
*Object Restrictions
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Competition Law
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On September 11, 2014, the Court of Justice overturned the judgment of the General Court upholding the European Commission's decision in *Groupement des Cartes Bancaires*. This paper contends that the Court of Justice's judgment is significant in two respects: First, it attempts to clarify apparent ambiguities and discrepancies in the case law on object restrictions and provides a more structured framework than previously existed for determining whether an agreement is restrictive in this way. However, the paper argues that in doing so the judgment does not fundamentally alter the law in this area as some have argued. Second, the paper contends that the judgment makes important findings as regards two-sided markets, clearly establishing the principle that the interaction between them must be taken into account regardless of whether the restriction under review applies only to one side of the market.

I. INTRODUCTION

On September 11, 2014, the Court of Justice overturned the judgment of the General Court upholding the European Commission's ("Commission") decision in *Groupement des Cartes Bancaires* ("Cartes Bancaires"). The judgment has been widely welcomed by practitioners for two main reasons. First, it is argued that it severely narrows the scope of application of the concept of restriction by object. Second, it is asserted that the judgment establishes that in cases involving two-sided markets, both sides must be taken into account in a determination as to whether Article 101(1) applies. This is the case even where, as in *Cartes Bancaires*, the apparent restriction takes place only on one (side of the) market.

This paper begins by summarizing the EU Courts' existing case law on object restrictions. It goes on to analyze the judgment in *Cartes Bancaires*. It argues that, while *Cartes Bancaires* makes important findings as regards two-sided markets, the judgment does not fundamentally alter the law for object cases. Rather the judgment attempts to clarify apparent ambiguities and discrepancies in the case law and provides a more structured framework than previously existed for determining whether an agreement is restrictive by object.

II. THE CONCEPT OF RESTRICTION BY OBJECT PRIOR TO *CARTES BANCAIRES*

Article 101(1) prohibits agreements that have as their object or effect the prevention, restriction, or distortion of competition. In line with the plain language of Article 101(1), the EU Courts have consistently held that "object" and "effect" are alternative tests. If an agreement is anticompetitive by object, there is no need to prove that it has restrictive effects.²

There is no definition in Article 101(1) for “object” restrictions. This required the EU Courts to establish the test that was to be applied through case law. The formula traditionally adopted by the EU Courts was that agreements which “by their very nature have the potential to restrict competition” were object restrictions.³ As such, object findings were traditionally limited to situations in which an “analysis of the clauses” of the agreement under review “reveal[ed] the effect on competition to be sufficiently deleterious.”⁴

What was meant by “sufficiently deleterious”? No clear definition was given by the EU Courts. It was left to the Commission to set out its understanding of the case law, which it did in its 2004 Guidelines on the application of Article 101(3).⁵ Therein the Commission argued that object restrictions were those that had “such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101(1)] to demonstrate any actual effects on the market.” The Guidelines went on to state that this “presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market.”⁶

Agreements that were almost always found to be “sufficiently deleterious” were those that had the obvious consequence of price-fixing, market-sharing, or collective exclusive dealing⁷ (more commonly known as “group boycotts”). The exchange of commercially sensitive information, particularly in the context of a cartel, was also highly likely to be caught by the object test.⁸ For vertical agreements, only those that impeded parallel trade within the European Union⁹ or enforced resale price maintenance (“RPM”)¹⁰ were likely to be considered restrictive by object.

Although somewhat form-based, the assessment as to whether or not an agreement was restrictive by object was not, however, limited to the arrangement’s wording or its provisions. The analysis also had to have regard to the agreement’s objective aims¹¹ and the legal and economic context in which the agreement was implemented.¹² As such, agreements that clearly appeared severely to restrict competition were, occasionally, found not to be restrictive by object on their facts. For instance, in *Erauw-Jacquery*,¹³ the Court of Justice held that an agreement prohibiting a licensee from exporting, directly or indirectly, certain varieties of cereal seeds protected by plant breeders’ rights did not infringe Article 101(1) given the costs and risks involved in developing seed varieties.¹⁴

ALTHOUGH SOMEWHAT FORM-BASED, THE ASSESSMENT AS TO WHETHER OR NOT AN AGREEMENT WAS RESTRICTIVE BY OBJECT WAS NOT, HOWEVER, LIMITED TO THE ARRANGEMENT’S WORDING OR ITS PROVISIONS.

The EU Courts also held that it might be necessary to consider the actual conduct and behavior of the parties on the market.¹⁵ The subjective intention of the parties was relevant but was not determinative.¹⁶ An agreement could be restrictive by object even if the parties to it were able to show that restricting competition was not their aim, or that they had other laudable motives.¹⁷ Conversely, the Commission and the EU Courts could not find that a particular agreement had as its object a restriction of competition merely because the aim of the parties was to restrict competition.¹⁸

This approach of course raised a question as to the extent and depth to which it was necessary to analyze the particular facts of a case before coming to a conclusion as to whether an agreement was restrictive by object. For reasons set out elsewhere,¹⁹ we believe that an analysis of the case law reveals that the EU Courts have not traditionally required the Commission to undertake a detailed analysis of the facts to prove that “obvious” cases (e.g. price-fixing, market-sharing, RPM, etc.) were restrictive by object. In our view, cases such as *Erauw-Jacquery* were distinguishable on their facts and did not undermine the basic position set out in the bulk of the Court of Justice’s jurisprudence.

