



Antitrust compliance in the EU – Reason rules again!

Agreements between undertakings that may affect trade between Member States and have as their *object* or *effect* the restriction of competition are prohibited pursuant to Article 101(1) of Treaty on the Functioning of the European Union (TFEU). If an agreement has the object to restrict competition, that is to say that by its very nature it has the potential to restrict competition under Article 101(1) TFEU, then it is not necessary to examine the actual or potential effects of the agreement on competition.¹

To assist companies in assessing whether their agreements have the object or the effect to restrict competition, the European Commission (EC) published, in 2001, the *De Minimis* Notice, which was revised in the summer of this year. The revised *De Minimis* Notice, (also) specifically aimed at providing guidance for the finding of “by object” restrictions on competition. That part of the revision was based on the *Expedia* ruling where the ECJ emphasized that “*an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.*”² The revision of the *De Minimis* Notice in light of the 2012 *Expedia* ruling supported the view of many parties that the *Expedia* ruling should be a landmark ruling, simplifying greatly the sanctioning of anti-competitive behavior.³ In doing so, the EC however neglected the 2013 *Allianz* ruling of the ECJ issued a couple months after the *Expedia* ruling. In the *Allianz* ruling, the ECJ broadened the understanding of by object restrictions, stating that “*to determine whether an agreement constitutes a by object restriction, the following should be*

¹ The European Court of Justice (“ECJ”) held in Case 5/69 *Völk v Vervaecke* [1969] ECR 295 that only agreements which ‘appreciably’ restrict interstate trade and competition fall within the scope of Article 101 TFEU.

² Case C-226/11 *Expedia*, Dec. 13, 2012.

³ See also the *GT Alert*, “[ECJ eliminates Noticeability Test in Regard to Restriction of Competition by Object](#)” of January 2013 by Hans Urlus and Sanne Mulder, and “[HvJ EU Expedia en de mededingingsrechtelijke merkbaarheid, Gevolgen voor de Nederlandse praktijk](#),” *Markt & Mededinging*, Aug. 1, 2013.

*considered: the agreement's content, objectives, economic and legal context, the nature of the goods or services affected, and the relevant markets' conditions, function, and structure."*⁴

Now, in its ruling of Sept. 11, 2014 in *Groupement des Cartes Bancaires*,⁵ the ECJ has (again) drastically altered the legal landscape, adding a new chapter on the determination of "by object" restrictions in which the (almost forgotten and often misunderstood) ruling in *Allianz* appears to make a remarkable comeback.

Facts

The *Groupement des Cartes Bancaires* (CB) is an economic interest group created for the holders of CB-cards issued by CB members to make payments to affiliated traders and/or withdrawals from automatic teller machines operated by the members of CB. In 2002, CB adopted new pricing measures, which the EC concluded shut out new entrants from the market for the issuance of payment cards in France. According to the EC, this hindered the issuance of cards by smaller banks prepared to offer cards at lower prices. The General Court (GC) fully upheld this Commission decision, considering the conduct a restriction "by-object." CB appealed to the ECJ.

Ruling

The ECJ declared that whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition to constitute a restriction of competition "by object" within the meaning of Article 101 TFEU, must be determined on the basis of the content of its provisions, its objectives, and the economic and legal context of which it forms a part. It is also necessary to consider the nature of the goods or services affected, and the functioning and structure of the market or markets in question. The ECJ confirmed that the GC should have considered whether there was a restriction of competition "by object" and if the CB activities had a sufficient degree of harm to competition.

Analysis

The ECJ has now made it clear that even though the parties' intentions is not a necessary factor in determining whether an agreement is restrictive, the assessment of a "by-object" restriction is to be based on the content of its provisions, its objectives, the economic and legal context of which it forms part, and the "nature of the goods of services affected." In sum, the ECJ annulled the GC's judgment by finding that the GC failed to properly apply the essential criterion of determining the existence of a "by-object" restriction, namely whether the measures "revealed a sufficient degree of harm to competition."

The *CB* judgment is a rather strongly worded ECJ statement and contains a cautionary message to the EC and all national authorities and court about their reliance on the *Expedia* ruling to the "by-object formula." The ECJ favors an extensive and full judicial review of EC competition decisions, and also requests the EC to apply a more detailed assessment of the arguments of the parties and the relevant factors when concluding that measures harm competition in such a way that it should be qualified to be a restriction "by-object" in the meaning of Article 101 TFEU. This indicates that the reasonable approach to the "by object" standard, as already defined in *Allianz*, is making a comeback.

⁴ Case C-32/11 *Allianz Hungária a.o./Gazdasági Versenyhivatalon*, March 14, 2013.

⁵ Case C-67/13 P *Groupement des cartes bancaires*, Sept. 11, 2014.

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