It was a great pleasure to be asked to deliver a Lectio Magistralis in Rome on 23 April 2015 as part of the celebrations of the first year of the Rivista Italiana di Antitrust. In my lecture I drew attention to four particular topics: the European Commission’s recent enforcement efforts in relation to cartels; the latest judgments of the Court of Justice on the meaning of a restriction of competition by object; vertical agreements; and the abuse of dominance.

1. CARTELS

In 2014 the Commission adopted 10 decisions imposing fines on cartels: the fines amounted to €1.68 billion. By the end of July 2015 the Commission had adopted a further four decisions, the fines amounting to €247.8 million. It is interesting to note how many pending cartel investigations there are before the Commission. Press releases are published when surprise inspections are carried out, proceedings initiated or statements of objections sent: these reveal investigations in many sectors, ranging from car parts and transport markets (maritime, rail and air) to financial services and precious metals. A particularly interesting case is Container liner shipping, where the Commission is investigating the practice of price signaling: can it amount to an unlawful agreement, or more plausibly concerted practice, for firms to send signals to one another about future behavior not by direct contact but by statements made to third parties (for example in speeches at conferences or comments made to the media)? In January 2014 the Dutch Competition Authority accepted legally-binding commitments from mobile telephony operators in relation to signaling practices, and it is understood that commitments might be forthcoming in the Container Liner Shipping case: developments will be closely watched, not least because the application of Article 101 in these circumstances is by no means clear. The theory of harm in the case of signaling is clear: that the practice could facilitate tacit collusion; but the existence of a plausible theory of harm does not, in itself, mean that there is an infringement of Article 101, and, even if it does, does it do so by object or effect? The Competition and Markets Authority (“CMA”) in the UK has been reviewing price announcements in the UK in the Aggregates sector, which includes cement. The Aggregates case is a market investigation reference rather than an Article

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101 TFEU infringement action. The UK Enterprise Act 2002 enables the Authority to consider whether there are any features of a market that have an adverse effect on competition; if there are such effects remedies can be imposed to bring them to an end, irrespective of whether there is any wrongdoing on the part of undertakings that are the subject of the investigation. The CMA concluded in the Aggregates investigation that there were problems with the cement market, and required some divestitures in order to remedy them; but it has also, in September 2015, published a draft order which would require cement producers to refrain from sending generic price announcement letters to their customers, which can be regarded as a form of price signaling. Following a period of public consultation it is possible (indeed probable) that the draft order will be formally adopted and therefore become legally binding in the UK cement sector.

It is interesting to note that a significant percentage of the Commission’s decisions in 2014 and 2015 were settlements: Cargo train operators, on 15 July 2015, was the 19th settlement since that procedure was adopted. When the system of settlements was introduced in 2008 there were many commentators who were sceptical that it would be successful: in particular it was felt that a reduction of 10% in the fine would not provide a sufficient incentive to undertakings to settle. The figures show that these misgivings were misplaced: in practice there are plentiful incentives to settle, not least if the duration, range of practices or products and the geographical scope of the cartel that is the subject of the settlement are narrower than the Commission would otherwise have established. Where this is the case the base figure – a percentage of the turnover in the market(s) cartelized – will be smaller than would otherwise have been the case, with obvious (significant) consequences for the final level of the fine. It is also of interest to note that the Commission’s settlement decision in Parking heaters of 17 June 2015 was adopted less than two years after it conducted the dawn raids in that case: a speedy conclusion for a cartel case, reducing the cost of the investigation for the undertakings concerned and freeing up the Commission’s resources to move on to other cases. For obvious reasons appeals are rare (though not unknown) in settlement cases, avoiding the further cost of litigation, both for the parties and the Commission, before the General Court and the Court of Justice.