The facts were, however, more important in cases which were “less obviously” harmful but yet still potentially restrictive by object.²⁰ In such cases a more detailed assessment of the agreements in questions than would have occurred in “obvious” cases was required under the case law. This is perhaps best summarized by the Commission Guidelines on Article 101(3) which state that “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.”²¹

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However, this did not mean that the effects of the agreement had to be taken into account. In fact the Guidelines stressed, “there is no need to take account of ... concrete effects. In other words, for the purpose of applying [Article 101(1)] no actual anti-competitive effects need to be demonstrated.”²²

Three recent cases—*T-Mobile Netherlands*, *E.ON Ruhrgas*, and *Allianz Hungária*—however, created uncertainty as to the status of the law and the extent of analysis that was required for an object finding.

In *T-Mobile* the Court of Justice held that for:

a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the [internal] market.²³

This paragraph, on which the Commission and national competition authorities (“NCAs”) have relied heavily in recent years, was clearly open to interpretation. On the one hand it could be argued that it significantly increased the scope of application of the object concept, since many types of agreements are, on their face, “capable” of restricting competition; on the other hand, it could be asserted that the judgment narrowed the object box by establishing an additional requirement to be fulfilled for finding that an agreement is restrictive of competition by object. Under this reading, *T-Mobile* required the Commission and NCAs to show, albeit to a low standard, some likelihood that the agreement would have an anticompetitive effect (or rather that the agreement was capable of having restrictive effects on competition).

While on its face *T-Mobile* can be read in both ways, we have previously argued that the better view is that paragraph 31 of *T-Mobile* did not impose an extra obligation on the Commission.²⁴ There are several reasons for this. First, paragraph 29 of *T-Mobile* describes restrictions by object as those that are “by their very nature, [...] injurious to the proper functioning of competition.”²⁵ It is hard, if not impossible, as a matter of logic to reconcile this finding with a need to go further and show that such a restriction is “capable” of harming competition (the argument would be circular). Second, the Court of Justice explicitly held in paragraph 30 of the judgment that there is no need to show effects where it is demonstrated that an agreement has an anticompetitive object (contrary to the claim by the referring Dutch court).²⁶ As such, in our view paragraph 31 of *T-Mobile* is no more than a restatement of the long-standing position that, when dealing with object restrictions, there is no need to demonstrate any actual or potential effects.²⁷ However, as noted above, the language of the judgment is ambiguous and open to interpretation.

Another recent judgment that has caused confusion is *E. On Ruhrgas*.²⁸ In this case, the General Court partially set aside the Commission’s finding that an agreement between the German gas incumbent Ruhrgas and the French gas incumbent GDF, which stipulated that the latter would not enter the German market, constituted a restriction of competition by object. The General Court found that at the material time (i.e. before the liberalization of the European gas markets) there was no potential competition between Ruhrgas and GDF in Germany as Ruhrgas had a lawful *de facto* territorial monopoly there (together with some other German suppliers) as part of the German pre-liberalization market organization.²⁹ This has led some commentators to argue that an object finding requires the Commission to undertake a detailed counterfactual/potential effects analysis.

In our view, this is not the correct interpretation of the judgment. The better view is that the requirement to demonstrate that the parties were at least potential competitors was simply part of the analysis of whether a market-sharing agreement was “by its very nature” restrictive of competition in its legal and economic context. If, due to the organization of a market, there is no potential for competition, there is by implication no competition to restrict.

IF, DUE TO THE ORGANIZATION OF A MARKET, THERE IS NO POTENTIAL FOR COMPETITION, THERE IS BY IMPLICATION NO COMPETITION TO RESTRICT.

Finally, and perhaps most confusingly, there is the Court of Justice’s ruling in *Allianz Hungária*.³⁰ Following a request for a preliminary ruling, the Court of Justice had to analyze whether bilateral agreements between an insurance company and car repairers (under which the hourly rate repairers could charge depended, *inter alia*, on how many insurance contracts the repairer has brokered for the insurance company) restricted competition by object.

In its judgment, the Court of Justice began in the traditional way by stating that where it had been demonstrated that an agreement had an anticompetitive object, there was no need to prove that it had anticompetitive effects.³¹ Consistent with this, the Court of Justice went on to recall that restrictions by object

were those that “by their very nature” were injurious to competition³² and reiterated the traditional criteria to be relied on when assessing whether an agreement had an anticompetitive object.

