ANNUAL PROCEEDINGS OF THE

FORDHAM COMPETITION LAW INSTITUTE

INTERNATIONAL ANTITRUST LAW & POLICY

This volume contains articles and panel discussions delivered during the Forty-first Annual Fordham Competition Law Institute Conference on International Antitrust Law & Policy

Editor

Barry E. Hawk

Fordham Competition Law Institute
2015

JURIS

Chapter 12

QUINQUENNIAL THOUGHTS: 2009-2014

*Ian S. Forrester and Mark D. Powell**

Vice President Joaquín Almunia's reign as Competition Commissioner started in the difficult times of the financial crisis, which threatened the core of the European venture. Despite the storms, the ship survived and its crew prospered. Today, despite calls for relaxation, EU competition law and policy are in better shape than ever. DG Competition has continued to play a prominent international role with a clearly audible voice within the International Competition Network, as well as speaking out in Europe against protectionist forces. The voice of DG Competition is an important one inside the Commission, especially at a time when it was no longer politically incorrect to be in favour of reversing the open market policies. And its clashes with Google, Gazprom and Ryanair are three examples among many of its important controversies over the past five years.[1] It would not be honest to wave farewell to the Almunia train without recording some regrets, and we will respectfully voice a few.

A good place to start an appraisal is the Vice President's confirmation hearing in January 2010, when we were all a little bit younger and less world-weary. These occasions often allow parliamentarians to test the nominee with obscure questions, special interests, or – indeed – complete misunderstandings. The nominee has to convey sharpness, confidence, competence and similar virtues, but is not expected to be very specific. Every topic should be worthy of further examination, no promises should be given, and all options kept open. However, the Almunia debate was hijacked by the financial crisis. Almost half of the questions from the MEPs focussed on what the Commissioner would do to address the situation. He indicated that his role was to ensure that the economy got back on track and that we restructured the European banks. Five years later, it is remarkable to see how the procedures and practices of the

---

* Respectively Queen's Counsel at the Scots Bar, Honorary Professor, University of Glasgow; and Solicitor, England & Wales; both of White & Case, Brussels. The authors jointly prepared comments for the traditional dialogue with the Commissioner at Fordham's Annual Antitrust Conference. Warm thanks are expressed to Guoda Majauskaite and other colleagues who have cheerfully shared their knowledge. The opinions expressed are wholly personal.

[1] The high-tech, pharmaceutical and financial sectors have been the prime targets of Commission enforcement during the past four years. For example, Google search, the functioning of online distribution models, so-called "pay-for-delay" transactions, and abuse of standard-essential patents.

European Commission have adapted to meet these challenges. Antitrust authorities are generally accused of moving too slowly. However, under the Vice President's guidance, decisions on the financial crisis were taken with extraordinary speed. Banco Espirito Santo was a bank on the verge of collapse. The decisions taken to support the bank were made over a weekend. Over that same weekend, the Commission, working alongside the Portuguese government, was able also to deliver a decision approving the rescue aid. A decade earlier, such drive and rapidity were unthinkable. To review the restructuring package was obviously more complex. But the European Commission has risen to the challenge and has adopted a number of very complex decisions. Another recent example is the approval of the restructuring aid for the Greek banks. The Commission moved efficiently to address a very challenging economic situation.

We do not suggest that everything was done perfectly. The rights of the recipients of the aid were given short shrift, and decisions involving immensely large sums were sometimes taken very swiftly or with a lack of convincing reasoning. The rights of third parties in State aid proceedings, notably the recipients of State aid, could be significantly enhanced, which perhaps explains why the Ombudsman is currently looking into the State aid procedures more generally to determine whether "third-party" rights are adequate ("third-party" is a misnomer, as the recipient of the aid should not be a third party in the proceedings). But there was a crisis, and it was coped with. So, as to the first big preoccupation of the MEPs at the confirmation hearing, reality has matched the promises.

Another big topic at the confirmation hearing was the difficulties for victims of cartel conduct to seek redress. The Vice President committed to propose rules on collective damage claims for businesses and consumers. Here again, he has succeeded. After tortuous negotiations in the Parliament and the Council, and after several hundred amendments, the Damages Directive finally saw the light of day and could enter into force.[2] Vice President Almunia was personally committed to this initiative and drove it to a successful conclusion. That is not to say that the Directive is perfect. We still have difficulties in accepting that European administrative law can intrude upon civil law as is contemplated: for example, decisions of national competition authorities are supposed to become binding on the national courts. This, we submit, is premature until we have a more developed, consistent and adequate regime which accords due process in administrative proceedings. The presumption of damage is a troubling encroachment in the field of civil law: we well know examples of situations where business problems are attributable to multiple causes, of

2 Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (adopted by the Council on 10 November 2014; not yet published).

which anti-competitive conduct may be only one arguable and possibly minor factor. Sacrifices have to be made to get legislation adopted, and that debate has already taken place. The Directive will enter into force and we will have to see in five years whether it will survive the test of time. So we are sceptical about the concepts, but we have respect for the achievement of consensus on a piece of controversial legislation.

