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Vertical agreements after Cartes Bancaires: any change on the horizon?

Federico Marini Balestra, LL.M., Ph.D.

Antitrust enforcement in Europe after Intel and Cartes Bancaires. A kind of trouble to enjoy

European University Institute (EUI)

20 April 2018

Some open issues after CB

- The role of intent
- The role of the 'legitimate objective' criterion
- The role of the economic analysis

The role of the intent

A QUESTION OF INTENT

- *Distinction between 'subjective' and 'objective' intent*

- *The evidence for proving intent can be* internal *and comprise documents, e-mail, etc. (*'subjective intent'*) and can be* external *and comprise market factors, such as prices, output levels (*'objective intent'*)*

- *Apparently no distinction between terms such as 'object', 'purpose', 'aim' and 'intent' as their use in the case law is evidenced by various judgements*

There is no consensus in the literature or guidance from the jurisprudence on the exact definition of 'intent' which is relevant for competition law purposes

The role of intent

Exemplifying the legal friction

"I Like a Little Competition"—J. P. Morgan

GC in *AstraZeneca* held that although the intention of a dominant undertaking to restrict competition by methods falling outside the scope of competition on the merits may be taken into consideration in the identification of abuse, that identification must be based on the "*objective finding of conduct which, in the context in which it is implemented, is such as to restrict competition*"

AstraZeneca's expectations , as displayed in internal documents, are not sufficient on their own to establish an abuse

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The role of intent

Exemplifying the legal friction

- In *Tomra*, the intent of the dominant undertaking established on the basis of internal documentation was used as part of the assessment by the Commission

  - This judgment suggests that the intent is proven, there is no need to prove that the conduct is capable of restricting or foreclosing competition since they are expressed as alternatives

- The ECJ in *Tomra* stated that the anti-competitive intent of the dominant undertaking was one of the fact that may be taken into account to establish the existence of abuse. This suggest that the intent of the undertaking can be used in establishing *any* type of abuse

The role of the intent according to CB

As the AG Wahl put it: Not necessary nor sufficient!

The Commission found inter alia "*that anticompetitive object corresponds to the real objectives of those measures, as stated by the main members in the course of their preparation, namely* ***the intention to impede competition*** *for new entrants and to penalise them,* ***the intention to safeguard the main members' revenue and the intention to limit the price reduction*** *for CB cards*"

- "*Just as the parties to an agreement cannot rely on the absence of an intention to breach the prohibition laid down in Article 81(1) EC,* ***it cannot be sufficient*** ***to show the existence of such an intention in order to conclude that the measures taken by them entail an anticompetitive object****. The intention expressed by parties* ***should not be taken into consideration at all*** *where, as in the present case, it is necessary to assess the anticompetitive impact of the undertakings' conduct*" (para. 109)

- "*I take the view that identification of an 'anticompetitive object' requires a properly objective examination, irrespective of the will of the parties. I therefore consider that* ***any intentions*** *expressed by the participants in a supposed restrictive agreement, decision or concerted practice, like any legitimate objectives pursued by them,* ***are not directly relevant*** *in examining whether the agreement, decision or practice has an anticompetitive 'object'*" (para. 110)

The role of the intent according to CB

The ECJ: more blurred!

In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account" (para. 54)

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The role of the 'legitimate objective': is there a room for an analysis as such?

- "*Such an object* [i.e., imposing a financial contribution on the members of the Grouping] *cannot be regarded as being, by its very nature, harmful to the proper functioning of normal competition, the General Court itself moreover having found* [...] *that combatting free-riding in the CB system was a legitimate objective*" (para. 75)

- "*Although* [...] *the fact that the measures at issue pursue the legitimate objective of combatting free-riding does not preclude their being regarded as having an object restrictive of competition, the fact remains that that restrictive object must be established*" (para. 70)

The role of the 'legitimate objective': is there a room for an analysis as such?

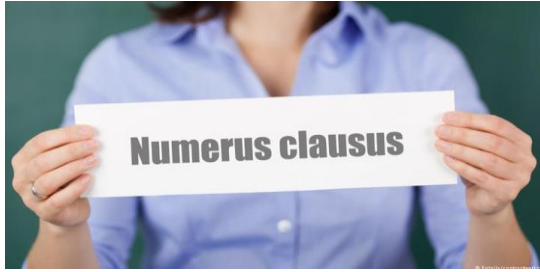
Reconciling CB with the previous case-law: easier said than done

- Is the 'legitimate objective' at odds with the ECJ's reasoning in *Pierre Fabre* (in which the Court admitted that restrictions by object can be *'objectively justified*' within Article 101(1) TFEU') and *Irish Beef* (where the ECJ advocated 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)*")?

- Is this 'legitimate objective' supposed to be associated with efficiencies, consumer benefits or redeeming virtues, so as to be assessed under Article 101(3)?

The renaissance of economic scrutiny

"If it ain't obvious, it ain't object!"



- "*Only 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, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition*" (para. 56, AG Wahl's Opinion)

Presumably only price-fixing, market sharing, output restrictions and other few conducts may be considered as restrictions 'by object', because – in the light of the (economic and legal) experience – they are likely to produce negative effects: for these conducts it could be effectively redundant to prove that they have actual effects on the market

Closed list of 'by object' restrictions: See §21 of Maxima Latvija

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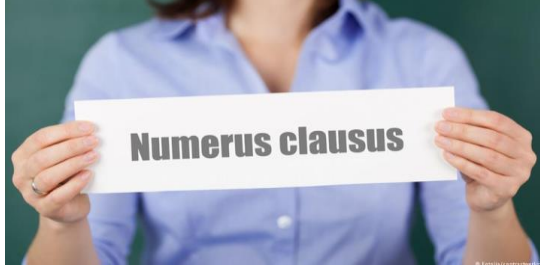

- On the contrary, it may be inferred that in a case presenting strong elements of novelty the 'by object' category would be inappropriate: no room for the assessment based on the Courts' 'experience'!

This is typically the case of practices which have ambivalent effects (*i.e.*, they can have negative or positive effects depending on the context) or whose restrictive effect is ancillary to the pursuit of a lawful aim (pharmaceutical co-marketing, temporary associations of companies, etc.)

More-economic approach side-lined

Thank you & Bird & Bird

Federico Marini Balestra
federico.marinibalestra@twobirds.com

twobirds.com