The Court of Justice then went on to refer to *T-Mobile*³³ and held that in order:

for the agreement to be regarded as having an anti-competitive object it is sufficient that it has the potential to have a negative impact on competition, that is to say, that it be capable in an individual case of resulting in the prevention, restriction or distortion of competition within the internal market. Whether and to what extent, in fact, such an effect results can only be of relevance for determining the amount of any fine and assessing any claim for damages.³⁴

The Court of Justice then held that for an object finding it would “be necessary to determine whether [the agreements in question], taking account of the economic and legal context of which they form part...are sufficiently injurious to competition on the car insurance market as to amount to a restriction of competition by object.”³⁵

Up to this point the judgment is broadly consistent with the existing case law. However, at paragraph 47 the Court of Justice appeared to go further. It held that the referring court had to determine whether, given the particular features of the market in question, its “proper functioning...is likely to be significantly disrupted by the agreements at issue.” While still possible to read this paragraph as requiring no more than an analysis of the agreement in its legal and economic context, it could be argued that this part of the judgment came close to requiring at least some effect analysis to be undertaken.

More significantly, and controversially, the Court then held, at paragraph 48, that the agreements in question:

would also amount to a restriction of competition by object in the event that the referring court found that it is likely that, having regard to the economic context, competition on that market would be eliminated or seriously weakened following the conclusion of those agreements. In order to determine the likelihood of such a result, [the referring] court should in particular take into consideration the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned.

IN OUR VIEW, THE FACTORS AND CRITERIA ON WHICH THE COURT OF JUSTICE SET OUT THIS PARAGRAPH RISKED BLURRING THE BOUNDARIES BETWEEN RESTRICTIONS BY OBJECT AND BY EFFECT.

In our view, the factors and criteria on which the Court of Justice set out this paragraph risked blurring the boundaries between restrictions by object and by effect. In particular the Court of Justice appeared to require an assessment to be made of the likelihood that the agreement in question would

eliminate or seriously weaken competition; in other words, it looked for causality between the agreement and likely negative effects on completion (rather than merely assessing the economic context—we will return to this below).

This becomes even clearer when looking at the factors that, in the judgment, are noted as being relevant. The Court referred to the market structure, the existence of alternative distribution channels, and, critically, the market power of the companies concerned. These are, of course, the very factors that would be relied on when analyzing the potential restrictive effects of an agreement on competition. Consequently, it could be argued that in *Allianz Hungária* the Court of Justice seemed to require a potential effects analysis to be conducted in object cases.

It would, however, seem unlikely that this would have been the intention of the Court; once anticompetitive effects are established, there is no need to prove that the agreement has an anticompetitive object. As such, both as a matter of logic and as a matter of existing law, this conclusion seems an untenable one to reach.

Another way of interpreting paragraph 48 is to see it as an explanation by the Court that there is a third type of restriction, one that sits between object and effect. Under this reading a full effects analysis is not required if it is clear from a summary analysis that, as a result of the agreement, competition would be eliminated or seriously weakened. This test would be similar to the “abridged” rule of reason analysis in U.S. federal antitrust law; the agreement is not prohibited *per se* but, equally, no full market analysis is required.

However, this way of reading the judgment is problematic. First, and most obviously, Article 101(1) makes reference only to object and effect; there is no intermediate category between the two in the TFEU. Second, it would significantly blur the line between object and effect cases, with the result of making the law less certain and lowering the burden of proof for certain restrictions that should, in principle, be examined under the effect test. Third, there is nothing in the pre-existing case law to support this development.

In our view, a better reading of paragraph 48 is that it was an attempt, albeit a poorly drafted one, by the Court of Justice to enunciate the test for “less obvious” object restrictions and explain how the *T-Mobile* “capability” test is to be applied in practice.

A BETTER READING OF PARAGRAPH 48 IS THAT IT WAS AN ATTEMPT, ALBEIT A POORLY DRAFTED ONE, BY THE COURT OF JUSTICE TO ENUNCIATE THE TEST FOR “LESS OBVIOUS” OBJECT RESTRICTIONS

If this interpretation is correct, the judgment by the Court in *Cartes Bancaires* was a further attempt to clarify the confusion in this area of the law. This attempt may well have been prompted by the critical Opinion of Advocate General Wahl, who rightly pointed out how “[c]ertain 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,” as “[i]n a number of cases, consideration of [the economic and legal] context is similar to a genuine examination of the potential effects of the measures at issue.”³⁶

III. THE CARTES BANCAIRES CASE

In its decision of October 17, 2007 (2), the Commission concluded that the Groupement des Cartes Bancaires had infringed Article 101 of the Treaty.³⁷