What will become of the legislation in daily legal and judicial practice is yet to be seen. Predictions of doom were confounded with respect to the Product Liability Directive,[3] and we may be hopeful that abuses, wastes of time and the other dangers of well-intentioned law reform as to fundamental matters will not materialise.

The Rise of Settlements

Not mentioned at the confirmation hearing was the expansion of settlements to dispose of cartel cases. However, this has been a feature of the final years of the Vice President's mandate. Fourteen such settlement decisions have been taken.[4] This is quite an achievement since most commentators believed that the "carrot" of a 10% reduction of the fine would be insufficient to attract potential settlers. So the concept is certainly working. However, the procedures by which a settlement is advanced are very particular. In a succession of meetings convoked by the Commission, supposed miscreants are told how strong and unanswerable is the case against them, how broad is the volume of sales affected and the range of fines contemplated. The supposed offender (which may have much or little to burden its conscience) has to balance the merit of a small discount and an acceleration of an outcome, albeit an adverse outcome, against the chances of convincing the accusers in a full procedure. Not many Statements of Objection lead to an "acquittal," so the statistical chances for an accused enterprise are not good. It remains for us uncertain

3 Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, [1985] OJ L 201/29, as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999, [1999] OJ L 141/20.

4 Case COMP/39965 - Mushrooms, decision of 25 June 2014; Case COMP/39729 - Steel Abrasives, decision of 2 April 2014; Case COMP/39922 - Bearings, decision of 19 March 2014; Case COMP/39952 - Power Exchanges, decision of 5 March 2014; Case COMP/39801 - Polyurethane Foam, decision of 29 January 2014; Case COMP/39861 - Yen Interest Rate Derivatives, decision of 4 December 2013; Case COMP/39914 Euro Interest Rate Derivatives, decision of 4 December 2013; Case COMP/39748 - Automotive Wire Harnesses, decision of 10 July 2013; Case COMP/39611 - Water Management Products, decision of 27 June 2012; Case COMP/39600 - Refrigeration Compressors, decision of 7 December 2011; Case COMP/39605 - CRT Glass, decision of 19 October 2011; Case COMP/38866 - Animal Feed Phosphates, decision of 20 July 2010; Case COMP/39579 - Consumer Detergents, decision of 13 April 2011; Case COMP/38511 - DRAMs, decision of 19 May 2010.

whether enforcement is made better or worse by the prevalence of horse-traded outcomes as opposed to what might be called conventional condemnations after accusation, defence and hearing.

While the increase in the reliance on settlements has no doubt boosted "productivity," questions remain. What to do with hybrid situations where some defend and others decide to seek a settlement? What of the due process difficulties associated with having condemned a handful of companies yet continuing to pursue the others, purportedly with an open mind? Should settlements be approved by some independent body, as is the case in the United States under the Tunney Act? Do we need such an additional safeguard in the process?

Deterrence and Penalties

Related to the Damages Directive is the notion of deterrence: to our regret, the Vice President has not essentially modified his predecessors' litany: at the hearing in January 2010, the Vice President said, *"we must vigorously enforce the rules on cartels and abuse of dominant positions."* There was no promise, or even an indication, that he might moderate the level of fines that had been imposed by his predecessor, and it would be difficult to do so without some explanations. However, there was generally an expectation of moderation, particularly towards low-margin companies in the industrial sector. This proved to be a false hope.

The conventional enforcement theory is that cartels are deplorable and when detected must be punished, and that the punishment must be set at a high enough level to "deter." Fines have increased from hundreds of thousands, to millions, to tens of millions, to hundreds of millions of Euros, so that for a while European competition fines have been the highest in the world for virtually any offence in any democracy.