2. OBJECT RESTRICTIONS

As is well-known, agreements infringe Article 101(1) where they have as their object or effect the prevention, restriction or distortion of competition; case-law dating back to 1966 establishes that where an agreement restricts competition by object it is not necessary for a competition authority, or for a claimant in a private action, to prove that the agreement also produces anti-competitive effects. This provides some legal certainty and avoids the wasted use of resources involved in proving effects where it is obvious that the agreement is anti-competitive. There is abundant jurisprudence on the meaning of a restriction of competition by object, but the size of the
‘object box’ remains controversial and there is a huge literature on the subject. There are at least two reasons for this controversy. First, there is a perception that the object box seemed only to be capable of getting larger, but never smaller: judgments of the Court of Justice such as Beef Industry Development Society (2008), T-Mobile (2009) and Allianz Hungaria (2013) all resulted in findings of that the agreements under scrutiny were restrictive of competition by object and contributed to this perception. Another reason for the controversy over the scope of the concept of an object restriction is the wholly incorrect perception in some quarters that a restriction of competition by object can never be found to satisfy the criteria of Article 101(3): in other words that object restrictions are per se illegal. This is manifestly wrong: the General Court in Matra Hachette v Commission (1994) held explicitly that any agreement – whether restrictive by object or effect - is capable of satisfying Article 101(3), provided that there is evidence that is responsive to each of the four criteria contained therein. The judgments of the Court of Justice in both the Beef Industry case and in GlaxoSmithKline v Commission (2009) found that the agreements in question restricted competition by object, but went on to require that further examination was necessary before it could be determined whether Article 101(3) was applicable. It was unfortunate that, for various reasons, neither of those cases resulted in a finding of the applicability (or non-applicability) of Article 101(3): a great deal of misunderstanding would have been avoided if one or both of them had resulted in a positive application of that provision. As long as the misperception exists that object restrictions cannot be defended under Article 101(3), professional advisers will seek to argue that agreements do not restrict competition by object; they will then go on to argue that, even if the agreement restricts competition by effect, Article 101(3) is satisfied. A lot of time and intellectual contortion could be avoided by conceding the object-effect point and proceeding straight to analysis of the criteria in Article 101(3).

It is against this background that the judgment of the Court of Justice in Groupement des Cartes Bancaires v Commission of 11 September 2014 must be read. The Commission and the General Court had held that a fee structure established by the nine main members of a payment card system, Cartes Bancaires, had the object and effect of restricting competition by preventing the entry by new banks into the sector. The Court of Justice annulled the finding of the General Court that the fee structure restricted competition by object on the basis that it had erred in law and remitted the matter to it to consider whether there was a restriction by effect. The Court of Justice rehearsed well-established law:

i) certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of competition

ii) some collusive behavior, such as horizontal price-fixing by cartels, is so likely to have negative effects that it is redundant to prove that it has actual effects on the market

iii) the essential 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’.

Importantly, the Court of Justice added that the General Court had erred in law when concluding that the concept of a restriction of competition should not be interpreted restrictively: the Court of Justice’s view was that the concept should be limited to coordination which reveals a sufficient degree of harm to competition with the result that there is no need to examine its effects. The judgment in Cartes Bancaires is an important one. For the most part it simply repeats the consistent jurisprudence of the Court over many years. However the clear statement that the concept of an object restriction should be interpreted restrictively is a very significant one and means, at the very least, that the size of the object box should not be expanded unduly. The Cartes Bancaires case will now have to be decided by the General Court according to whether the agreement in question produced anti-competitive effects.

One way of describing the current situation would be to suggest that the very wide test suggested in T-Mobile and the outcome in Allianz Hungária represent the ‘high tide’ of expansion of the object box, and that Cartes Bancaires marks a return to a more conservative and orthodox approach. Since Cartes Bancaires the Court of Justice has applied its reasoning in that case in three further judgments, Dole v Commission, Del Monte v Commission and ING Pensii, and on each occasion reached the conclusion that the agreement in question restricted competition by object. Some commentators suggested after Cartes Bancaires that all or most cases in the future would require effects analysis, which is clearly incorrect; what Cartes Bancaires does is to require a more cautious approach than in T-Mobile and Allianz Hungária, with a presumption against an expansive interpretation.