The Groupement des Cartes Bancaires (“the Groupement”) managed a card payment system that accounted for over 70 percent of card payments in France at the time of the decision. The Groupement had agreed on a series of fees to be paid by some member banks when issuing cards under certain conditions. A key measure was the Mécanisme Régulateur de la Fonction Acquéreur (“MERFA”), a formula that determined the fee to be paid for each card issued where a bank was not, according to the formula, sufficiently active in concluding contracts with merchants (“acquiring merchants”) or installing automated teller machines (“ATMs”). The other measures were: (i) a membership fee per card, (ii) an additional membership fee, and (iii) a “wakeup” fee per card issued over and above the maximum number of cards stipulated by the Groupement.³⁸

According to the Commission, despite formally applying equally to all Groupement members, the fee measures were carefully designed to hinder the ability of, in particular, new entrants to issue cards at prices that would be lower than that of the large, incumbent banks. By increasing the cost of the cards issued by new entrants, the measures had in practice the effect of keeping the price of payment cards artificially high to the benefit of the major French banks. Consumers were therefore deprived of cheaper cards and a wider range of products.³⁹

During the administrative proceedings, the Groupement argued that the purpose of the measures was twofold: (i) to encourage those members of the Groupement that are issuers rather than acquirers to develop their acquiring activities; this reflected the two-sided nature of the activities in question and (ii) to give financial recognition to the efforts of the “founding members.”⁴⁰

The Commission rejected these arguments. In its view, the way the parties claimed the MERFA operated was at odds with other interbank charges applicable within the Groupement: some of the interchange fees paid on each transaction ran counter to the MERFA by penalizing acquiring and rewarding card issuing, and some of the other measures notified by the Groupement together with the MERFA—the additional membership fee and the dormant-members wake-up mechanism—penalized banks that had issued “too few” cards in the past.⁴¹

CRITICALLY, MANY OF THE DOCUMENTS OBTAINED DURING THE ON-SITE INSPECTIONS SHOWED (ACCORDING TO THE DECISION) THAT THE AIM OF THE MEASURES WAS TO PREVENT COMPETITION FROM NEW ENTRANTS ISSUING CARDS AT PRICES LOWER THAN THOSE OF THE LARGE FRENCH BANKS.

Critically, many of the documents obtained during the on-site inspections showed (according to the Decision) that the aim of the measures was to prevent competition from new entrants issuing cards at prices lower than those of the large French banks.⁴² In conclusion, the Commission found that the arrangements under review were restrictive of competition by object.⁴³

The General Court upheld the Commission's decision. It found, *inter alia*, that it was apparent from the formulas used in the measures in question that they hindered new entry on the market for the issuing of payment cards in France⁴⁴ and that the Commission had relied properly on the internal documents of the parties.⁴⁵ The General Court went on to say that Article 101(1) did not provide an exhaustive list of prohibited practices and that the concept of infringement by object "should not be given a strict interpretation."⁴⁶

The General Court also rejected the argument that the analysis of the need to balance issuing and acquiring activities had to be carried out under Article 101(1). It held that such an argument failed because the relevant market was the issuing market and not the payment system market, implying that factors concerning a different, but related, market do not need to be taken into account under Article 101(1).⁴⁷ The Groupement appealed to the Court of Justice, in part on the issue of whether the agreement was restrictive by object.

The Court of Justice held, *inter alia*, that the General Court had incorrectly concluded that the measures had as their object the restriction of competition under Article 101(1). It held that:

[h]aving acknowledged that the formulas for those measures sought to establish a certain ratio between the issuing and acquisition activities of the members of the Grouping, the General Court was entitled at the most to infer from this that those measures had as their object the imposition of a financial contribution on the members of the Grouping which benefit from the efforts of other members for the purposes of developing the acquisition activities of the system.⁴⁸

The Court of Justice further held that "[s]uch an object cannot be regarded as being, by its very nature, harmful to the proper functioning of normal competition," particularly as the General Court had found that combatting free-riding in the system was a legitimate objective.⁴⁹

Furthermore, the Court of Justice, following the opinion of Advocate General Wahl,⁵⁰ held that the General Court had wrongly concluded that the concept of a restriction by object should not be interpreted restrictively. The concept could only be applied to certain types of coordination between undertakings that revealed "a sufficient degree of harm" to competition such that their effects did not need to be examined.⁵¹

The Court of Justice also held that the General Court had been wrong to conclude that an analysis of the requirement of balance between issuing and acquiring activities could not be carried out in the context of Article 101(1) simply because the purported restriction took place in the market for issuing only. The Court of Justice concluded that the lower court had confused two issues: (i) that of the definition of the relevant market, and (ii) that of the context to be taken into account to ascertain whether the content of an agreement reveals the existence of a restriction by object. Since the General Court had found issuing and acquiring activities to be essential for the operation of a card payment system it could not ignore this simply because the act of acquiring did not occur in the issuing market.⁵²