After ten years of higher and higher fines, it is proper to ask if the conventional wisdom about fining is sound. We suggest that it is not. The recent fines of just under one billion Euros on ball-bearings confirm the power of the conventional wisdom. Although in 2011 they were lower, fines in 2014 are currently in the region of 1.5 billion Euros. Naturally shareholders, pensioners and companies take a different view and would argue that now we have the Damages Directive in place, which is designed to ensure that victims are adequately compensated, fining practices need to be recalibrated accordingly. We respectfully suggest that the fines pedal should be pressed less hard. Fines should be as high as is necessary to punish and deter. We consider that they are currently very severe punishment and are not a deterrent. While the severity of the fines increases, the number of cases does not diminish. It is evidently not the case that absurdly high fines deter. We pose the question provocatively. Is fining into bankruptcy the next target? Given that the current regime does not deter, other means of deterrence, better targeted, should be pursued: national criminal prosecutions, disqualification from holding office, divestitures are some of the alternatives which might be envisaged.

Some Good News

Another theme over the last few years has been the apparent bias in favour of pan-European consolidation in the field of merger control, as opposed to in-country consolidation. This has been particularly evident in the airline and telecommunications sector. Again, we have seen a slight softening of position after an initial fear that all in-country consolidation was potentially bad. The Vice President has demonstrated that he and his team were ready to look into the specific details and circumstances of any proposed consolidation, which perhaps explains why a different position was reached in *Aegean/Olympic*, the second time around. The Greek economy was going through very torrid times, while in *Ryanair/Aer Lingus*, where there were no such circumstances, the outcome was a refusal. But it is perhaps in the telecommunications domain that we have seen the most heated debate. Mobile operators, even heads of State, have all argued that there needs to be greater flexibility to allow in-country consolidation, especially in smaller jurisdictions. In each of the telecoms cases, a solution has been found to try to balance the interests of consumers with those of consolidation and the need for investment in infrastructure. By and large, a happy medium seems to have been found, based on a readiness to be guided by reality, not doctrine.

Due Process

One problem is so familiar that experienced readers may sense an excess of déjà vu at our mentioning it: due process. But it is true, though elementary, that competition law is enforced by the European Commission according to procedures which are unique on earth. No other agency replicates the triple curiosities that one finds in DG Competition's decision-making: cases are investigated, then decided, by the same officials, who successively hear complaints, investigate, accuse, reject defences, draft a condemnation and help decide the punishment. There is no hearing in the presence of a decision-maker. The task of deciding innocence or guilt falls to a college of 28 political figures who have never seen the evidence. While there are some improvements at the margins, the essential structural problems remain. Uniqueness on earth is not per se illegal, but it is not a guarantee of perfection. The best time to make reforms is when things are going well. Vice President Almunia received a letter, from one of the authors of this paper, in the following terms, at the start of his mandate in December 2009:

"Dear Commissioner,

I was pleased to learn that you will be in charge of competition matters over the next years, and though my intention in writing is not only to congratulate you, I hope you will accept my good wishes as you assume this important and very interesting position.

...

The Commission has had a tremendous series of successes, and is at the moment the world's first, or first equal, competition agency in terms of prestige and successful pursuit of innovative theories. That authority should give you confidence to review the processes by which the Commission takes decisions. Although experts can disagree, I submit that the processes currently in force do not satisfy modern needs. It is inappropriate for sharply-debated disputes (although the process is in one sense public, the underlying causes are commonly private disputes) to be decided by 27 eminent politicians, without a hearing by a decision-maker, still less to impose heavy sanctions. Europe's procedures are unique, and are deeply unsatisfactory. Talented officials deserve a platform which will endorse their conclusions with more external authority. Good procedures are not antithetical to vigorous enforcement. The Court defeats in the merger cases a few years ago helped the rigour of the Commission's subsequent merger enforcement. I am not commending under-enforcement, or a relaxation of the Commission's vigour in the fight against anti-competitive behaviour.

...

I would like to propose that your services actively consider procedural reform. To do this at a time of strength is healthy. The bar is sympathetic, and academic opinion would likewise be favourable. At a time when there is a new Treaty, a new Commission, a new Commissioner and, last but not least, a new duty (the ECHR), it is opportune to launch the process ..."

The initiative did not lead to any reaction; but such a dialogue between opposing views would do no harm. Maybe Mr. Almunia's successor will consider it.

Doctrine or Reality?

