

## THE IMPACT OF *GROUPEMENT DES CARTES BANCAIRES* ON COMPETITION LAW ENFORCEMENT

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**Keywords:** Restriction, object, standard of review, agreement, ECHR

**Abstract:** *The Groupement des Cartes bancaires represents a key judgment for competition enforcement, as it provides helpful clarification on the notion of “restriction by object” and on the judicial standard of review of Commission decisions. As of the first aspect, the ruling limited the restrictions by object to those which by their very nature and on the basis of the experience reveal a sufficient degree of harm to competition. On the standard required to the Court in reviewing competition decisions, the ECJ underlines the necessity of carrying out a full review, specifying that the presence of economic issues should not dispense the Court with an in-depth review of the law and the facts. The principles expressed in the judgment could have a great impact also at national level, where it could provide useful guidance both to Italian competition authority and to the Administrative Courts.*

### 1. BACKGROUND

On September 11, 2014 the European Court of Justice (“ECJ”) delivered its judgment on the

*Groupement des Cartes Bancaires* (“GCB”) case. The ECJ, overturning the position taken by the General Court, annulled the Commission decision which found that the measures submitted to its scrutiny by GCB – a group of main French banks – were anticompetitive.<sup>3</sup>

According to the Commission, the disputed measures - which consisted of fees that would have been paid by GCB members - constituted a “by object” restriction of competition, as their aim was to keep the price of payment cards artificially high and consequently “[hinder] current and future competition from new entrants”.<sup>4</sup> The Commission decision was challenged before the General Court, which - upholding the Commission position - recognized that the measures proposed by GCB had an anticompetitive object<sup>5</sup> and at the same time rejected the pleas of the applicants which contested the analysis of the effects of the measures carried out by the Commission.<sup>6</sup> GCB then appealed the judgment to the Court of Justice, which set aside the ruling of first instance, finding that “the General Court erred in

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<sup>2</sup> Article based on the speech given at the conference: “A year of the Italian Antitrust Review”, Rome, 23 April 2015.

<sup>3</sup> European Commission, *Groupement de cartes bancaires* (COMP/D1/38606), October 17, 2007. The Commission considered that the measures represented a decision of associations of undertakings but decided not to impose a fine on GCB since the measures were notified in advance.

<sup>4</sup> Id., § 251.

<sup>5</sup> Case T-491/07, *Groupement des cartes bancaires v European Commission*, November 29, 2012 § 234.

<sup>6</sup> Id. §§ 269-272.

law and failed to observe the standard of review required under the case-law”.<sup>7</sup>

## 2. GROUPEMENT DE CARTES BANCAIRES: MAJOR HIGHLIGHTS

The importance of GCB judgment is still debated.<sup>8</sup> If for some commentators it represents a “révirement” of the previous case-law, others consider the ruling in line with ECJ previous judgments.<sup>9</sup> In both cases, the Court ruling is of great interest, because it provided helpful clarification on the notion of restriction by object and on the judicial standard of review of Commission decisions.

### 2.1 The notion of “restriction by object”

As recognized by AG Wahl in its Opinion in GCB case, the interpretation of a “restriction by object” is far from new.<sup>10</sup> In this regard, it is sufficient to recall the STM case<sup>11</sup> – dating back to 1966 – where the ECJ held that “object” and

“effect” were alternative, and that a restriction to competition could have been qualified as “by object” only if it “reveal[ed] the effect on competition to be sufficiently deleterious”.<sup>12</sup> The issue seemed settled, but during last few years the ECJ has delivered several judgments which blurred again the distinction between “object” and “effect”.

In 2009, in fact, the ECJ delivered T-Mobile ruling, where it held that that “for a concerted practice to be regarded as having an anticompetitive object, it is sufficient that it has the potential to have a negative impact on competition”.<sup>13</sup> Such approach was subsequently confirmed in Pierre Fabre – concerning selective distribution in cosmetics sector – where the ECJ held that “agreements constituting a selective distribution system [...] necessarily affect competition in the common market [and], in the absence of objective justification, [have to be considered] as ‘restrictions by object’”.<sup>14</sup> Both judgments clearly adopt an ample interpretation of “restriction by object” which is no more limited to the “sufficiently deleterious” conducts, but embraces also other anticompetitive practices.

This trend was confirmed by a more recent judgment, which definitely contributed to confound the boundaries between restrictions “by object” and “by effect”: *Allianz Hungaria*.<sup>15</sup>

<sup>7</sup> Case C-67/13, *Groupement des cartes bancaires v European Commission*, September 11, 2014 § 92.

<sup>8</sup> See J. Killick and J. Jourdan, *Cartes Bancaires: A revolution or a reminder of old principles we should never have forgotten?*, Competition Policy International, 2014, p.2. See also R. Whish, *Recent developments in antitrust policy*, AGCM April 2015, asking whether “the tide [has] turned on object restriction”.

