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Groupement des Cartes Bancaires (referral to the General Court): Finding of a Restriction by Effect in the Absence of a Restriction by Object

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Judgment of 30 June 2016, Groupement des cartes bancaires v Commission, T-491/07 RENV, EU:T:2016:379

Following a referral from the Court of Justice, which set aside a judgement of the General Court and ruled that three pricing measures adopted by the Groupement des cartes bancaires did not constitute a restriction by *object*, the General Court upheld a decision of the European Commission for the second time, ruling that these measures have the *effect* of restricting competition within the meaning of Article 101(1) TFEU.

I. Legal context

In its judgement of 30 June 2016, *Groupement des cartes bancaires v Commission* (T-491/07 RENV), the General Court upheld the decision of the European Commission (the "Commission") in *Groupement des cartes bancaires* ((Case COMP/D1/38.606) Commission Decision C(2007) 5060 final; the "Decision") for the second time. The General Court concluded that three pricing measures (the "measures at issue") adopted by the Groupement des cartes bancaires (the "*Groupement*") qualified as restrictions of competition *by effect* within the meaning of Article 101(1) TFEU.

II. Facts

The *Groupement* is a French economic interest grouping, established in 1984 by the main French banking institutions with the aim of ensuring the interoperability of the systems for payment and withdrawal by bank cards issued by its members (the "CB system").

On 10 December 2002, the *Groupement* notified the measures at issue to the Commission pursuant to Council Regulation 17/62. The first measure, known as the "mechanism for regulating the acquiring function" (MERFA), required the payment of a fee of up to €11 per issued card by banks that were not sufficiently active in acquiring activities (operating merchant payment systems and ATMs) compared to their issuance activities (issuing bank cards to cardholders). The second measure was aimed at reforming the *Groupement*'s membership fee that comprised: (i) a fixed sum of €50,000 levied on membership, (ii) a fee of €12 per active bank card issued during the three first years of membership, and, if necessary, (iii) an additional fee for banks that tripled the number of bank cards in circulation between the end of their third and sixth year of membership. The third measure, known as a "dormant members wake-up" mechanism, applied to members that were inactive or not very active before the implementation of the new pricing measures. This required banks to pay a fee per issued bank card if the bank's share in the issuance activity of the CB system in 2003, 2004 or 2005 was more than three times higher than its share within the CB system as a whole (issuance and acquiring) in 2000, 2001 or 2002.

On 17 October 2007, the Commission adopted the Decision. It concluded that the measures at issue had the object and effect of restricting competition and that the *Groupement* had infringed Article 101 TFEU. The conditions for the application of Article 101(3) TFEU had not been satisfied. The *Groupement* appealed to the General Court, which upheld the Commission decision in its judgement of 29 November 2012, *Groupement des cartes bancaires v Commission* (T-491/07, EU:T:2012:633; see Paul Stone, "*Groupement des Cartes Bancaires*: The General Court Reinforces the Enforcement of Competition Policy in the Financial Sector", [2013] JECL&Pract 140), qualifying the measures at issue as restrictions of competition by *object*. The *Groupement* filed an appeal with the Court of Justice, which ruled in *Groupement des cartes bancaires v Commission* (C-67/13P, EU:C:2014:2204; see Javier Ruiz Calzado and Andreas Scordamaglia-Tousis, "*Groupement des Cartes Bancaires v Commission*: Shed-

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ding Light on What is not a "by object" Restriction of Competition", [2015] JECL&Pract 495) that the General Court had erred in law in characterising the measures at issue as restrictions by object. The Court of Justice referred the case back to the General Court to ascertain whether the agreements of the *Groupement* had the effect of restricting competition. The General Court answered this question in the affirmative.

III. Analysis

The General Court limited its assessment to the possible anticompetitive effects of the measures at issue within the meaning of Article 101 TFEU.

Regarding the method of analysis, the General Court found that the Commission correctly took into account the framework in which the measures at issue showed their effects. In defining the relevant market, i.e. the French market for issuance of payment cards (paras 77–81) and in examining the interaction between the relevant market and the related market for acquiring activities in France (paras 82–92), the Commission had properly assessed the two-sided nature of the CB system, which was characterised by the interdependence of the issuance and acquiring activities. The analysis of the competitive situation that would have prevailed in the absence of the measures at issue was also correct: this related to the analysis of the risk of free-riding that existed within the CB system, to the competitive situation in the market for payment services (paras 102–128) and to the method used by the Commission to assess the effects of the measures at issue (paras 129–142). With regard to the last aspect, the situation was different from the one prevailing in Commission decision *Visa International* ((Case COMP/29.373) Commission Decision 2001/782/CE) and *Visa International—Multilateral interchange fees* ((Case COMP/29.373) Commission Decision 2002/914/CE). Accordingly, the Commission had not breached the principle of equal treatment. The General Court finally ruled that the Commission had adequately explained why the issuance and acquiring activities were not interchangeable and that no contradiction existed between the definition and analysis of the markets concerned (paras 145–155).