THE COURT OF JUSTICE CONCLUDED THAT THE LOWER COURT HAD CONFUSED TWO ISSUES

IV. THE OBJECT TEST IN *CARTES BANCAIRES* AND ITS IMPLICATIONS FOR TWO-SIDED MARKETS

The judgment has been widely welcomed by practitioners. The consensus view appears to be that this is a “landmark ruling” that makes crucial points about two-sided markets and, more importantly, seriously narrows the object box. With respect to the latter, it is argued that the Commission must now “abandon its simplistic use of the by object restriction notion in cases that are not obviously harmful to competition and focus on the actual effects of the conducts.”⁵⁴

We see some merit in this viewpoint. We agree that the judgment makes important findings as regards two-sided markets. In this regard, the Court was very clear in stressing that the overall economic and legal

IN THIS REGARD, THE COURT WAS VERY CLEAR IN STRESSING THAT THE OVERALL ECONOMIC AND LEGAL “CONTEXT” WAS NOT THE SAME AS THE RELEVANT MARKET

“context” was not the same as the relevant market.⁵⁵ In effect the Court held that the economic and legal context could include factors that took place outside the relevant market.

On the facts of the *Cartes Bancaires* case, one of the relevant aspects overlooked by the General Court was that the restriction under scrutiny had an impact not only in the relevant market where the restriction took place (the market for the issuing of payments cards to consumers) but also on the related market for acquiring services. Both sides of the market had to be taken into account.

However, we do not believe that the judgment fundamentally alters the law as regards object restrictions. Rather the judgment is an attempt to restate—in a clearer, more detailed way than in the past—the test that has been a consistent feature of much of the EU Courts’ existing case law. As such, we see *Cartes Bancaires* as an attempt by the Court to address the confusion generated by recent judgments in this area, in particular as regards (i) paragraph 48 of *Allianz Hungária* (which, as discussed above, could be read as permitting a finding of anticompetitive object to be made following a truncated effects analysis) and (ii) the “capability” test in paragraph 31 of *T-Mobile* (which many believe significantly widened the object box).

As regards *Allianz Hungária*, while it is true that the Court of Justice cites the judgment on numerous occasions in *Cartes Bancaires*, it is striking that nowhere in the document does the Court rely on paragraph 48. As such, we believe that *Allianz Hungária* can no longer be interpreted as authority for the proposition that an agreement which, on its face, is *not* obviously restrictive, may yet be found to be restrictive by object on the basis of a truncated effects analysis.

As regards the capability test in *T-Mobile*, in paragraph 57 of *Cartes Bancaires* the Court held that the “essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction

THE COURT OF JUSTICE CLEARLY STATES THAT THE CONCEPT OF RESTRICTION BY OBJECT IS A NARROW ONE

of competition ‘by object’ is the finding that such coordination reveals in itself a sufficient degree of harm to a competition.” This test plainly makes no reference to

capability. Linked to this, the Court of Justice clearly states that the concept of restriction by object is a narrow

one⁵⁷ and cannot be applied in cases “which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.”³⁸

In order to avoid any doubt as to its views, the Court also spelled out the policy rationale for its conclusion; it held that a restrictive interpretation of the object category is needed to reduce the risk of false positives. Taken together, in our view, this means that it is no longer possible to interpret paragraph 31 of *T-Mobile* as significantly widening the object box; put differently, *Cartes Bancaires* has clarified that an agreement is not restrictive by object merely because it is capable of restricting competition.

It is important to note, however, that *Cartes Bancaires* does not say that the object category is closed and that it applies only to those restrictions that have, previously, been found to be restrictive in this way. This raises an important question: If the object category must be interpreted restrictively, but is not a closed one, and if the object test does not permit any analysis of effects, what then is the legal framework under which it is to be determined whether an agreement is restrictive by object?

As noted above, the Court of Justice held that the “essential” legal criterion for determining whether an agreement is restrictive by object is whether it “reveals in itself a sufficient degree of harm to competition.”⁵⁹

We believe this sets out a cumulative, two-step test for object restrictions. First, the agreement under scrutiny must entail an obvious restriction of competition. Indeed, the agreement under review must “reveal in itself” or be “by its nature”⁶⁰ a restriction of competition. Second, the restriction must entail “a sufficient degree of harm”⁶¹ to competition.” In this regard the Court of Justice held that:

WE BELIEVE THIS SETS OUT A CUMULATIVE, TWO-STEP TEST FOR OBJECT RESTRICTIONS.

although the General Court [had] set out the reasons why the measures at issue...are capable of restricting competition...it in no way explained — contrary to the requirements of the case-law...**in what respect that restriction of competition reveals a sufficient degree of harm** in order to be characterised as a restriction by object.