<sup>9</sup> According to a press release, the European Commission – in a note sent to the French Supreme Court – held that “*Cartes Bancaires* decision is in line with the existing jurisprudence on the subject of ‘by object’ restriction of competition”. See the Mlex press release, April 20, 2015.

<sup>10</sup> Case C-67/13, *Groupement des cartes bancaires v European Commission*, Opinion of AG Wahl, March 27, 2014, § 3.

<sup>11</sup> Case 56/65, *Société Technique Minière v Maschinenbau Ulm*, June 30, 1966.

<sup>12</sup> Id. § 8.

<sup>13</sup> Case C-8/08, *T-Mobile Netherlands and Others*, June 4, 2009 § 31.

<sup>14</sup> Case C-439/09, *Pierre Fabre 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*, October 13, 2011, § 39.

<sup>15</sup> Case C-32/11, *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenybírálat*, March 13, 2013.

In this ruling, delivered in 2013, the ECJ dropped off the original “formula” which limited the restrictions by object to the conducts which are “sufficiently deleterious” for competition, holding 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*”.<sup>16</sup> Moreover, the same judgment - in providing some guidance on how determining whether an agreement involves a restriction of competition ‘by object’ - required *de facto* to apply an effect analysis also to restrictions by object. According to the ECJ, “*regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part [...]. When determining that context, it is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question*”.<sup>17</sup> After *Allianz Hungaria*, the solidity of the doctrine of anticompetitive object was compromised.<sup>18</sup> the ECJ not only extensively interpreted the notion of “restriction by object”, but also - by applying the same test to both categories - clearly obliterated the distinction between anticompetitive ‘object’ and ‘effect’.<sup>19</sup>

In this context of “confusion”, GBC judgment contributed to redefine the boundaries between

“object” and effect”, giving some important (and welcomed) guidance on the correct interpretation of “restriction by object”. Without expressly overruling its previous case law, the ECJ nuanced most of the contradictory statements contained in the abovementioned rulings, ensuring a coherent and consistent interpretation of ‘by object’ restrictions.

The ECJ - expressly recalling *Allianz Hungaria* ruling and the cited case law - held that only certain types of coordination between undertakings which by their very nature and on the basis of the experience reveal a sufficient degree of harm to competition can be considered as restrictions ‘by object’.<sup>20</sup>

Particularly relevant is the reference made by the ECJ to the “experience” as a criterion to be used in order to assess whether a certain conduct can be qualified as a restriction by object. On this point, the Court showed to follow AG Wahl, which in its Opinion recognized that “*only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should [...] be regarded as a restriction of competition by object*”.<sup>21</sup> It is then possible to affirm that only price-fixing, market sharing, output restrictions and other few conducts can be considered as restrictions ‘by object’, because - in the light of the (economic and legal) experience - they are likely to produce negative effects: for these conducts it could be effectively redundant to prove that

<sup>16</sup> Id., § 38.

<sup>17</sup> Id., § 36.

<sup>18</sup> C.I. Nagy, *The new concept of anticompetitive object: a loose cannon in EU competition law*, 36 ECLR 2015, p. 154.

<sup>19</sup> P. Harrison, *The Court of Justice's Judgment in Allianz Hungaria is wrong and needs correcting*, 1 CPI Antitrust Chronicle 2013, p. 9.

<sup>20</sup> Case C-67/13, *cit.*, §§ 50, 51 and 53.

<sup>21</sup> Case C-67/13, *cit.*, Opinion of AG Wahl, § 56.

they have actual effects on the market.<sup>22</sup> On the contrary, it can be inferred that a case which presents strong elements of novelty would be hardly considered as a restriction by object: the Courts in fact would not be able to rely on their “experience” in order to assess the existence of a sufficient degree of harm to competition.

In all cases where it is not possible to identify a sufficient degree of harm to competition “*the effects of the coordination should (...) be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact be prevented, restricted or distorted to an appreciable extent*”.<sup>23</sup> As a consequence, an assessment of the conducts on the basis of their potential restrictive effects on competition - as the one done by General Court in the GCB case – should lead to exclude the configuration of a restriction ‘by object’, which, on the contrary, is limited to conducts which are ‘by their very nature’ harmful to the proper functioning of normal competition.<sup>24</sup>

In the light of the above, the ECJ quashed the judgment of the General Court in its entirety, finding that the latter made an error in law in qualifying GCB conduct in terms of restriction by object without explaining in what respect GCB measures presented the sufficient degree

of harm necessary to qualify them as restrictive ‘by object’.<sup>25</sup>

## 2.2 On the judicial standard of review of Commission decisions

The GCB judgment gave also some useful guidance on the standard of judicial review that is required to EU and national Courts when examining the decisions adopted by the European Commission or NCAs in application of articles 101 and 102 TFEU.

