

XVIII Curso de Derecho de la Competencia Europeo y Español  
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## **Some additional reflections on Cartes Bancaires**

Alfonso Lamadrid de Pablo

**GARRIGUES**

## 10 Comments on the ECJ's Judgment in Case C-67/13 P, Groupement des Cartes Bancaires

with 12 comments



September 11 2014 was a big day for antitrust at the European Court of Justice. The Court delivered two important Judgments in the *Mastercard* and *Cartes Bancaires* cases, and heard oral arguments in *Huawei/ZTE*. We'll comment on the latter in due course, and will be devoting our next posts to discussing the content and implications of the two Judgments. Let's start with *Cartes Bancaires*, which is the one with greater potential future implications (as already noted by Pablo in the post below).

This can be an analytically complex subject and there's much to discuss, so allow me to skip the basics and the summary of the Judgment that you can find [here](#) (a copy-pasted version will also appear in some newsletters...) Here are my 10 initial reactions to the Judgment. These are not at all definitive positions but rather preliminary thoughts that I'm hastily posting now with the hope that I'll be able to polish them in the course of follow-up discussions. **For the lazy ones, and given that the full text may be lengthy and dense**

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# On the value of the CB Judgment

- **The object category had expanded beyond the limits of its logic**
- P. Areeda: “[T]he law evolves in three stages: (1) An extreme case arises to which a court responds. (2) The language of the response is then applied -often mechanically, sometimes cleverly- to expand the application. With too few judges experienced enough with the subject to resist, the doctrine expands to the limits of its language, with little regard to policy. (3) Such expansions ultimately become ridiculous, and the process of cutting back begins”.
- The object category was expanded not only by EC, but also by ECJ (*T-Mobile*) **as well as by NCAs** (Opinion of AG Wahl in CB, para. 59).
- **The Judgment is welcome mainly as a cautionary message from the Court in reaction to the abuse of the object label** (also welcome for stating the obvious in two-sided markets: that the two sides must be taken into consideration)
- **As if GC had asked to be quashed:** (i) “by object” should not be interpreted restrictively (possibly bad drafting); (ii) no need to consider the two-sides of a two-sided market?!



# Back to the future + the root of the problem?

- **This is not a first:** think of *Nungesser*, *Coditel*, *European Night Services*, *Delimitis*
- But **perhaps these lessons were forgotten** post-modernization
- Partly because relatively **few controversial 101 decisions now get to the EU Courts** (*BIDS*, *T-Mobile*, *Allianz Hungaria*, all preliminary references).
- **In more recent cases ECJ had arguably validated an ample interpretation of object** (*Glaxo Spain*, *T-Mobile*, *Pierre Fabre*, *Premier League*, *Allianz Hungaria*) but widened role of “objective justifications” and placed emphasis on the need to conduct a proper 101(3) assessment in any event.
- Query: **perhaps the practical unavailability of 101(3) has triggered a change in approach** on the part of ECJ?
- **Problems with application of 101(3) are at the root of controversies and contortions in 101(1).**





# On the definition of a restriction “by object”

- Albeit certainly welcome, the Judgment does not shed much light on how to resolve the object/effect conundrum
- In fact, analytical framework heavily builds on *Allianz Hungaria*, identified by AG Wahl as one of the most confusing precedents (para. 50 of the Opinion)
- It does nevertheless underscore two ideas which are important, if only because they should have been evident:
  - The concept of restriction “by object” is to be interpreted restrictively”
  - The fact that an agreement has the potential to restrict competition is not enough to qualify it as “by object” restriction
- The key test: Coordination that “***reveals a sufficient degree of harm to competition that it may be found that there is no need to examine their effects***” (paras. 58 or 69)



