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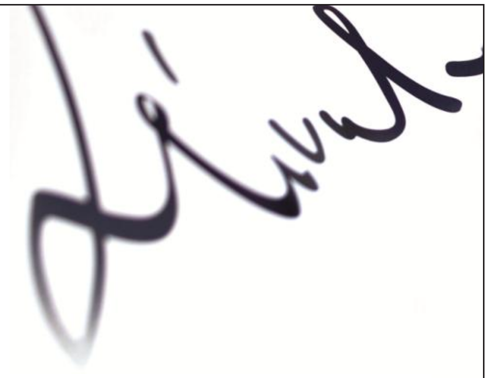
THE ECJ JUDGMENT IN *GROUPEMENT DES CARTES BANCAIRES*

THE LIMITATION OF THE "SUFFICIENT DEGREE OF HARM" IN RESTRICTIONS OF COMPETITION BY OBJECT

The relevant legal criteria used to ascertain the anti-competitive nature of an agreement between undertakings or a decision by an association of undertakings, and how, for certain typical prohibited collusions, the Commission, the national competition authorities and the national courts have been omitting the examination of the actual effects on competition has, nowadays, been widely debated and increasingly jeopardized. In fact, since the 2007 *Leegin* judgment, of the US Supreme Court (which reversed a century old precedent), that minimum price-fixing agreements should no longer be treated as a *per se* restriction of competition, but should rather be analyzed under a *rule of reason* (which examines the actual effects of its implementation). This approach should also be applicable to the European competition law, thus reducing the scope of anti-competitive restrictions by the object.

The case-law of the European Court of Justice (ECJ) shows that certain forms of coordination between undertakings reveal such a degree of harm that the need to examine its concrete effects on the market is usually disregarded. In other words, typical prohibited collusions, such as horizontal price fixing, are, by their very nature, harmful to the proper functioning of normal



competition (i.e., they are objectively predictable to produce negative effects in the market, to the detriment of consumers). In the European Union (EU), these behaviors are also seen as a restriction by object, without the need for the authorities to carry out the analysis of its effects.

However, in *Groupement des cartes bancaires* (Proc. C-67/13 P), dated 11.9.2014, the ECJ has reversed a decision of the General Court (GC) in favor of the European Commission. The dispute arose with a series of measures adopted by a group of the major French banking institutions to achieve interoperability of the systems for payment and withdrawal by banking cards. According to the Commission, these measures had an anti-competitive purpose, which stemmed from the very calculation formulas which were provided for the measures at issue, and which were not justified as balancing mechanisms between the acquisition and issue functions of banking cards. On appeal, the GC considered that the measures were a restriction of competition by object, concluding that «the types of agreements referred to in article [101 TFEU], do not form an exhaustive list of prohibited collusions and, for that reason, there is no need to interpret the concept of infringement for purpose restrictively». However, the ECJ has reversed that decision on the grounds that the GC erred in law when it took the view that the restrictive object of the measures at issue could be inferred from their wording alone. In contrast, the GC should have justified, in the context of its review of the lawfulness of the Commission’s decisions, in what respect that wording could be considered to reveal the existence of a restriction of competition by object. According to ECJ, «**the concept of restriction of competition "by object" can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine**

their effects», otherwise «the Commission would be exempted from the obligation to prove the actual effects on the market».

With this judgment, the ECJ finally takes a step forward in considering that a prior and careful analysis of the effects of agreements or decisions from association of undertakings is deemed necessary. Indeed, where certain types of coordination which, in theory, may restrict competition by "object" (and, therefore, will be prohibited under in 101 (1) TFEU), even in those cases, the competition authorities and national courts will have to justify in what respect that restriction of competition reveals a sufficient degree of harm in order to be characterized as a restriction "by object". More importantly, the ECJ set out the relevant legal criteria that should be used in this assessment: «it is necessary (...) **to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market**». It must therefore be found that, whenever it cannot be demonstrated that certain collusive behaviors reveal a sufficient degree of harm to competition to be considered as a restriction by object, regard must be had to an actual examine of the effects of those measures on competition and not of their object.

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