By contrast, an unhealthy doctrinal weed has sprouted in the competition law garden. The proliferation of the Commission cases based on "by object" infringements is a new and dangerous reversal of the

reform adopted in 2003. Messages from Luxembourg have been mixed. Advocate General Wahl warned that: "[a]n uncontrolled extension of conduct covered by restrictions 'by object' is dangerous having regard to the principles which must govern evidence and the burden of proof in relation to anti-competitive conduct."[5]

"By object" restrictions of competition are those that are "regarded, by their very nature, as being harmful to the proper functioning of normal competition."[6] In the words of the Commission, the presumption of harm for object restrictions is justified by their "*serious nature*," and by past "*experience showing that restrictions of competition by object are likely to produce negative effects on the market and jeopardize the objectives pursued by the Community competition rules.*"[7] This means that "by object" infringements could be found only in instances where anti-competitive effects have "*high potential*"[8] and thus would inevitably arise as a necessary consequence of a particular practice. To determine the occurrence of harm the Commission is required to conduct a competitive analysis of the practice taking into account the prevailing characteristics of the market and the legal and economic context of the arrangement.[9] Since we have been involved in several "by object" cases, it seems permissible to discuss the topic with a little detail.

Competition law should be rooted in reality, in demonstrated bad or good consequences of controversial behaviour. It should not be rooted in hypothetical doctrinal contentions. The doctrinal weed has spread from parallel trade to patent settlements (*Servier* and *Lundbeck*), as well as complex schemes for mutual promotion (*Allianz*).

Of course, condemnations "by object" make it easier to move cases forward to a decision. However, the accused enjoys the right to presumption of innocence under Article 6(2) of the European Convention on Human Rights.[10] The EU Courts have long recognized that undertakings accused of infringing competition laws have the right to a

---

[5] Opinion of Advocate General Wahl in Case C-67/13 P Groupement des cartes bancaires v Commission [2014], not yet reported, paragraph 57.

[6] Case C-209/07 Competition Authority v Beef Industry Development Society Ltd, Barry Brothers (Carrigmore) Meats Ltd [2008] ECR I-8637, paragraph 17; Case C-8/08 T-Mobile Netherlands and Others v Raad vanbestuur van de Nederlandse Mededingingsautoriteit [2009] ECR I-4529, paragraph 29.

[7] Guidelines on the application of Article 81(3) of the Treaty [2004]OJ C 101/2, paragraph 21.

[8] Article 101(3) Guidelines, paragraphs 21 and 22.

[9] Case C-56/65 Societe Technique Miniere v Maschinenbau Ulm [1966] ECR 337, p. 14, Case C-8/08 T-Mobile Netherlands and Others v Raad vanbestuur van de Nederlandse Mededingingsautoriteit [2009] ECR I-4529, paragraph 28; Case C-32/11 Allianz Hungária Biztosító Zrt., Generali-Providencia Biztosító Zrt. and others v Gazdasági Versenyhivatal [2013] not yet published, paragraph 33.

[10] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ("ECHR").

fair and independent legal process[11] which means that the Commission is required to respect the presumption of innocence and to keep an open mind when prosecuting competition law offences.[12] There is no substitute for checking on reality. Assumption and assertion are understandable tools for the investigation, but they should not excuse a thorough and neutral verification of the facts.

GlaxoSmithKline Spain[13] is a good example of the new wave of "by object" determinations despite market realities. In 1998 GSK notified its new sales conditions to the Commission. The case presented a challenge to the long-established civil religion of European law: the religion holds that market integration is facilitated by parallel trade, which benefits consumers. Now, Spain had established exceptionally low prices for the reimbursement of prescription medicines, but made it clear that it had no wish to see such prices exported to other Member States, whose reimbursement policies would reflect their own legitimate budgetary priorities. The pharmaceutical company reacted by indicating that it would respect the Spanish law and would deliver to pharmacies in Spain at the stipulated price. For product not destined to be dispensed to patients covered by the Spanish price reimbursement scheme, a different, free-market price reflecting the price proposed as a reasonable price to the government by the company would prevail. To zealots who might regard parallel trade almost as a goal in itself, this was a gross example of dual pricing, intended to deter and penalise exporters. To the industry, the regime was a realistic reaction to a Spanish rule that was intended to have no effect outside Spain.

The Commission found that the notified sales conditions reduced incentives to parallel trade and *hence automatically were* restrictive of competition for the purposes of Article 101(1) TFEU.[14] In finding an infringement, the Commission did not look at the economic implications of the notified clauses or at any distinctive circumstances of the case. It essentially presumed the obvious harm of the arrangement and stated that

[11] Case C-235/92P Montecatini v Commission [1999] ECR I-4539, paragraphs 175 and 176; Case T-30/91 Solvay v Commission [1995] 5 ECR II-1775, paragraph 73; Case C-199/92P Hüls v Commission [1999] ECR I-4287, paragraph 150.