# The novelty of the “sufficiency” test

- **Makes sense, but not consistently found in the ECJ’s case law** (“*sufficiently deleterious effects*” a reminiscence from *STM* at most referred to in passing in later Judgments; never a key criterion)
- **ECJ in *T-Mobile*** (31 and 43): “*It is sufficient that it has the potential to have a negative impact on competition. In other words, [it] must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition*”.
- **Same formulation used in para. 125 of the General Court’s quashed Judgment** (with direct citations to *T-Mobile* and *Glaxo Spain*). **Nevertheless, the ECJ reprehends the GC for not having had proper regard to its case-law...**
- **Same formulation used in para. 24 of Guidelines on horizontal agreements** (“*restrictions of competition by object are those that by their very nature have the potential to restrict competition*”)= **bad soft law**

# On the prior assessment of the “legal and economic context”

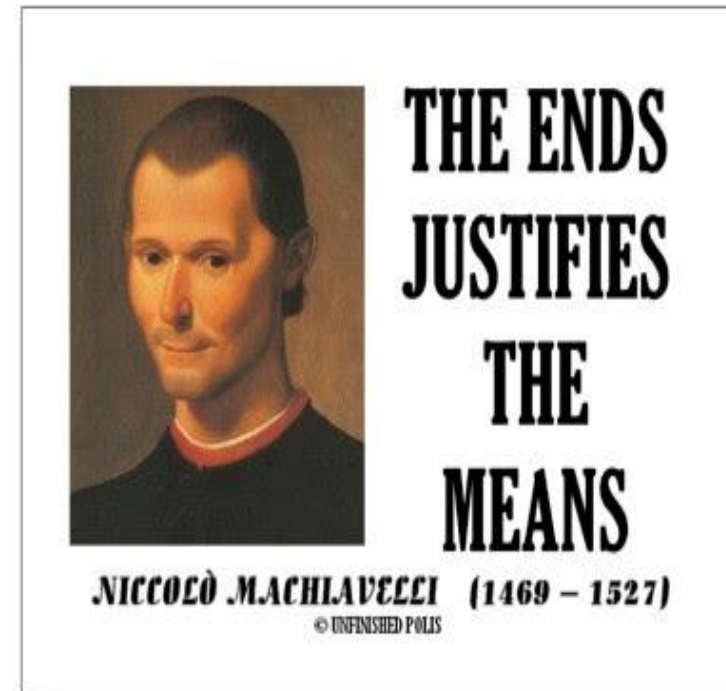
- **The case-law has been resilient on the idea that a “by object” qualification requires prior assessment of “legal and economic context”** = Not to prohibit what is only restrictive in appearance, but that placed in context is ancillary and indispensable to legitimate objective or merely incidentally restrictive
- CB is, on the facts, a perfect example of why this makes sense given the two-sided nature of the card payment market
- **Query: how deep must one dig into the “legal and economic context”?** When does this exercise blur the lines between object and effect? (*Allianz Hungaria* as an extreme exercise ?)
- If object is about legal certainty, deterrence and procedural efficiency, then it only makes sense to have it where “context” examination can be swift and easy (see CB, para. 82 and conclusions below)



*“It’s not what you think it is”*

# On the role of “legitimate objectives”

- **Where do legitimate objectives fit in the analysis?**
- Para 75 of the Judgment places value on the fact that the agreement pursued the “*legitimate objective*” of ensuring equilibrium and combatting free riding in a two-sided market.
- At the same time, it makes it clear that there can be a restriction “by object” even when a legitimate object is pursued (para. 70)
- In *Pierre Fabre*, the ECJ affirmed that restrictions by object could be “objectively justified” within 101(1)
- In *Irish Beef*, the ECJ ruled that *[i]t is only in connection with Article [101(3)] that [other legitimate interests] may, if appropriate, be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in Article [101(1)]*”.
- ECJ in *Mastercard* (89-93): if restriction is objectively necessary and proportionate to the main (legitimate) operation, then examine under 101(1); all other restraints (even those that reduce costs or make operation easier to implement) can only be saved within 101(3)