Since the foundations of the European Community, the ECJ has tried to define the intensity of judicial scrutiny over Commission decisions adopted in the field of competition.<sup>26</sup> In this regard the ECJ admitted – already in 1966 - that “*the exercise of the Commission's powers necessarily implies complex evaluations on economic matters, [which] [...] confir[m] [es] [the judicial review] [...] to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom*”.<sup>27</sup> The “judicial deference” showed by the ECJ towards Commission decisions was then justified in

<sup>22</sup> Case C-67/13, *cit.*, § 51. Although the Court refers only to price fixing agreements, the reasoning could be extended to all those conducts which integrate a cartel.

<sup>23</sup> Case C-67/13, *cit.*, § 52.

<sup>24</sup> Case C-67/13, *cit.*, §§ 80-82.

<sup>25</sup> Case C-67/13, *cit.*, §§ 65 and 92-93.

<sup>26</sup> On the notion of judicial deference and its evolution over time see M. Siragusa and C. Rizza, *Violazione delle norme antitrust, sindacato giurisdizionale sull'esercizio del potere sanzionatorio da parte dell'autorità di concorrenza e diritto fondamentale a un equo processo: lo “stato dell'arte” dopo le sentenze Menarini, Kme e Posten Norge*, 2 *Giurisprudenza Commerciale* 2013, pp. 408-456.

<sup>27</sup> Joined Case C-56 and 58/64, *Consten and Grundig v Commission*, July 13 1966. See also Case C-26/76, *Metro v Commission*, Opinion of AG Reischl, June 9, 1977, holding that “*the assessment of a system such as this involves difficult economic judgments. [...]. This necessarily means that the Commission has a margin of discretion in this respect and this means at the same time that there is a corresponding restriction on judicial review*”.

consideration of the “complex economic assessments” that the Commission had to carry out in its capacity of competition authority. In the subsequent years the ECJ was increasingly deferent to Commission’s decisions, and in *Microsoft* the General Court held that even technical matters were “*in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission’s*”.<sup>28</sup>

The extensive application of the judicial deference, however, contrasts not only with the principle of effective judicial protection as set out in Article 47 of the EU Charter of fundamental rights,<sup>29</sup> but also with the right to a fair trial, set out in article 6 of the European Convention of Human Rights (“ECHR”).<sup>30</sup> In this regard it should be highlighted that in two judgments delivered by the European Court of Human Rights (“ECtHR”) - *Menarini*<sup>31</sup> and *Grande Stevens*<sup>32</sup> - the ECtHR considered that the pursuit of competition law infringements

made by competition authorities is compatible with Article 6 ECHR as long as the person concerned has the opportunity to challenge the decision made against him before a judicial body with “full jurisdiction”, i.e. extended to both legal and factual issues.<sup>33</sup> It can be therefore inferred that a marginal judicial review – such as the one exercised in *Microsoft* case - would not be considered in principle compatible with Article 6 ECHR.

GCB ruling clearly takes into account the ECtHR case law, reinforcing the methodological convergence already existing between the two Courts.<sup>34</sup> The ECJ – after having recalled the principle of effective judicial protection under Article 47 of the EU Charter of fundamental rights<sup>35</sup> – held that the General Court is required to “*undertake, on the basis of the evidence adduced by the applicant in support of the pleas in law put forward, a full review of whether or not the conditions for applying [Article 101 TFEU] are met*”.<sup>36</sup> In this regard, the General Court has to “*establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is*

<sup>28</sup> Case T-201/04, *Microsoft v Commission*, September 17, 2007, § 88. See also F. Pradelles and A. Scordamaglia-Tousis, *The Two Sides of the Cartes Bancaires Ruling: Assessment of the Two-Sided Nature of Card Payment Systems Under Article 101(1) TFEU and Full Judicial Scrutiny of Underlying Economic Analysis*, 2 CPI 2014, p. 151.

<sup>29</sup> Charter of fundamental rights of the European Union, art. 47(1): “*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article*”.

<sup>30</sup> European Convention on Human Rights, art. 6: “[...] *everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law* [...]”

<sup>31</sup> ECtHR, *Menarini Diagnostics S.R.L. vs. Italy*, complaint 43509/08, September 27, 2011.

<sup>32</sup> ECtHR, *Grande Stevens and Others v Italy*, complaints 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, March 4, 2014.

<sup>33</sup> In *Menarini* the ECtHR specifies that the review should be carried out by a “tribunal” which “*must have jurisdiction to examine all questions of fact and law relevant to the dispute before it*” (§ 59). In *Grande Stevens* the ECtHR – recalling *Menarini* – held that “*the characteristics of a judicial body with full jurisdiction include the power to quash in all respects, on questions of fact and law, the decision of the body below. It must have jurisdiction to examine all questions of fact and law relevant to the dispute before it*” (§ 139).