[12] For further reading on presumption of innocence in competition cases see Ian S. Forrester "Improving how European competition decisions are made: 'I would not start from here,'" P. Lowe and M. Marquis, eds., European Competition Law Annual 2014: Institutional Change and Competition Authorities, Hart Publishing (not yet published).

[13] Commission Decision of 8 May 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty Cases: IV/36.957/F3 Glaxo Wellcome [2001] OJ L 302/1, partially annulled by the General Court in Case T-168/01GlaxoSmithKline Services v Commission [2006] ECR II-2969.

[14] "A pricing policy which makes it economically uninteresting for wholesalers to indulge in parallel trade must be considered to be at least as effective as an outright contractual export ban." GSK Spain Decision, paragraph 118.

"[t]he Court of Justice (and Court of First instance) have always qualified agreements containing export bans, dual-pricing systems or other limitations of parallel trade as restricting competition 'by object.' That is to say, prohibited by Article 81(1) without there being any need for an assessment of their actual effects."[15] As a result, the Commission inferred from a reading of the notified clauses and the mere fact that the conditions established a system of differentiated pricing that they were restrictive of competition "by object." As GSK's objective was *"clearly to impede parallel trade,"*[16] and the notified conditions *"clearly restricted the welfare of consumers,"*[17] no other circumstances required to be examined.

On appeal, the General Court held that the Commission had failed to conduct an adequate examination of GSK's submissions and erred in finding a "by object" infringement. The decision was annulled.[18] According to the General Court, the Commission could not base its infringement decision on the mere fact that the system introduced by GSK intended to limit parallel trade because *"if account is taken of the legal and economic context in which GSK's General Sales Conditions are applied, it cannot be presumed that those conditions deprive the final consumers of ... advantages"* or *"reveals in itself that competition is prevented, restricted or distorted."*[19] The CFI considered that the Commission had failed to undertake a *"rigorous examination"* of GSK's factual arguments and evidence and had confined itself to *"fragmentary"* observations *"of limited relevance and value."* The General Court found that unlike in other economic sectors, the prices of medicines reimbursed by national sickness insurance schemes were not freely determined by supply and demand, but were controlled by the Member States. Therefore, according to the General Court, it could not have been presumed that parallel trade tended to reduce prices, thus increasing the welfare of final consumers. Nevertheless, said the General Court, since parallel trade could bring some benefits to the final consumers, Article 101(1) applied, such that GSK's practices were anti-competitive by effect.

The ECJ did not go as far as GSK had argued and modified the General Court's findings as to the existence of the infringement. The ECJ overturned the General Court's analysis according to which a restriction to parallel trade could have been qualified as an infringement "by object" only if it had direct harm to end consumers by depriving them of the

[15] GSK Spain Decision, paragraph 124.

[16] GSK Spain Decision, paragraph 116.

[17] Case T-168/01GlaxoSmithKline Services v Commission [2006] ECR II-2969, paragraph 118

[18] Case T-168/01GlaxoSmithKline Services v Commission [2006] ECR II-2969, paragraphs 117 and 133 ("At no point ... does the Commission examine the specific and essential characteristic of the sector").

[19] Case T-168/01GlaxoSmithKline Services v Commission [2006] ECR II-2969, paragraphs 122 and 136.

"advantages of effective competition in terms of supply or price."[20] However, the ECJ confirmed the message to the Commission that it must take into account the nature and specific features of the pharmaceutical sector when carrying out its assessment. The ECJ upheld the General Court's findings that the Commission had failed to conduct a proper examination of the facts.

In *Irish Beef*[21] the ECJ analysed whether a horizontal market sharing and output limitation agreement aimed at reducing overcapacity on the Irish beef market was an infringement "by object" and thus inevitably contrary to Article 101(1). The concept was that capacity would be reduced with beef farmers being either "stayers" or "goers:" by contractual understanding capacity would be reduced, a sort of private crisis cartel. In her opinion, Advocate General Trstenjak stated that *"it is clear that the category of restrictions of competition 'by object' cannot be reduced to agreements which obviously restrict competition"* and that when analysing the alleged injurious practice regard cannot be given *"solely to the necessary consequences of an agreement."*[22] According to the Advocate General, the arrangements *"appear to be aimed at an appreciable restriction of competition."*[23]

The Court held that the type of arrangement discussed by the beef processors *"conflicts patently with the concept inherent in the EC Treaty provisions relating to competition"* as it *"include[s] restrictions whose object is anti-competitive."*[24] The Court did not consider the actual context of the arrangements and simply found that the *"restrictions are obviously intended to dissuade any new entry of competitors"* and therefore had as *"object the prevention, restriction or distortion of competition within the meaning of Article 81(1) EC."*[25] The conclusion of the *Irish Beef* case was not so surprising, perhaps, since a privately-negotiated crisis cartel intrinsically seems unlikely to be wholesome. But the habit of judgment by categorisation has become established.