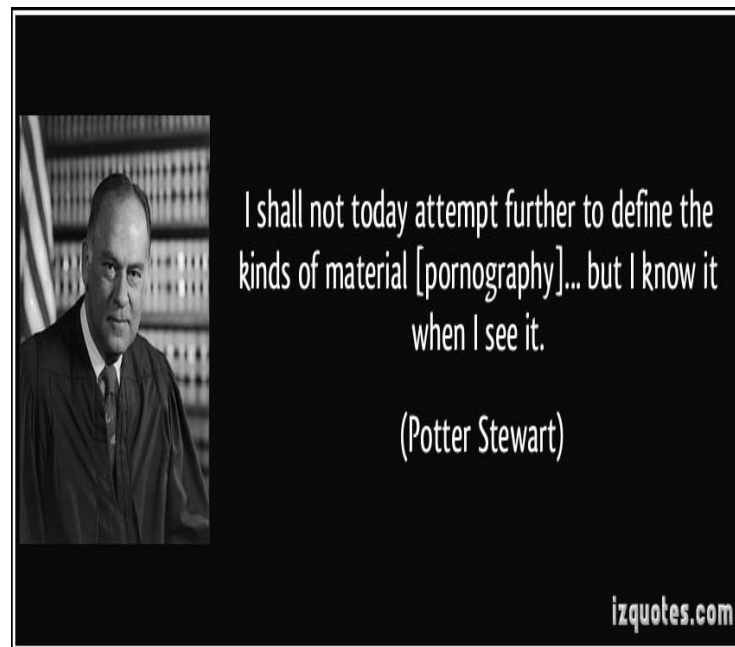
# Intentions are not what matters

- Decision and GC gave great importance to subjective intention of some members of GCB (statements that measures were intended to exclude new members)
- AG Wahl (paras. 96-114): excessive importance was given to subjective intent; good/bad intention are only one more element but not in itself sufficient.
- ECJ: The parties' intention may also be taken into account, but is not a “necessary factor in determining whether an agreement [...] is restrictive”
- In sum, even if some subjective intent had been established, the ECJ assesses purpose of agreement mainly on the basis of objective elements – *in casu*, wording alone did not reveal sufficient harm.

# My take on identifying object restrictions

- A simple rule of thumb: **“if it ain’t obvious, it ain’t object”**.
- CFI in *European Night Services*, para. 136:

*“In assessing an agreement under Article 85(1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned, **unless it is an agreement containing obvious restrictions of competition** such as price-fixing, market-sharing or the control of outlets. In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 85(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 85(1).*
- Since **“obviousness” is difficult to verbalize, the Court refers to “sufficiency” and, in passing, about experience** (para. 51, which is a novelty in the case-law, inspired either by the Opinion or by the US case law)
- Compare with AG Wahl’s definition (para. 56) *“any conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object”*



# Life after *Cartes Bancaires*

- In practice, will preclude competition authorities from relying lazily excessively on object label
- A narrow understanding of “object” should not pose a significant obstacle to competition law enforcement
- CB represents a limitation to the concept of “by object restriction” (but not to the very ample concept of “restriction”)
- If authorities are confident that a restriction is “obvious”, then there should be no problem in justifying its effects
- This very case is a perfect example for (i) the Commission was perfectly able to conduct an effects assessment in its decision and (ii) according to the ECJ, the General Court had also conducted a proper effect assessment, although only to conclude that the agreement was restrictive by object (see. para 82) = There was no need to apply the object label (compare with Mastercard)
- More room for lawyers to dress object restrictions?



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**You can put lipstick on a pig..  
„BUT IT'S STILL A PIG !**



# A contradiction with Intel?

- CB: agreement restrictive by its very nature in the light of experience and economic analysis [but defense available under 101(3)]
- Intel: exclusivity rebates are *prima facie* abusive by nature even if economic analysis shows that procompetitive justifications are plausible [but defense available as “objective justification”]
- A contradiction?



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