Restriction of Competition by Object or by Effect – How to establish a Sufficient Degree of Harm to Competition

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Overview

(I) Introduction

(II) Restriction by object: ECJ judgment in C-67/13 *Cartes Bancaires ("CB")* (2014)

(III) Learnings from recent cases (39.685 *Fentanyl*; T-472/13 *Lundbeck;* C-172/14 *ING Pensii;* C-345/14 *SIA "Maxima Latvija";* C-179/16 *F.Hoffmann-La Roche Lt,* Opinion of AG Saugmandsgaard Øe)

(IV) Restriction by effect

Introduction

- Importance of topic:

  ECJ: "the essential legal criterion for ascertaining whether coordination between undertakings" amounts to "a restriction of competition 'by object' is the finding that such coordination reveals in itself a sufficient degree of harm to competition." (*CB*, ¶57)

- Before *CB*, ECJ criticized for expanding by object categories (e.g. in *T-Mobile* and *Allianz*)

Cartes Bancaires: background

- Groupement Cartes Bancaires: association of banks - aim to manage French card payment system; notification of new fee structure

- Two-sided market:
  - (i) "issuing" cards
  - (ii) "acquiring" merchants accepting cards

CB: alleged infringement, GC and EJC

Commission (10/2007): new fee system has the object and effect to foreclose new entrants by making issuing more expensive (if little acquiring activity).

GCB: new fee system encourages acquiring activity; legitimate to avoid free-riding by new entrants.

Courts:

- GC T-491/07 (11/2012): confirmed by object restriction, did not examine effects analysis
- EJC C-67/13 (9/2014): annulled GC judgment – no restriction by object; referred case back to GC for effects analysis
- After referral, GC (T-491/07 RENV, 6/2016) upheld by effects analysis (but annulled Article 2, because based on by object)

CB: reasons for ECJ by object annulment

ECJ criticized GC, amongst others, for:

- failing to have regard to **essential criterion** that the coordination needs to (be of a "type" that) "reveals **in itself a sufficient degree of harm**" (¶57)
- erring that the concept of restriction 'by object' must not be interpreted **restrictively** (¶58)
- failing to consider **context**, i.e. requirement of balance between issuing and acquiring activities, **and legitimate aim** of combatting free-riding in the CB system ("financial contribution" for "benefit[ing] from the efforts of other members") (¶¶74-75, 77)
- **inferring** from "**capable** of restricting competition"-analysis by **object** infringement (without showing sufficient degree of harm) (¶69)
- resorting to **effects analysis** to demonstrate object (¶¶80-82)
- **wrongly comparing** *CB* fee structure **with *BIDS*** judgment (¶¶83-86)

CB: "sufficient degree of harm" I

What has to be shown?

- That coordination is "**so likely to have negative effects**, in particular on the **price, quantity or quality** of the goods and services that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market…" (¶51);
- "**certain types of coordination** …**can be regarded, by their very nature, as being harmful** to the proper functioning of normal competition" (¶¶49, 50) (e.g. price fixing)
- No need to show actual or appreciable effects

CB: "sufficient degree of harm" II

How?

- By analysing 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 necessary 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" (¶53), also intention (optional)

Anything new?

Confirms and applies existing case law (see AG Wahl, ¶61); *Société Technique Minière* (1966): "sufficiently deleterious"

CB: "sufficient degree of harm" III

Practical implications

- **Showing a sufficient degree of harm** (or that an agreement is capable of restricting competition) is no effect analysis
- Analysis whether there is a "**type of coordination"** that is by its **"very nature harmful"** showing a **"sufficient degree of harm"**
- For novel cases, helpful to show **similarity with well-established types of restrictions by object**: price-fixing, output restriction, market exclusion, market/customer sharing, market partitioning

Example: 39.685 *Fentanyl* (12/2013)

2005 "**Co-promotion**" agreement between J&Johnson (Janssen-Cilag), the originator, and Sandoz (Novartis), the generic.

Analysis of content of agreement and in particular its objective revealed that agreement was about delay of market entry in return for payments for **17 months** of Sandoz' generic version of the **strong pain-killer fentanyl** in the Netherlands.

Internal documents:

- Sandoz abstained from entering the Dutch market in exchange for "a part of [the] cake".
- Cooperation to avoid generic entry so as "to keep the high current price".

Conclusion: Restriction by object; fines: €16 million. **No appeal.** Janssen PR of 14 December 2013: "We regret…"

Recent case law I

T-472/13 *Lundbeck* (9/2016)

- **Citalopram:** blockbuster antidepressant medicine and Lundbeck's best-selling product at the time: it's "**golden egg**".

