Object and effect

Andrew Francis considers the EUCJ decision in Groupement des cartes bancaires *and its relevance to land agreements within Chapter I of the 1998 Act and Art 101 of the TFEU*

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'This decision will force the Commission (and the CMA when concerned) to alter its policy of treating agreements as violating Art 101 by virtue of the fact that they contain restrictions, which "by object" prevent etc competition, without having to show their effect in such terms.'

It is over three and a half years since the removal of the exemption of land agreements from Chapters I and II of the Competition Act 1998 on 6 April 2011. Given the publicity surrounding the decision in *Martin Retail Group Ltd v Crawley Borough Council* [2013] (see 'The Fire and Furnace of land covenants', *PLJ*322, June 2014, p10) and the decision of Henderson J in *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] (see my article 'Restrictive covenants considered' in *PLJ*324, September 2014, p24), property lawyers with an eye on competition issues returning refreshed from their summer holidays might be forgiven for thinking that all would be quiet on this front; at least for the moment.

It was not to be, for on 11 September 2014, the EU Court of Justice (EUCJ) gave judgment in the appeal from the General Court in the dispute between the Groupement des cartes bancaires (GDCB) and the EU Commission (*Groupement des cartes bancaires v European Commission*) The significance of that judgment for property lawyers is explained below. But in summary, when construing land agreements (eg trading covenants in a lease or on a freehold), the GDCB decision means that when carrying out that task, not all agreements potentially within Art 101(1) (or s2 of the 1998 Act which mirrors Art 101(1)) can be presumed to have the effect of restricting etc competition 'by object' under Art 101(1). Save in cases where the agreement is by its very nature harmful to competition (eg a price-fixing agreement – not usually encountered in land agreements), the EUCJ stated that 'by object' should be interpreted restrictively. Thus, save in plain cases, there is an obligation on the party to it seeking to challenge the agreement (or the CMA or the Commission) to prove by an effects-based analysis that the agreement infringes Art 101(1) 'by object'. The alternative is to prove restriction 'by effect'. So there is no shortcut in the analysis. The practical effect when advising on land agreements potentially within Art 101(1) is set out below.

The GDCB dispute concerned rules which GDCB introduced in 2002 between itself and its members, namely banks that issued cards for payment to merchants and for withdrawals at ATMs. The activities of the members could be defined as the 'issuing function' (ie issuing cards for use within the GDCB system) and the 'acquisition function' (ie the acquisition of merchants accepting the cards and the installation of ATMs). GDCB and the main members were concerned that new members (issuing cards only) might get a 'free ride' on the main members' investments in merchants and ATMs. (A close reading of the judgment of the EUCJ shows how such concern was justified and the anti-competitive object, let alone effect, of the rules was by no means obvious). It was said that the rules discriminated against those members who mainly issued cards, but did not acquire merchants or install ATMs, and those who mainly acquired merchants and installed ATMs. Those who did more of the former paid higher fees to GDCB than the latter. Other terms were also introduced by GDCB such

as imposing a fixed fee of €50,000 on membership, and a 'wake-up' fee per card issued on members who were inactive, or not very active before the new rules were introduced. In 2002 GDCB referred the new rules to the EU Commission for advance 'clearance' (then available) so as not to fall foul of Art 101(1). The Commission issued statements of objections to those rules stating that they were a series of pricing measures which were anti-competitive by object, or effect. The Commission's decision was based upon the fact that the new rules were designed 'by object', for example, to impede competition of new entrants and to penalise them in order to safeguard the main members' revenue (main members included BNP Paribas and Société Générale), by keeping the price of payment cards high (benefiting main members to the disadvantage of new entrants), and 'by effect' where the evidence was that the new rules led to a reduction in the issue plans for GDCB cards by new entrants. Finally there was no evidence to exempt the rules under what is now Art 101(3) TFEU. The Commission required GDCB to withdraw the rules and give undertakings as to its future conduct.

In 2007 GDCB applied to the General Court to annul the Commission's decision. In November 2012 the General Court upheld the Commission's decision and dismissed the action, finding that GDCB's new rules restricted competition 'by object' and that it was not necessary to examine the effect of those rules. In February 2013 GDCB appealed to the EUCJ, seeking orders (*inter alia*) that the judgment under appeal be set aside and to refer the case back to the General Court, unless the court felt able to annul the decision

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Article 101 (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

   (b) limit or control production, markets, technical development, or investment;

   (c) share markets or sources of supply;

   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

   - any agreement or category of agreements between undertakings,
   - any decision or category of decisions by associations of undertakings,
   - any concerted practice or category of concerted practices,

   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

of the Commission in issue. The EUCJ allowed the appeal and referred the case back to the General Court.

There are two significant parts of the EUCJ's judgment. The first can be dealt with briefly as it is not at the heart of this article.

First, the EUCJ held that the General Court should have undertaken a full review, on a judicial basis, of the evidence before the Commission; in particular on the question whether the evidence sustained the argument that the rules by their terms and context displayed a sufficient degree of harm to competition, and whether all the relevant data on that question had been taken into consideration.

Except in the case of 'hardcore' agreements, which 'by object' will infringe Art 101(1), the task of the regulators and the courts will be to examine the effect of potentially void agreements within Art 101(1) more closely.