In *Expedia* the Court created a tension between the law on de minimis restrictions and the law on "by object" infringements, holding that an agreement which has an anti-competitive object constituted an appreciable restriction on competition *"independently"* of any concrete effects,[26] and, therefore, *"there is no need to take account of the effects of an agreement once it appears that its object is to prevent, restrict or distort competition."*[27] Now, it had always been believed that an agreement between two sardines about a tiny corner of an ocean would not trouble the competition rules. But the Court did not agree that falling below the de minimis thresholds was sufficient to immunise a controversial practice.

During the main proceedings in France, Expedia argued that its joint venture with SNCF, the state railway company, could not be caught by the competition rules because the combined market share held by the parties was below the thresholds of the Commission's de minimis notice.[28] The Court stated that a *"national competition authority [was not precluded] from applying Article 101 (1) TFEU to an agreement between undertakings that may affect trade between Member States, but that does not reach the thresholds specified by the Commission in its de minimis notice, provided that that agreement constitutes an appreciable restriction of competition within the meaning of that provision."* As a consequence, the Court expanded the possibilities for the Commission to infer restrictions "by object" even where the market share is tiny and even where there may be only trivial perceptible effects.

In the same vein of exotic and unfortunate innovation is *Allianz Hungária*.[29] Normally one would tell students that certain categories of conduct are so obviously intrinsically injurious to competition that it is not necessary to enquire into their effects. Cartels are the natural candidate for such categorisation. By contrast, a joint venture or an exclusive distribution contract or a software licence over secret technology would need to be examined neutrally, to find out if on balance the effects of the deal were pro-competitive or anti-competitive.

In the *Allianz* judgment, the ECJ went off (to quote the case of *Joel v Morison*)[30] on a *"frolic of its own,"* recommending a different approach: look at the structure of the market, who has power, what are the affected goods or services, and determine whether it is to be damned as a by object infringement. Thus before reaching the conclusion as to black-listing the agreement as a by object restriction, an effects analysis should be done. The result of "losing" or not surviving the effects analysis would thus be to proceed to the stage of inexcusable, irredeemable restrictiveness. The judgment will probably join the Pantheon of ECJ errors which, like *Sirena*,[31] will in due course be covered over by subsequent judicial decisions and no great harm will be done.

The Hungarian Supreme Court referred to the ECJ a question about a vertical agreement between motor insurance companies and car repairers according to which the size of compensation for repairs to vehicles insured

[20] Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services Unlimited v Commission [2009] ECR I-9291, paragraphs 62-63.

[21] Case C-209/07 Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd [2008] ECR I-8637.

[22] Opinion of Advocate General Trstenjak in Case C-209/07 Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd [2008] ECR I-8637, paragraphs 46 and 47.

[23] Opinion of Advocate General Trstenjak in Irish Beef, paragraph 77.

[24] Case C-209/07 Irish Beef, paragraphs 34 and 36.

[25] Case C-209/07 Irish Beef, paragraphs 38 and 40, emphasis added.

[26] Case C-226/11 Expedia Inc. v Autorité de la concurrence, not yet reported, paragraph 37.

[27] Case C-226/11 Expedia, not yet reported, paragraph 35.

[28] Case C-226/11 Expedia, not yet reported, paragraph 11.

[29] Case C-32/11 Allianz Hungária Biztosító Zrt., Generali-Providencia Biztosító Zrt. and others. v Gazdasági Versenyhivatal, judgment of 14 March 2013, not yet reported.

[30] Joel v Morison 3 July 1834, [1834] EWHC KB J39.

[31] Case 40/70 Sirena S.r.l. v. Eda S.r.l. and others [1971] ECR 69.

by the insurance company was linked to the number of insurance policies taken out with the insurance company through that repairer: whether that repairer benefiting more if it convinced its customers to take car insurance as well as repair services (in addition to the repair services purchase motor insurance) was anti-competitive.