The obviousness part of the test is exclusively focused on the nature of the limitation placed on the commercial freedom of action of the parties and does not look at likely or actual effects of the agreement on competition. In particular, the analysis will have to be carried out on the basis of all relevant factors, including, in particular: (i) experience and existing case law, (ii) the content and wording of the provisions of the agreement, and (iii) the agreement’s objectives.⁶² Consistent with the existing case law (and rejecting by omission the Advocate General’s advice), the judgment in *Cartes Bancaires* means that some weight can be placed on the parties’ intention (as revealed for example by internal documents), although it is neither a necessary nor a decisive factor.⁶³

Looking at the facts in *Cartes Bancaires*, the Court of Justice found that, contrary to the position in *Beef Industry Development Society and Barry Brothers* (“BIDS”), the wording of the agreement was not obviously

restrictive of competition.⁶⁴ In *BIDS* the parties' aim had clearly been to change "appreciably, the structure of the market through a mechanism intended to encourage the withdrawal of competitors."⁶⁵ However, in *Cartes Bancaires* the Court of Justice found that the aim of the agreement under review had been to impose "a financial contribution on the members of the Grouping which benefit from the efforts of other members for the purposes of developing the acquisition activities of the system," an activity that is not clearly restrictive of competition.⁶⁶

As regards the sufficiency part of the test, it is easier to explain what it is not (than what it is). First, the thrust of the *Cartes Bancaires* judgment itself, and vast bulk of the existing case law, means that any analysis

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conducted cannot include consideration of the market power of the parties or the likely/actual effects of the restriction on the market⁶⁷ (as seemed to be suggested in paragraph 48 of *Allianz Hungária*). Put differently, the test does not require the Commission to show that the restriction is so harmful as to be likely to result in higher prices or lower output.⁶⁸ Second, it is not necessary to find that consumers may be deprived of the advantages of effective competition.⁶⁹

Third, the judgment explicitly held that legitimate business justifications could not be taken into consideration as part of the assessment as to whether an agreement is restrictive by object.⁷⁰ In other words, contrary to what some commentators seem to infer, it is not relevant to look at whether, *prima facie*, there are possible legitimate reasons or justifications for the restriction; this can only be done at a later stage, in particular when assessing whether the conditions under Article 101(3) are met.

Unfortunately, as noted above, it is much harder to work out from the judgment how the EU Courts will apply the sufficiency part of the test in practice. What seems clear is that the Court of Justice in *Cartes Bancaires* considered the situation in *BIDS* to meet the sufficiency part of the test; it did not, however, seem to consider the exclusion of new entrants as being sufficiently serious.

V. CONCLUSION

Cartes Bancaires is a significant judgment. It makes important findings as regards two-sided markets, clearly establishing the principle that the interaction between them must be taken into account regardless of whether the restriction under review applies only to side of the market.

It also clarifies important aspects of the existing law on the object test. In doing so it draws a clearer line between object and effect than was apparent from some of the language in recent judgments. It also limits the ability of those who wish to bring effect cases under the object test. In particular, the Court of Justice has set out the following principles: (1) the object category must be interpreted restrictively,⁷¹ (2) the likely or actual effects of the agreement are not relevant to the object test,⁷² and (3) the essential legal criterion for

ascertaining whether coordination between undertakings involves a restriction by object “is the finding that such coordination reveals in itself a sufficient degree of harm to competition.”⁷³

In our view, the third principle is in line with settled case law and can be formulated as a two pronged test: the restriction must both be obvious and serious.

WHILE IMPORTANT AS A RESTATEMENT AND CLARIFICATION OF THE OBJECT TEST UNDER ARTICLE 101(1), IN PRACTICE WE DO NOT BELIEVE THAT THE *CARTES BANCAIRES* CASE WILL HAVE SIGNIFICANT IMPLICATIONS OF OBJECT CASES.

While important as a restatement and clarification of the object test under Article 101(1), in practice we do not believe that the *Cartes Bancaires* case will have significant implications of object cases. There are two main reasons for this.

First, it is evident that the test in *Cartes Bancaires* is not of great practical relevance to classic “hardcore” agreements, including the secret exchange of future price information. These will continue to fall easily into the object category. Indeed the Court of Justice was clear that:

collusive behaviour, such as that leading to horizontal price-fixing by cartels [which] 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.⁷⁴

While the Court did not refer specifically to hardcore vertical cases, we do not believe that *Cartes Bancaires* in any way waters down the position as regards these types of restrictions. In fact, the opposite might be true: *Cartes Bancaires* would appear to make it harder for such cases to be taken outside the object box. It does this by removing the possibility that may have existed (i) under *T-Mobile* for the parties to argue that, on the facts, their agreement was not “capable” of restriction competition and (ii) under *Allianz Hungária* that the Court should apply a truncated effects analysis to such agreements (rather than treating them as “obvious” restrictions of competition).

Second, as should be clear from our analysis, we believe that the universe of agreements falling within the object box has always been smaller than many argued. Of the current cases that are public, very few are likely to be affected in any significant degree by the judgment.⁷⁵ ▲

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² See, inter alia, Case 56/65, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, [1966] ECR 00337, p. 249 (hereinafter, “*Société Technique Minière*”). See also Joined Cases 56 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, [1966] ECR 00429, p. 342.