<sup>34</sup> See F. Pradelles and A. Scordamaglia-Tousis, *cit.*, p. 151

<sup>35</sup> Case C-67/13, *cit.*, § 43.

<sup>36</sup> *Id.*, § 44.

capable of substantiating the conclusions drawn from it”.<sup>37</sup> As for the economic assessments - made by the Commission under its own responsibility – the ECJ clarified that they cannot be used “as a basis for dispensing [the Court] with an in-depth review of the law and of the facts”,<sup>38</sup> since the Court remains competent to review Commission’s legal classification of information of an economic nature.<sup>39</sup>

Applying the abovementioned principles to the case, the ECJ – for the first time - quashed a judgment for “insufficient review”. According to the ECJ, the “limited review” carried out by the General Court<sup>40</sup> resulted in a simple “reproduction” – within the ruling - of the contents of the Commission decision, thus violating its duty to carry out a full judicial review.<sup>41</sup>

The principles affirmed by the ECJ in GCB bode well for an increase of the standard required to EU and national Courts when reviewing decisions adopted by antitrust authorities and could represent an important

step forward in ensuring undertakings hit by antitrust fine an effective judicial protection.

### 3. LOOKING FORWARD: THE IMPACT OF THE JUDGMENT ON NCAS /COMMISSION ENFORCEMENT ACTIVITY

It is finally the case to make some observations on the “practical implications” of GCB judgment on competition law enforcement both at national and EU level.

First, the new standard of judicial review for competition decisions is more than welcome, since it strengthens the role of the Courts, too often extremely deferent to the competition Authority. This could have practical implications also at national level, especially in Italy, where the decisions of the Italian Competition Authority are often subject to a “limited” review,<sup>42</sup> at least (if not in theory) in practice.

Second, the clarifications provided on the notion of restriction ‘by object’ are likely to have significant consequences on 101 TFEU enforcement. In this regard, it seems that the ruling will have no impact on “true” cartels, which by their very nature reveal a high degree of harm to competition. Instead, the judgment

<sup>37</sup> Id., § 46.

<sup>38</sup> Id., § 45.

<sup>39</sup> Id., § 46.

<sup>40</sup> See case T-491/07, *Groupement des cartes bancaires v European Commission*, November 29, 2012, § 278. The General Court held that “the review carried out by the Court of the complex economic assessments undertaken by the Commission in the exercise of the discretion conferred on it by Article 85(3) of the Treaty in relation to each of the four conditions laid down therein, must be limited to ascertaining whether the procedural rules have been complied with, whether proper reasons have been provided, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers”. In fact, “it is not for the Court [...] to substitute its own assessment for that of the Commission”.

<sup>41</sup> Case C-67/13, *cit.*, § 90.

<sup>42</sup> See Corte di Cassazione, United Sections n. 1013, January 20, 2014 § 4.3, holding that the review over ICA’s assessments which present an objective questionable nature should only be aimed to assess the reasonableness, the coherence and the logic of the reasoning as well as the respect by the ICA of the margins of discretion at its disposal.

could have important implications for all conducts for which – given the novelty or the complexity of the case, and the consequently lack of “experience” by the Courts – the legal characterization results difficult. This is typically the case of practices which have ambivalent effects – i.e. they can have either negative or positive effects depending on the context – or whose restrictive effect is ancillary to the pursuit of a licit objective (Co-insurance, pharmaceutical co-marketing, temporary associations of companies, etc.).

For all these conducts the competition authority would then be required to carry out a full scale analysis of the effects on the market. However, one may wonder whether competition authorities will effectively make more efforts in order to prove the effects of the alleged anticompetitive conduct, given the burden that such activity requires.

More realistically, GCB ruling will lead to an increase of commitments decisions, which are less burdensome than a final decision, but however present some relevant drawbacks. As it is known, commitments decisions do not qualify the conduct in legal term, thus not contributing to clarify in which regard the contested practice has been considered having an anticompetitive character. Moreover, such decisions clearly do not constitute an incentive for follow on actions, as private parties cannot rely on them, given that they do not provide a legal assessment of the case. Finally, an increase in this kind of decisions could also lead to the paradoxical effect that the same undertakings could be less interested to adopt commitments if – thanks to the new strict interpretation of

‘by object’ restrictions - their conduct does not risk to be considered in this category.

The effective impact of GCB on the enforcement activity of competition authorities could be appreciated only in the next future: if the approach held by the ECJ in this case will be followed also in forthcoming judgments (both at EU and national level), two of most debated issues of competition law will finally be clarified.