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## The EU General Court Gets a Rap on Its Knuckles

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**In *Groupement des cartes bancaires*, the EU Court of Justice severely reprimanded the General Court for its failure to properly analyze a restriction of competition ‘by object’ within the meaning of Article 101(1) TFEU.**

### Brief Background to the Dispute

Groupement des cartes bancaires is a French association of banking institutions, which was set up to achieve interoperability of the systems for payment and cash withdrawal by bank cards issued by its members. In December 2002, it notified to the Commission a series of new rules, including a series of pricing measures to regulate the so-called ‘acquiring’ function.<sup>1</sup> In October 2007, the Commission adopted a Decision, which was confirmed on appeal by the General Court, in which it took the view that the measures at issue constituted an infringement ‘by object’. On appeal to the Court of Justice, the Groupement des cartes bancaires alleged serious errors in law in the application of the concept of restriction of competition ‘by object’.

### Let This Judgment Be a Lesson

In what is a landmark judgment, the Court of Justice reminded both the Commission and the General Court that not all agreements, even if affecting pricing in some way, between undertakings or decisions by an association of undertakings can be presumed to harm competition and that there is a need to examine their actual effects.

#### By Object vs. by Effect

Certain types of coordination between companies can be regarded, by their very nature, as being harmful to the proper functioning of normal competition. For instance, price-fixing agreements between competitors are presumed to have negative effects on competition so that proof that they actually have such effects on the market is unnecessary. On the other hand, where the nature of the agreement does not reveal a sufficiently likely risk of harm to competition, its effects on

<sup>1</sup> The requirement of prior notification to the Commission of restrictive agreements was abandoned on 1 May 2004, with the entry into force of Regulation 1/2003.

competition should be properly analyzed. For such arrangements to fall under the Article 101(1) TFEU prohibition, the Commission must establish that competition has in fact been prevented, restricted or distorted to an appreciable extent.

#### Relevant Criteria to Assess the Existence of a 'By Object' Restriction

The essential legal criterion for ascertaining whether coordination between companies involves a 'by object' restriction of competition is the finding that such coordination *reveals in itself* a sufficient degree of harm to competition.

In this case, the General Court set out the reasons why the measures were capable of restricting competition, but did not explain in what respect that restriction of competition revealed a sufficient degree of harm in order to be characterized as a restriction 'by object'. Neither had the Commission. The Court concluded that to assess whether coordination between companies is by nature harmful to competition, the Commission must consider all relevant aspects of the economic and legal context in which that coordination takes place.

The Court of Justice did not exclude that the measures notified by the Groupement could hinder competition from new entrants and even lead to their exclusion. It stressed, however, that such a finding falls within the examination of the effects of those measures on competition, and not of their object.

The Court of Justice also brushed aside the General Court's comparison of the measures at issue with arrangements considered illegal by the Court of Justice in *BIDS*.<sup>2</sup> In the latter case, the wording of the arrangements made it clear that cooperation was aimed at implementing a policy which had as its object the encouragement of some companies to withdraw from the market, thus leading to a reduction of capacity. By contrast, the General Court did not find that the measures adopted by the Groupement were intended appreciably to change the structure of the market through a mechanism encouraging the withdrawal of some players.

Most importantly, the Court of Justice rejected the position of the General Court that the concept of restriction of competition 'by object' must not be interpreted restrictively. Such an approach would exempt the Commission from the obligation to prove the actual effects of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.

#### General Court's Failure to Fulfill Its Obligation

The last paragraphs of the Court of Justice's judgment deserve to be highlighted as they illustrate the determination of the Court of Justice to clarify and correct the situation:

*"[T]he errors of law committed by the General Court [...] indicate [...] a general failure of analysis by the General Court and therefore reveal the lack of a full and detailed examination of the arguments of the appellant and of the parties which sought the annulment of the decision at issue.*

*By simply reproducing [...] the contents of the decision at issue, the General Court failed to review, even though required to do so, whether the evidence used by the Commission in the decision at issue enabled it correctly to conclude that the measures at issue, in the light of their wording, objectives and context, displayed a sufficient degree of harm to competition to be regarded as having as their object a restriction of competition within the meaning of Article [101(1) TFEU]."*<sup>3</sup>

<sup>2</sup> Case C-209/07, Beef Industry Development and Barry Brothers.

<sup>3</sup> Case C-67/13 P, Groupement des cartes bancaires vs. European Commission, para. 89-90.

## The End of an Era?

Many will applaud the Court of Justice's ruling. The Commission has been criticized for overextending the limits of the 'by object' category, thus shortcutting the need to conduct a proper market analysis and giving itself wide powers of intervention. This practice by the Commission could now belong to the past. That may be more likely as the new President of the Commission has instructed Margrethe Vestager, his nominee as the new Competition Commissioner, to develop a more economics-based approach to competition decision-making.

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