One could agree that there were certain restrictions but there was also potential gain for the repairers. The insurance companies believed that such conduct was a sensible commercial practice. Various authorities submitted a range of opinions.[32] The Commission and the Hungarian Government were fast to condemn the arrangement and considered that it was definitely an injurious violation by object. The EFTA Surveillance Authority suggested a more moderate view depending on the extent to which the agreements were harmful to competition. Finally, Advocate General Cruz Villalón did not consider that a "by object" rule was appropriate, as the arrangement did not fit into any of the previously established "by object" boxes.[33] Such a range of opinion could well have flagged the likelihood that this was a case where the "by object" label was not appropriate.

The ECJ, however, had its own interpretation. As a starting point for its considerations, the Court agreed that acting in the dual capacity of a quasi-broker for the insurer and at the same time repairing vehicles was possible for car repair shops. It noted that *"the establishment of such a link between two activities ... does not automatically mean that the agreement concerned has as its object the restriction of competition."*[34] Nevertheless, the Court found that such vertical arrangements amounted to Article 101(1) TFEU infringement "by object" because they were by their very nature injurious to the proper functioning of competition.

The ECJ arrived at its "by object" conclusion by analysing numerous market conditions, including its structure, nature of goods and market power.[35] The Court condemned the arrangements as *"apparent... by their very nature"* to harm healthy competition. However, paradoxically, the Court proposed to look at an extensive list of factors in order for such a "by object" finding to materialize. Normally, if judges had to undertake such a wide-ranging (even though *"concrete and individual"*)[36] examination of the prevailing market conditions for finding an infringement, the practice was not obviously harmful and therefore deserved to be subject to a "by effect" analysis.

The disagreement among the various stakeholders (i.e. the Commission, Hungarian Government, Advocate General and others) as to whether the Hungarian insurers and repairers' practice constituted a restriction "by object" also points at the fact that it was not a clear-cut case of significant harm to competition which is indispensable in framing under the "by object" rule. The more debate there is as to whether a practice constitutes a "by object" restriction, the less likely that it deserves the label of "by object" infringement. Practitioners wondered how to reconcile the case with previous Court and Commission precedents in which the requirement to look at the economic or legal context of the arrangement has never involved verifying actual effects before deciding to damn it as "by object," an infringement capable of being excused.

The ECJ's judgment in *Cartes Bancaires*[37] was a welcome change back to the belief in the fairly comprehensible categorization of "by object" and "by effect" infringements. The Court held that the "by object" category can be used for prohibiting only clear-cut infringements, and thus raised the threshold of the burden to demonstrate a "by object" infringement.

The Court ruled that *"[t]he concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition."*[38] The essential legal criterion should be whether an agreement revealed an obvious harm to competition. The ECJ criticised the General Court, which had ruled that *"the agreement or decision must simply be capable in the particular case, having*

---

[32] Case C-32/11 Allianz Hungária Biztosító Zrt., Generali-Providencia Biztosító Zrt. and Others v Gazdasági Versenyhivatal, judgment of 14 March 2013, not yet reported, paragraph 32.

[33] As stated by Advocate General Cruz Villalón in his Opinion in Allianz, delivered on 25 October 2012, only "the imposition of minimum resale prices, the prohibition of parallel trade between Member States through the establishment of absolute territorial protection, and, more recently, clauses prohibiting distributors from using the internet to sell certain products, unless ... justified objectively" are by object restrictions of competition (paragraph 74).

[34] Case C-32/11 Allianz, paragraph 40.

[35] "[I]t 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" (*Allianz*, paragraph 36); "[T]hat court should in particular take into consideration the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned" (*Allianz*, paragraph 48). See also Ian S. Forrester "Art. 267 TFEU preliminary rulings: An overview of EU and national case law," e-Competitions, No 63974.

[36] "In the light of all of the foregoing considerations, the answer to the question submitted is that Article 101(1) TFEU must be interpreted as meaning that agreements ... can be considered a restriction of competition "by object" ... where, following a concrete and individual examination of the wording and aim of those agreements and of the economic and legal context of which they form a part, it is apparent that they are, by their very nature, injurious to the proper functioning of normal competition" (*Allianz*, paragraph 51).

[37] Case C-67/13 P Groupement des cartes bancaires v Commission, judgment of 11 September 2014, not yet reported.

