Commission (Tetra Pak II)* [1994] ECR II-755, §§ 83 and 84 and 138.

⁴² By Object Guidance, section 1.

agreement (only) after having done an effects analysis of the agreement in question and would take away any meaningful distinction between by object and by effect restrictions.

54. Whereas finding a negative effect on competition in an individual case is thus no proof of a by object restriction, evidence or indications that there are no likely or actual negative effects may lead an authority to reconsider the classification of the restriction as a by object restriction. Such evidence or indications seem in contradiction with the expectation that by object restrictions generally lead to net negative effects. There may be no reason for reclassification in case it concerns a clear cut by object restriction, for instance a naked price cartel. The cartel may simply have failed to create negative effects because the cartel turned out to be less stable than the cartellists expected or may not yet have produced its negative effects. However, in case the classification was already open to discussion, for instance because the restriction is part of a wider agreement, clear evidence of a lack of negative effects may indicate that the classification was in error.

55. For similar reasons, finding that a particular agreement is not leading to any efficiencies is no proof of a by object restriction. However, evidence or indications that there are significant efficiencies created through a particular agreement seem to contradict that by object restrictions are highly unlikely to be used to create efficiencies. Evidence of substantial efficiencies may therefore lead an authority to reconsider the classification of the agreement in question as a by object restriction. There may be no reason for reclassification in case the positive effects concern an exception to a long line of similar cases where the net effects were negative. However, in case the classification was already open to discussion, evidence of significant efficiencies may indicate that the classification was in error.

56. Because by object restrictions are in general not used to create efficiencies, it can be expected, to the extent that companies behave rationally, that the intention will in general be to harm competition if such restrictions are used. As explained in section IV, an investigation into the intentions of the parties can thus help to classify a particular type of restriction as a by object restriction. However, it would obviously be wrong to conclude that a restriction is a by object restriction only because the parties to that agreement had the intention to distort competition.⁴³ For instance, a non-compete obligation does not (and should not) suddenly become a by object restriction if, in a particular case, documents are found showing that the supplier only implemented the restriction in order to obtain an anticompetitive foreclosure effect.

57. On the other hand, the fact that an authority has not been able to show that the parties to an agreement had the intention to distort competition, should not be seen as evidence that the restriction is not a by object restriction. The parties may simply have cleverly concealed their true intentions.

58. Nonetheless, evidence or indications that the parties definitely did not have the intention to restrict competition may indicate that the classification was in error. Such evidence may warrant a second look at the classification of that agreement as a by object restriction if the classification of the agreement in question was already open to discussion from the beginning because the restriction did not fit clearly in one of the known types of by object restrictions.

VII. Conclusion

59. The By Object Guidance lists the different by object restrictions as currently found in the various Commission regulations, guidelines and notices. What it does not do, or does only very briefly, is explain what determines that a restriction is a by object restriction and not a by effect restriction.

60. Building further on the reasoning of the Court of Justice and AG Wahl in *Cartes Bancaires*, this article develops a consistent application of the by object category which fits well in an overall effects-based approach under Articles 101 and 102 TFEU.

61. The classification as a by object restriction is justified if and to the extent that it can be credibly argued that a particular type of restriction will generally result in net negative effects. Restrictions can be expected to generally have net negative effects if they are (highly) unlikely to be used to create efficiencies. Restrictions are unlikely to be used to create efficiencies if they are not able to create efficiencies and/or because other restrictions or conducts are superior to create the concerned efficiencies. As a result of the absence of efficiencies, such restrictions will as a rule only be used by those who have (individually or collectively) considerable market power, i.e. those who are able to restrict competition and harm consumers.

62. Effectively basing the classification of by object restrictions on the low likelihood that a particular type of restriction is used to create efficiencies has important advantages.

63. Firstly, even if in an exceptional case the agreement in question will not have negative effects, prohibiting it can be expected not to destroy any efficiencies. Even if a cartel is formed, by mistake, by a group of producers who collectively are too small to control the market—and who will thus fail to produce an appreciable negative effect on the market—not allowing such a cartel does not risk harming consumers.

⁴³ See § 88 of Case C-67/13 P – *Groupement des cartes bancaires (CB) v. European Commission*.

64. Secondly, such classification ensures that the restriction will generally lead to net negative effects, thus justifying the use of the presumptions and the reversal in the burden of proof and other consequences of being classified as a by object restriction discussed in section III.

65. Thirdly, it provides a clear limiting principle for the determination of by object restrictions and is therefore better at ensuring the required restrictive approach to defining by object restrictions than vaguer concepts such as “being injurious by their very nature,” “having by their very nature the potential to restrict competition” and “revealing a sufficient degree of harm to competition.”

66. Classifying restrictions as a by object restriction requires two levels of analysis. The first level concerns whether a particular type of restriction will generally have net negative effects and should therefore fall within the category of by object restrictions. The second level concerns how to determine in an individual case whether a particular restraint falls within such a type of by object restriction and is to be dealt with as a by object restriction.

67. That a particular type of restriction is classified as a by object restriction is usually based on sufficient experience that the restriction in question will normally have an overall negative effect on competition and consumers. The classification is the outcome of the experience gained in a number of cases. In the case of a truly new type of restriction, it thus seems prudent to first acquire sufficient experience before classifying the new restriction. However, it cannot be excluded that in rare cases

it is clear enough, based only on investigating in theory what the effects could be, that a new type of restriction can appropriately be classified as a by object restriction.

68. At the second level, determining whether in an individual case a particular restraint is a by object restriction, regard must be had to the content of the provisions and objectives of the agreement and its economic and legal context.

69. The requirement to have regard to the economic and legal context of the agreement has sometimes been misread as requiring an assessment of the market conditions prevailing in that individual case. However, in *Cartes Bancaires* the ECJ, correcting its previous judgment in *Allianz Hungária*, essentially makes it clear that it would be wrong if, to identify a by object restriction in a particular case, it was necessary to undertake an investigation into market conditions and the effects of that particular agreement. That would indeed defy the object of having the category of by object restrictions.

70. That brings the analysis of the economic and legal context back to its useful role of determining whether the agreement concerns an agreement between competitors or between non-competitors. Investigation of the economic and legal context may also be necessary to establish whether a restriction is a functional part of a wider agreement that may be efficiency enhancing or is artificially inserted in a wider agreement to cover up a cartel agreement. Looking into the economic and legal context may finally be necessary to test whether there is an objective necessity for a by object/hardcore restriction. ■

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