³ Case C-209/07, *Beef Industry Development Society and Barry Brothers (Carrigmore) Meats*, [2008] ECR

I-08637, ¶17 (hereinafter “BIDS”); Case C-8/08 *T-Mobile Netherlands and Others*, [2009] ECR I-4529, ¶29 (hereinafter “*T-Mobile Netherlands*”); Case C-226/11 *Expedia v Autorité de la concurrence and Others*, not yet reported, ¶36; Commission’s Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, 2011, OJ (C 11/01) ¶24 (hereinafter, “Commission’s Horizontal Guidelines”); Commission’s Guidelines on the application of Article 101(3) of the TFEU, 2004, OJ (C 101/08), ¶21, (hereinafter, “Commission’s Guidelines”).

⁴ *Société Technique Minière*, *supra* note 2, at 249.

⁵ Commission’s Guidelines, *supra* note 3.

⁶ *Id.*

⁷ See e.g. Commission Decision of 26 October 1999 in Case IV/33.884 - *Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU)*, 2000 OJ (L39/1).

⁸ See e.g. Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S, Irish Cement Ltd, Ciments français SA, Italcementi - Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA and Cementir - Cementerie del Tirreno SpA (Cementeries CBR) v Commission*, [2004] ECR I-00123.

⁹ See Joined Cases 56 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, [1966] ECR 00429; Case 19/77 *Miller International Schallplatten GmbH v Commission*, [1978] ECR 131; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06, P *GlaxoSmithKline Services Unlimited v Commission*, [2009] ECR I-09291, ¶59.

¹⁰ Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, [1985] ECR 02015, ¶44.

¹¹ Case C-32/11, *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal*, not yet reported, ¶36 (hereinafter “*Allianz Hungária*”); Joined Cases 29/83 and 30/83 *Compagnie royale asturienne des mines SA (CRAM) and Rheinzink GmbH v Commission*, [1984] ECR 1679, ¶26, and Case C-551/03 P, *General Motors v Commission*, [2006] ECR I-3173, ¶66.

¹² See Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06, P *GlaxoSmithKline Services Unlimited v Commission*, [2009] ECR I-09291, ¶58; Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, [2011] ECR I-09083, ¶136; and Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence and Ministre de l’Économie, de l’Industrie et de l’Emploi*, [2011] ECR I-09419, ¶35.

¹³ Case 258/78 *L.C. Nungesser KG and Kurt Eisele v Commission*, [1982] ECR 02015.

¹⁴ Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, [1988] ECR 01919, ¶¶10ff.

¹⁵ See, Commission’s Guidelines, *supra* note 3, ¶22. See also Joined Cases 29/83 and 30/83, *Compagnie Royale Asturienne des Mines SA (CRAM) and Rheinzink GmbH v Commission*, [1984] ECR 01679, ¶26, and Joined Cases 96/82 and others, *NV IAZ International Belgium and others (ANSEAUNAVEWA) v Commission*, [1983] ECR 3369, ¶¶23ff.

¹⁶ See e.g. Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06, *GlaxoSmithKline Services Unlimited v Commission*, [2009] ECR I-09291, ¶58; Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, [2009], I-04529, ¶27; *BIDS*, *supra* note 3, ¶¶15ff; Commission’s Guidelines, *supra* note 3, ¶¶21ff; Commission’s Horizontal Guidelines, *supra* note 3, ¶25.

- 17 See e.g. Joined Cases 96/82 and others, *NV IAZ International Belgium and Others (ANSEAUNAVEWA) v Commission*, [1983] ECR 3369, ¶¶23ff.
- 18 Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission*, [2006] ECR II-2969, ¶119.
- 19 J. Faull, L. Kjolbe, H. Leupold, & A. Nikpay, *Article 101*, THE EU LAW OF COMPETITION, 3rd Ed. 238 (Faull & Nikpay eds. 2014).
- 20 See for example joined Cases 29/83 and 30/83, *Compagnie Royale Asturienne des Mines SA (CRAM) and Rheinzink GmbH v Commission*, [1984] ECR 01679, ¶26, and Joined Cases 96/82 and others, *NV IAZ International Belgium and others (ANSEAUNAVEWA) v Commission*, [1983] ECR 3369, ¶¶23ff.
- 21 Commission's Guidelines, *supra* note 3, at ¶22.
- 22 *Id.* ¶20
- 23 *T-Mobile Netherlands*, *supra* note 3, ¶31.
- 24 *Faull, et al.*, *supra* note 19 at 239 - 240.
- 25 *T-Mobile Netherlands*, *supra* note 3, ¶29.
- 26 *Id.* ¶30.
- 27 Even though, as has been shown, *T-Mobile* does not confer an “incapability defense” as a limiting factor for treating obvious restrictions of competition as restrictions by object, there is a linked notion that may play a role for “Category 3” agreements. An agreement that has the “capability of resulting in a restriction of competition” may be restrictive by object even if, on its face, it does not appear to have an anticompetitive object.
- 28 *Case T-360/09 E.On Ruhrgas AG and E.On AG v Commission*, *not yet reported*.
- 29 *Id.* ¶¶98ff.
- 30 *Allianz Hungária*, *supra* note 11.
- 31 *Id.* ¶34.
- 32 *Id.* ¶35.
- 33 *T-Mobile Netherlands*, *supra* note 3, ¶31.
- 34 *Allianz Hungária*, *supra* note 11, ¶38.
- 35 *Id.* ¶46.
- 36 Opinion of Advocate General Wahl delivered on 27 March 2014 in Case C-67/13 P, *Groupement des cartes bancaires (“CB”) v Commission*, ¶¶46 and 47 (hereinafter “Opinion of Advocate General Wahl”).
- 37 Commission's Decision of 17 October 2007, in Case COMP/D1/38.606 *Groupement des Cartes Bancaires “CB”*, OJ [2009] C183/12 (published on 5.8.2009) (hereinafter “Commission's Decision of 17 October 2007”).
- 38 *Id.* ¶¶137 - 154.
- 39 *Id.* ¶¶236 - 250.
- 40 *Id.* ¶¶199 (in the context of the Article 101(1) analysis) and 384 - 388 (in the context of the Article 101(3) analysis).
- 41 *Id.* ¶¶223 - 234.
- 42 Commission's Decision of 17 October 2007, *supra* note 37 at ¶235.
- 43 *Id.* ¶¶193 - 251.
- 44 Case T-491/07, *Groupement des cartes bancaires “CB” v Commission*, *not yet reported*, ¶¶126 and 132

