The Boundaries of “Restrictions by Object” under EU Competition Law: A Badly Needed Debate

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EU competition law, more specifically Article 101(1) TFEU, prohibits agreements that restrict competition either by “object” (i.e. by their very nature, because they are considered to be so injurious to competition that no inquiry into their effects is necessary for a finding of infringement) or by “effect” (i.e. because they negatively affect competition). If an undertaking is found to restrict competition under Article 101(1) TFEU, be it by object or effect, it will be subject to a fine. The category under which the undertaking finds itself is unlikely to influence the amount of the fine, but the path leading to a finding of an infringement can be markedly different. Many would argue that, for reasons of procedural efficiency, the European Commission (EC) has overextended the type of conduct that should be classified as a restriction of competition by object.

The case that has kicked off the debate on the EC’s perceived overuse of the notion of restriction by object is case T-491/07 Groupement des cartes bancaires (CB) v. Commission. CB challenged the EC’s 2007 decision finding that certain tariff measures applied by CB amounted to restrictions of competition by “object” under Article 101(1) TFEU. CB’s tariff measures, which drew a distinction between its main members and other members, increased the cost of cards issued by new entrants. This, the EC held, allowed CB to maintain the price of bank cards in France above the level that would have otherwise existed and limited the number of cards supplied. In its defense, CB argued inter alia that the measures in question had the legitimate objective of tackling free riding among members. The General Court (GC) held that (regardless of there being any legitimate objectives) the measures could still restrict competition by object; although CB’s objectives could help in any argument that the measures satisfy Article 101(3) TFEU and are therefore exempt from Article 101(1) TFEU. CB is currently appealing the GC judgment (C-67/13 P) before the European Court of Justice (CoJ).

Why is there a debate about the difference between a restriction by object and a restriction by effect?

Restriction by object: It is an agreement or collusive behavior that, by its very nature, can be regarded as being injurious to normal competitive conditions. As mentioned in the Guidelines on [Article 101(3) TFEU], the presumption that certain types of restrictions are simply bad for competition is based, in part, on experience. The EC has seen time and again that these types of restrictions are likely to produce negative effects on the market and frustrate the objectives of EU competition law. Sometimes it is not the agreement on its face, but rather how the parties to it actually implement it. As pointed out by the Guidelines, evidence of the parties’ subjective intent to restrict competition can be a relevant factor in determining whether an agreement or collusive behavior is a restriction by object, although it is not a requirement.

Therefore, to support a finding of restriction by object, the EC only has to show that the conduct has the “potential to have a negative impact on competition” (see for example, T-Mobile Netherlands v. Commission at paragraph 31). It must do this by looking at the objective meaning of the agreement, not the parties’ subjective intention – although this
can be useful –, as well as the economic context in which the agreement existed (see for example, Compagnie Royale Asturienne des Mines SA and Rheinzinc GmbH v. Commission, paragraph 26). Restrictions by object include: (i) the coordination of actual prices, price increases or reductions; (ii) the coordination of quotation prices (as opposed to the final prices charged); and (iii) market-sharing.

If the object of an agreement or concerted practice is to restrict competition, the EC does not have to show that it might have an anti-competitive (adverse economic) effect. If the conduct in question does not have a clear anti-competitive purpose or object and hence does not qualify as a restriction by object, the EC may nonetheless prove that the conduct is a restriction by effect, i.e. that it negatively affected competition.

**Restriction by effect:** In order for an agreement or collusive behavior to be deemed a restriction of competition by effect, the EC looks at the actual conditions in which it functions, in particular: (i) the economic context in which the undertakings operate; (ii) the products/services covered; and (iii) the structure of the market (see for example, European Night Services v. Commission, in particular paragraph 136). The EC also examines the counter-factual – it looks at what would have occurred in the absence of the agreement or collusive behavior. In order to generate such counter-factual, the EC can use computer-based methods taking the data (prices, volumes, etc.) in an unaffected period or on unaffected markets, or it can build economic models that simulate the likely market outcome that would have occurred absent the alleged infringement.

In any case, where one party has to present evidence on a point this provides the opposing party with an opportunity to rebut it. Therefore, not only must the EC look at the actual conditions in the market and prepare a counter-factual, but it must then also address any rebuttals by the undertaking in question. It is no wonder that it seems as if the EC favors concluding that allegedly anti-competitive agreements and collusive behavior are restrictions by object. Unfortunately, it appears that things have gotten a bit out of hand as the EC is gradually expanding the definition of restriction by object, and we are seeing limited cases based on restriction by effect. The concern is that the reviewing courts might not do much about it, and in fact, the courts seem to be further blurring the line between restriction by object and effect. In Allianz Hungária and Others v. Gazdasági Versenyhivatal (C-32/11, issued March 14, 2013), a reference for a preliminary ruling, the Hungarian Supreme Court asked the CoJ whether certain incentives of insurance companies to insurance brokers in order to increase the sales of policies could constitute a restriction of competition by object.[1] Rather than clearly defining the two types of anti-competitive conduct and how each must be reviewed by courts and competition authorities, the CoJ provided a mash-up of the two. The CoJ, in reviewing the insurance companies’ questionable incentives, engaged in what would appear to most to be a restriction by effect analysis, including at least one counter-factual. But, then it ultimately concluded that the conduct may be a restriction by object. This is not helpful in resolving the debate.

It is only once the EC has decided how it is going to treat a restriction that the courts appear to feel ready to truly weigh-in, particularly when it is a restriction by effect. The most recent example is MasterCard and Others v. Commission (C-382/12 P), which is an appeal before the CoJ. Advocate General (AG) Mengozzi issued his non-binding opinion on January 30, 2014. In the decision being challenged, the EC did not adopt a definitive view as to whether the multilateral interchange fee (MIF) was a restriction by object. Therefore, it had to look at its effects on the market. A number of undertakings took issue with the EC’s analysis, including its counter-factual. Both the GC and AG Mengozzi were ready to deal with the arguments and examine each step taken by the EC to show that it was a restriction by effect.

Thus, we await AG Wahl’s opinion in the CB case, which should be available around March 27, 2014, and the CoJ’s subsequent ruling. The CB appeal would be the perfect opportunity for the CoJ to weigh in on the debate and give clear guidance as to when the EC should use “effect” rather than resulting to its default “object” position.