[38] Case C-67/13 P, Groupement des cartes bancaires, paragraph 58. The requirement for "sufficient degree of harm" in "by object" cases has been consistently pointed out in the most recent case-law (see Beef Industry Development Society and Barry Brothers, paragraph 15; T-Mobile Netherlands and Others, paragraph 28; GlaxoSmithKline Services and Others v Commission and Others, paragraph 55; and Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others [2011] ECR I-9083, paragraph 135).

regard to the specific legal and economic context, of preventing, restricting or distorting competition within the common market."[39] Crucially - and encouragingly for proponents of a modern approach - the General Court *"erred in law with regard to the definition of the relevant legal criteria in order to assess whether there was a restriction of competition by 'object'"*[40] because it *"took the view that the restrictive object of the measures at issue could be inferred from their wording alone."*[41] The General Court failed to demonstrate in what respect the restriction of competition revealed *"a sufficient degree of harm in order to be characterised as a restriction 'by object' within the meaning of that provision, there being no analysis of that point in the judgment under appeal."*[42]

The ECJ argued for reserving narrowly the application of restriction "by object" to clear-cut infringement cases that inherently present an unequivocal degree of harm. Practices which are merely capable or had the potential to restrict competition would not qualify as "by object" infringements. For the harm to be *"sufficient"* the conduct's harmful nature has to be *"proven and easily identifiable"*[43] within a relevant legal and economic context.[44] If, after analysing the comprehensive set of factors surrounding the practice, the Commission does not find sufficiently serious competitive harm, it cannot conclude that the conduct constituted a restriction "by object."[45] Mere suspicions of harm will not satisfy the "obviousness of harm" test. We must look at the core of the practice instead of simply looking for an easy way out by condemning through labelling. The "by object" debates in Europe are far from being over and

[39] Case C-67/13 P Groupement des cartes bancaires, paragraph 55.

[40] Case C-67/13 P Groupement des cartes bancaires, paragraph 56.

[41] Case C-67/13 P Groupement des cartes bancaires, paragraph 65.

[42] Case C-67/13 P Groupement des cartes bancaires, paragraph 69.

[43] Opinion of Advocate General Wahl, delivered on 27 March 2014, in Case C-67/13 P Groupement des cartes bancaires v Commission, paragraph 56.

[44] Case C-67/13 P Groupement des cartes bancaires, paragraphs 53 and 55 as well as case law cited in paragraph 55. In his Opinion, at paragraphs 44-45, Advocate General Wahl, further expanded on the role of the economic and legal context in order to identify an anti-competitive object by arguing that "[c]onsideration of the context in identifying the anti-competitive object can only reinforce or neutralise the examination of the actual terms of a purported restrictive agreement. It certainly cannot remedy a failure actually to identify an anti-competitive object by demonstrating the potential effects of the measures in question... [R]ecourse to the economic and legal context in identifying a restriction by object cannot lead to a classification to the detriment of the undertakings concerned in the case of an agreement whose terms do not appear to be harmful to competition."

[45] Case T-588/08 Dole Food Company and Dole Germany v Commission, judgment of 14 March 2013, not yet published: "Where ... the analysis of the terms of the concerted practice does not reveal a sufficient degree of harm to competition, the consequences of the concerted practice should then be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent," paragraph 68 and the case law cited.

we do hope that the new Commissioner will stimulate an independent thought and insist on checking the facts rather than assume the existence of a restriction.

It is to a degree unfair to blame the Commissioner for judgments by a Court which he certainly does not control. We have mentioned some of the recent cases to illustrate the controversy. But there is a broader policy message relevant to the Competition Commissioner: up until the reforms of ten years ago, competition enforcement notionally depended upon whether the terms of an agreement or practice fell within the narrow parameters prescribed by DG Competition. Self-assessment, a Presbyterian searching of the conscience in private, was much less encouraged than seeking the approval of the Catholic priestly cadre of officials by confession and justifications. The new "economic approach" eschewed or lessened doctrinal assumptions and laid more emphasis on actual effects. It was not by notification and by squeezing the agreement into an approved category of exempted contracts that pro-competitive merit could be discerned. It was by looking at reality, at effects, at consumer harm or benefit, at the actual market place. We urge the new Commission to urge her staff not to take us back 20 years to a world where categorisations were more important than reality.

In the same vein, the Commission Legal Service deserves and receives much respect in Luxembourg, as government lawyers normally will from any supreme court. The Legal Service has therefore multiple duties when dealing with the European Courts. One is to defend against challenges seeking to annul Commission action. Another is to guide prudently. We suggest that it would do no harm for the new Commissioner to convey that she favours distinguishing between winning against an appeal and taking the right legal path. If, for example, the law on rebates is irrational, or parallel trade is not bringing useful fruits, there is no harm in acknowledging that traditional doctrine was opposed, but actual reality seems to offer a different conclusion. To adapt a Biblical reference, competition law was made for man, not man for competition law.

We bid farewell to the Spanish Commissioner and welcome the Danish Commissioner to what will be five unpredictable but interesting years.