(hereinafter “*Groupement des cartes bancaires*, not yet reported”).

45 *Id.* ¶¶123 ff and 170ff.

46 *Id.* ¶124.

47 *Id.* ¶105. At the following para the Court noted, however, that the Commission had considered potential benefits accruing on the acquiring market within the framework of Article 101(3).

48 *Id.* ¶75.

49 *Id.* ¶75ff. See also ¶81 of the Opinion of Advocate General Wahl, *supra* note 36, where it stated that “it is not apparent from the outset that the measures at issue are harmful to competition,” and ¶¶92 and 122ff.

50 Opinion of Advocate General Wahl, *supra* note 36, ¶¶52ff and, in particular, ¶¶58, 59, 68 and 74.

51 *Groupement des cartes bancaires*, not yet reported, *supra* note 44, ¶58.

52 *Id.* ¶¶76 AND 77.

53 For an excellent summary of this view, see Frédéric Pradelles’s note at <http://www.lw.com/thoughtLeadership/LW-European-Justice-Court-Groupement-Cartes-Bancaires>. See also, *ex multis*, Matthew O’Regan, *The Court of Justice of the EU provides further clarity on when an agreement has the object of restricting competition (Groupement des cartes bancaires)*, 69491 E-COMPETITIONS (October 2014); and Hans Vedder, *The EU Court of Justice clarifies the object-effect dichotomy and deals with two-sided markets (Cartes Bancaires-MasterCard)*, 69013 E-COMPETITIONS, (September 2014).

54 *Id.* Frédéric Pradelles.

55 *Groupement des cartes bancaires*, not yet reported, *supra* note 44, ¶¶76 to 79.

56 *Id.* ¶57.

57 *Id.* ¶58.

58 *Id.* ¶58.

59 *Id.* ¶57.

60 *Id.* ¶78.

61 *Id.* ¶57; see also *Allianz Hungária*, *supra* note 3, ¶¶34 and 46.

62 See *BIDS*, *supra* note 3, ¶21.

63 *Groupement des cartes bancaires*, not yet reported, *supra* note 44, ¶54.

64 *Id.* ¶¶60ff.

65 *Id.* ¶¶84 and 85, distinguishing *BIDS*; and *BIDS*, *supra* note 3, ¶31.

66 *Id.* ¶75.

67 *BIDS*, *supra* note 3, ¶16 and the case law cited there.

68 *Groupement des cartes bancaires*, not yet reported, *supra* note 43, ¶¶80 and 81.

69 See Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services U Unlimited v Commission*, [2009] ECR I-09291, ¶¶62 and 63.

70 *Groupement des cartes bancaires*, not yet reported, *supra* note 44, ¶70; and ¶¶121ff of the Opinion of Advocate General Wahl, *supra* note 36. See also *BIDS*, *supra* note 2, ¶21.

71 *Groupement des cartes bancaires*, not yet reported, *supra* note 44, ¶58.

72 *Id.* ¶¶51 and 58.

73 *Id.* ¶57.

74 *Id.* ¶51. See also, to that effect, in particular, judgment in case 123/83, *Bureau national interprofessionnel*

du cognac v Guy Clair, [1985] ECR 00391, ¶22.

⁷⁵ On this topic, see for example Sven Gallasch, *The Court of Justice of the EU invites to rethink the approach to pay for delay settlements in its recent case law (Groupement des Cartes Bancaires)*, 69490 E-COMPETITIONS (October 2014).