Secondly, the EUCJ had to rule on the meaning of the words 'by object or effect' in Art 101 TFEU (see box on p7).

The court held that the words 'by object' in Art 101(1) were to be interpreted restrictively. This means that unless the agreement under examination reveals a sufficient degree of harm on its face, so that there is no need to examine its effect (eg a price-fixing cartel), the agreement must be examined to see whether its effect on competition is such as to prevent, restrict or distort it to an appreciable extent. This decision will force the Commission (and the CMA when concerned) to alter its policy of treating agreements as violating Art 101 by virtue of the fact that they contain restrictions, which 'by object' prevent etc competition, without having to show their effect in such terms. (The record of the Commission's findings between January 2004 and July 2014 indicates that in non-cartel infringement decisions the majority (10/12) were based on a 'by object' decision, which saved the need for the Commission to spend time and resources in examining detailed evidence on the effect of the agreements under scrutiny). Thus, except in the case of 'hardcore' agreements, which 'by object' will infringe Art 101(1), the task

of the regulators and the courts will be to examine the effect of potentially void agreements within Art 101(1) more closely. That is not to say that even in the case of 'by object' restrictions the economic and legal context in which the agreement was concluded by the parties can be ignored; quite the reverse, as the context is significant and, for example, market share will be one relevant factor even in 'by object' cases. The question to be asked is: does the object reveal 'a sufficient degree of harm' to competition? Note that the subjective intention of the parties is not relevant and even if the agreement pursues other legitimate objectives it may still be held as having a restrictive object within Art 101(1).

Final thoughts

In light of the GDCB decision, the task set when examining whether agreements will potentially infringe Art 101(1) will require greater effort in obtaining the necessary economic data (for example) to judge their effect. The GDCB decision is an example of a case where, as the EUCJ recognised, there was a balance to be struck between the interests of the main and new members, where the latter could be required to make a financial contribution to the former whose efforts had developed the GDCB system.

The decision is significant because it restores the distinction between the concept of restrictions 'by object' and restrictions 'by effect'. Previous case law had led to a blurring of this distinction; eg *Allianz Hungária Biztosító Zrt & ors v Gazdasági Versenyhivatal* [2013]. The Advocate General's Opinion to the Court (27 March 2014) made clear the need to restore this distinction at para 52. That distinction is stated at para 58 of GDCB, thus adopting the Advocate General's Opinion.

What lessons can property lawyers take away from this decision?

First, as it is unlikely that land transactions will involve a 'hardcore' breach of Art 101(1) (although that might be possible, for example, in the sale of off-plan leases between competing developers (see *PLJ*324, p24)) the key question is whether the land agreement is 'by object' anti-competitive based on the evidence of its effect. (The treatment of 'hardcore' infringing agreements as ones classified 'by object' is reflected in the Commission's own Guidelines (2004/C 101/08, para 21) and see OFT 1280a, Note on Land Agreements, March 2011 (adopted by the CMA) para 2.1 and footnote 13).

This means that:

- the mere existence of a covenant protecting trade does not itself allow the covenant to be treated as infringing Art 101(1) (see the 'sufficient degree of harm' point above);
- unless the agreement is so clear cut in its effect, the mere fact that the agreement is capable of restricting competition does not mean that it infringes Art 101(1) *by object*; and
- the effect of the agreement must be considered.

While this may require complex analysis (eg isochrones), no firm conclusion as to invalidity can be made until that is done.

There are two other practical effects.

First the burden of proof is firmly on the challenging party, who must show at least a *prima facie* case for infringement of Art 101(1) whether 'by object' or 'by effect'. So, in the case of a trading covenant, for example, prohibiting the sale of certain goods in a retail park, the fact that such a covenant may restrict competition is not enough to bring it within Art 101(1). For example, the position which would apply if the covenant was not in place must be examined: 'the counter factual'. The GDCB decision is good news for those with the benefit of these covenants.

Secondly, the importance of the exemption under Art 101(3) is now far greater given the need in most cases to examine the effect of the agreement. The burden is firmly on the party seeking to rely on any exemption, which is usually hard to prove. This was the point which seems not to have been properly explored by Crawley Borough Council in the claim against it by Martin Retail Group (see *PLJ*322 p10). So, in the case of covenants protecting an 'anchor tenant' in a shopping centre, while there may a strong case for establishing a breach of Art 101(1) 'by effect' (if not 'by object'), the benefits that may be shown from those covenants and the economic effect of the anchor tenant within Art 101(3) must be demonstrated by the parties seeking to assert the validity of the agreement.

The GDCB case points the way to a thorough examination of the effect of land agreements from either side, with expert advice, before jumping to conclusions under Art 101. ■

There was a balance to be struck between the interests of the main and new members, where the latter could be required to make a financial contribution to the former whose efforts had developed the GDCB system.

Case C-32/11 *Allianz Hungária Biztosító Zrt & ors v Gazdasági Versenyhivatal* [2013] EU:C:2013:160

Carewatch Care Services Ltd v Focus Caring Services Ltd & ors [2014] EWHC 2313 (Ch)

Case C-67/13 P *Groupement des cartes bancaires v European Commission* EU:C:2014:2204

Martin Retail Group Ltd v Crawley Borough Council [2013] EW Misc 32 (CC)