3. VERTICAL AGREEMENTS

It is many years since the Commission adopted an infringement decision in a vertical case under Article 101: the last one was Peugeot in 2005. Its interventions in relation to vertical agreements have invariably been under Article 102, and have often resulted in commitment decisions under Article 9 of Regulation 1/2003, such as Distrigaz, E.ON and GDF in the energy sector. Most vertical agreements are investigated at the level of the national competition authorities, or litigated in national courts.

However it would be wrong to assume that this means that the Commission has no interest in the application of Article 101 to vertical agreements. Of particular interest is its investigation into the agreements between various Hollywood film studios and a distributor, Sky, in relation to which it has sent a statement of objections on 23 July 2015. This hugely important case will examine whether the judgment of the Court of Justice in the Murphy case, which concerned the broadcasting of football matches via satellite from Greece to the UK and which found that the vertical agreements that purported to prevent this restricted competition by object and were incapable of satisfying Article 101(3), reads across to the transmission, including in the
online environment, of films. The issues are complex and controversial, and the stakes are very high.

Vertical issues are also under consideration in the numerous cases around the EU concerning the online booking of hotel rooms. Competition authorities throughout the EU – including in the UK, Germany, Italy, France and Sweden – have already reached decisions on aspects of the relationship between hotels and online booking platforms. The current position is far from harmonious, and in retrospect it would seem regrettable that the European Commission did not take this matter on from the outset so that a common position could have been established for the whole of the internal market. The Commission is now conducting a sectoral investigation into e-commerce, which might lead to the adoption of some common standards.

4. ABUSE OF DOMINANCE

Article 102 remains as fascinating and as controversial as ever. The most interesting recent development has been the series of cases concerning standard-essential patents (SEPs), standard-setting and commitments to licence on FRAND terms. On 29 April 2014 the Commission adopted two decisions – an infringement decision against Motorola and a commitments decision from Samsung – on this topic. In Motorola it held that, where Motorola had committed to licence SEPs on FRAND terms, and a licensee demonstrated that it was willing to pay FRAND royalties, to be determined, if necessary, by a judge in court, it was an abuse of a dominant position to seek an injunction to prevent the licensee from applying the technology in question: in that case, an injunction would have resulted in the removal of Apple’s iPhone from the market. In the Samsung case the Commission accepted a remedy package from Samsung in which it set out proposals for the resolution of FRAND disputes in the future.

What was interesting about these two decisions was that the Court of Justice, at the same time, had received an Article 267 reference from a German Court in Huawei Technologies Co Ltd v ZTE Corp. Some commentators suggested that the Commission should stay its investigations of Motorola and Samsung pending the outcome of the Huawei case. Instead the Commission pressed ahead, and was then able to explain to the Court in that case how it had approached the issues raised by SEPs and standard-setting. The Court of Justice’s judgment in Huawei of 16 July 2015 endorses the approach taken by the Commission in Motorola and Samsung, and provides some additional guidance as to how FRAND disputes of this kind should be resolved. As a consequence, in the space of 16 months, considerable guidance has been provided, both by the Commission and the Court of Justice, on this complex, and commercially extremely important, area of competition law: it would be unwise to suggest that all the problems that can arise have been resolved; but a great deal has been learned in a relatively short period of time.

Attention now turns to the subject of loyalty rebates and their compatibility with Article 102: perhaps the most controversial issue of all in
current EU competition law. The Court of Justice, within the next year or so, will hand down judgments in the Intel case, on appeal from the General Court, and in Post Danmark II, an Article 267 reference from a Danish Court. In the mean time the Commission has initiated an investigation of loyalty rebates offered by Qualcomm to its customers. The Court will be aware of how important these two judgments will be, and must decide, among many other things, whether such rebates should be analysed by reference to the ‘as-efficient competitor’ test: a good topic for a future Lectio Magistralis!