Concerning the effects of the measures at issue, the General Court confirmed that the measures would result in additional costs for new entrants issuing bank cards. Because these costs would have the actual or potential effect of requiring new entrants to increase the price of their cards or to issue fewer cards, the measures at issue would reduce the competitive pressure on certain incumbents. The measures at issue thus had restrictive effects on competition and infringed Article 101 TFEU (paras 356–359). The General Court confirmed the Commission's analysis of the effect of the measures at issue on the price of bank cards issued by new entrants, e.g. with regard to the amount of additional costs (paras 169–173), the fact that the additional costs could not be easily avoided (paras 177–209), and the disadvantaging of new entrants (paras 212–217). The General Court also agreed with the analysis of the potential or real effects of a reduction in the volume of cards issued by new entrants (paras 283–307), concluding that the measures at issue had affected new entrants' plans for issuing bank cards (para. 308). The General Court finally endorsed the assessment of the effects of the measures at issue in terms of: (i) the safeguarding of income and the price of bank cards of certain incumbents (paras 312–322), (ii) the limitation of the technical development of bank cards (paras 324–337), and (iii) the "walling off" of the French market for the issuance of bank cards (paras 339–350).

As in its judgement of 29 November 2012, the General Court dismissed the *Groupement*'s arguments relating to the application of Article 101(3) TFEU. The measures at issue did not contribute to improving the production or distribution of the CB system or to promoting technical or economic progress. Moreover, there was no risk of free-riding potentially reducing the investments of members of the *Groupement* (paras 370–398), and the measures did not create a balance between issuance and acquiring activities (paras 399–426). Regarding the principle of sound administration, the General Court also endorsed the Commission's analysis, despite the presence of some errors of fact in the Decision (paras 436–465).

The General Court partly annulled the order in the second paragraph of Article 2 of the Decision, insofar as it prohibited the *Groupement* "in the future, from adopting any measure or behaviour having an identical or similar *object*" (emphasis added; paras 473–479). It held that the Commission could not prohibit the *Groupement* from adopting a measure that did not qualify as a restriction by object.

IV. Practical significance

The recent practice of the Court of Justice characterises an agreement between undertakings as constituting a restriction of competition by object when this agreement reveals "in itself a sufficient degree of harm to competition that it may be found that there is no need to examine [its] effects" (a concept that must be interpreted restrictively; see judgement in *Groupement des cartes bancaires v Commission* (EU:C:2014:2204), paras

57–58). However, it is always more difficult to classify an agreement either as a restriction of competition by object or by effect. In view of these elements, the General Court's judgement of 30 June 2016 confirms the soundness of the Commission's assessment of both the object and effects of an agreement in its competition procedures. The General Court in fact upheld a Commission decision qualifying pricing measures as a restriction by effect under Article 101 TFEU, where they do not constitute a restriction by object. In the market for issuance of payment cards in France, these measures were found to have the effect of reducing the competitive pressure exerted by new entrants on incumbents due to their impact on the bank card prices and issued volume of new entrants.

It could make sense for the General Court in appeals recognising the existence of a restriction of competition by object to extend its analysis to the effects of such an agreement where the restriction by object is not supported by a past decision of the Court of Justice. This extended analysis, which would keep intact the object–effect distinction while recognising that this distinction is not obvious in every case, would initially increase the work of the General Court, given that a complete analysis of the agreement in its market context is required in order to assess its effects. Such an assessment would, however, enable the General Court to participate in the classification of agreements as restrictions by object or by effect, while supporting the principle of prompt justice. In appeal cases where it would deny the existence of a restriction of competition by object, the Court of Justice would be in a position to give a final judgement, thereby avoiding referrals like in the case at hand. This would, of course, mean that in such cases the Court of Justice would first need to assess whether any restriction by object exists before assessing, if necessary, the possibility of restriction by effect. Unless this sequence is followed, this proposed course of action could be counterproductive.

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