- Lundbeck's **basic patent** for the citalopram molecule and **two original processes** had **expired (1/2002)**. Thus, **market** was in principle **open** for generic competition.

- Lundbeck had patented some **30 different citalopram processes including of intermediates**, which offered still limited protection. The scope of those patents led to **uncertainty** and at least to a **potential patent dispute** among the parties.

- **Several generic companies** had made serious **preparations to enter**; **one** of them **had actually started** selling its own generic version of citalopram.

Recent case law II

- In 2002, Lundbeck entered into **six agreements** with these **four groups of generic companies for a duration of between 10 and 22 months**. **In total**, Lundbeck transferred a value of around **EUR 66.8 million** (booking this money as "cost" to gain "time").

General Court on restriction by object:

- Comparison with *BIDS* appropriate
- *CB* did not call into question the basic principles. L comparable to market exclusion; profit sharing; context fully considered (process patents could not exclude all competition);
- Role of experience: "does not concern the specific category of an agreement…, but rather… that certain forms of collusion are, in general and in view of the experience gained so likely to have negative effects on competition…" (¶438)
- Preventing patent infringement: legitimate objective? Agreements objectively not necessary and disproportionate

Recent case law III

C-172/14 *ING Pensii* (07/2015)

- Agreement between 14 (out of 18) private pension fund management companies in Romania about allocating customers that had made duplicate applications
- Statutory obligation of membership; proportionate allocation on random basis, if no membership choice after 4 months. Some signed up for two (which was not possible)
- Textbook analysis: Terms, objective, legal and economic context: customer sharing ("by its very nature"); irrelevant that potentially low share of customers concerned (1.5%)

C-345/14 *SIA "Maxima Latvija"* (11/2015)

- Lease contracts of Latvian supermarket chain with veto right regarding lease to competitors (12 of 119)
- Not among the (type of) agreements that by their very nature, prevent, restrict or distort competition. Economic context does not show clearly a sufficient degree of harm. Foreclosure unclear. Effects analysis would have to establish "cumulative closing-off effect"

Recent case law IV

Case C-179/16 *F. Hoffmann-La Roche v Autorità Garante della Concorrenza e del Mercato* (Opinion by AG Saugmandsgaard Øe)

Facts: Avastin and Lucentis are two drugs developed by Genentech (controlled by Roche)

- Avastin, a cancer drug, is an anti-VEGF (vascular endothelial growth factor) antibody, licensed to Roche
- Lucentis, an ophtalmologic drug, is an anti-VEGF antibody-fragment, licensed to Novartis. Roche holds a share in Novartis
- Before Lucentis was launched (at a much higher price), doctors used Avastin off-label for ophtalmology. Doctors continued using Avastin off-label
- Some time after license agreements had been concluded, Roche and Novartis started colluding in communication of allegations of lesser safety of one medicinal product compared to the other (to prevent off-label prescriptions)

Recent case law V

On restriction by object:

- Narrow interpretation; however, restriction by object not limited to the forms of collusion listed in Article 101(1) (¶150)
- Collusion distorted competition by exploiting scientific uncertainty
- Restriction by object, if information was misleading (impairs the quality of information available; adversely affects decision making process; likely to reduce, if not suppress demand) (¶137)
- No plausible alternative explanation
- Legal and economic context: no legitimate aim (¶170)
- Not ancillary to license agreement, which was concluded independently and before
- Capacity to have effects, irrespective of specialist competence of doctors (¶176)

By effect

C-382/12 *Mastercard* ("C") and T-491/07 RENV *Cartes Bancaires* ("T")

- Liable to have an appreciable adverse impact on the parameters of competition, i.e. price, quantity and quality of goods (C¶164)
- Restriction of decision making independence as such not enough; necessary to consider concretely the economic and legal context, the nature of the goods or services affected as well as the real conditions of the functioning and structure of the market (T¶69); any relevant factor (C¶177)
- No rule of reason (i.e. no balancing within Article 101(1)) (T¶109)
- Main elements: Counterfactual, i.e. the competition situation in the absence of the agreement (T¶¶107, 109-11); counterfactual hypothesis must be appropriate and realistic (C¶¶109, 166); economically viable and plausible or likely (C¶173); impact of agreement on existing and potential competition (T¶110)

Additional points:

- Market power analysis; does the agreement contribute to maintaining or increasing market power? (see, e.g. Case 39.612 *Servier*)
- Restriction must be appreciable (*De Minimis* Notice 2014/C 291/01) (horizontal: <10%; vertical: <15% MS)

Next case on effects: T-691/14 *Servier* (restriction of potential competition)

Thank you!