Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 27 March 2014[1]

Case C-67/13 P

Groupement des cartes bancaires (CB)
v

European Commission

(Appeal — Agreements, decisions and concerted practices — Market for bank cards in France — Groupement des cartes bancaires (CB) — Pricing measures applicable to 'new entrants' to the Grouping — Membership fee, mechanism for regulating the acquiring function and 'dormant member "wake-up" mechanism' — Existence of a restriction of competition by object — Powers to issue an order — Respect for the principles of proportionality and legal certainty)

1. By the present appeal, the Groupement des cartes bancaires (CB) ('the Grouping') asks the Court to set aside the judgment of the General Court of the European Union of 29 November 2012 in *CB* v *Commission*[2] by which the General Court dismissed its action for the annulment of Commission Decision C(2007) 5060 final of 17 October 2007 relating to a proceeding under Article [81 EC] (COMP/D1/38606 — Groupement des cartes bancaires 'CB') ('the decision at issue').

2. In this case, the Court must, above all, determine whether the General Court could conclude, without committing an error in law, that the measures at issue had as their 'object' the restriction of competition within the meaning of Article 81(1) EC (now Article 101(1) TFEU), given that in this instance the General Court did not examine their effects on competition, unlike the European Commission which, in the decision at issue, found, after a detailed analysis,[3] that, in addition to such an object, those measures had anticompetitive effects.

3. In particular, it is necessary to answer the question whether the General Court was right to adopt and, as the case may be, apply a rather broad interpretation of the concept of 'restriction by object'. This important question, which is far from new, arises in the very specific context of the payment cards market, whose two-sided nature[4] and very particular features have, at present,[5] not yet been examined by the Court. More fundamentally, the present case gives the Court another opportunity to refine its much debated case-law on the concept of 'restriction by object' within the meaning of Article 81(1) EC.

1 — Original language: French.

2 — Case T-491/07 ('the judgment under appeal').

3 — See paragraphs 252 to 358 of the decision at issue.

4 — Two-sided markets can be defined as markets in which the volume of transactions effected depends not only on the general level of prices paid by members, but also on their structure (Rochet, J.-C., and Tirole, J., 'Two-sided markets: a progress report', *The RAND Journal of Economics*, Vol. 37, No 3, 2006, pp. 645 to 667).

5 — It should be pointed out, however, that Case C-382/12 P *MasterCard and Others* v *Commission*, pending before the Court (see the Opinion of Advocate General Mengozzi delivered on 30 January 2014), concerns the examination of certain decisions taken in connection with the 'open' card payment system run by MasterCard. It appears that that case, aside from the fact that it raises very distinct legal questions from those posed in the present case, concerns very different measures for charging multilateral interchange fees (MIF).

I – **Background to the dispute**

4. The background to the dispute, as set out in the judgment under appeal, may be summarised as follows.

5. The appellant is an economic interest grouping governed by French law which was created in 1984 by the main French banking institutions. It was established to achieve the interoperability of systems for payment and withdrawal by bank cards issued by its members ('CB cards'). That interoperability is reflected in practice by the fact that a CB card issued by a member of the Grouping can be used to make payments to all traders affiliated to the CB card system through any other member and/or can be used to make withdrawals from automatic teller machines (ATMs) operated by all other members. The members of the Grouping, which numbered 148 on 29 June 2007, are either 'main members' or institutions linked with a main member. Under the Grouping's constitutive agreement, BNP Paribas, BPCE, formerly Caisse nationale des caisses d'épargne et de prévoyance (CNCEP), and Société générale (SG) are among the eleven main members.

6. On 10 December 2002, the Grouping notified the Commission pursuant to Regulation No 17[6] of various new rules envisaged for the CB card system, including[7] three pricing measures, which can be described as follows:

— A device known as 'MERFA'[8] which, according to the Grouping, essentially aimed to encourage members that are issuers more than acquirers to expand their acquiring activities and to take financial account of the contributions of members whose acquiring activity is considerable in relation to their issuing activity. The proposed formula compared the share of the member in the total issuing activities under the CB card system (measured as the number of SIRENs[9] and ATMs) with that member's share in the total issuing activities under that system. MERFA was to apply where the ratio between the two shares was lower than 0.5. The sums levied under MERFA were to be distributed among members of the Grouping that were not charged any such sum, according to their contribution to the acquiring business. Those members could freely use the sums thus levied.

— A reform of the membership fee for the Grouping comprising, in addition to a fixed sum of EUR 50 000 levied on membership, a fee per active CB card issued in the three years following membership and, where appropriate, a supplementary membership fee applicable to members that triple the number of registered CB cards in stock or at the end of their sixth year of membership compared with their number of registered CB cards at the end of their third year of membership.

— A mechanism known as a 'dormant member wake-up mechanism' consisting in a fee per CB card issued, which is applicable to members that were inactive or not very active before the date of entry into force of the new pricing measures, whose share in the CB card issuing activity within the entire CB card system, in the course of either 2003, 2004 or 2005, was more than three times higher than their share in the activity for the total number of CB cards in the entire CB card system in the course of 2000, 2001 or 2002.

6 — Council Regulation of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87).

7 — According to the description of the measures, in addition to pricing measures, the notified measures provided for the remodelling of the method for calculating members' voting rights within the Grouping.

8 — Mechanism for regulating the acquisition function.

9 — Système d'identification au répertoire des entreprises (business register identification system).

7. On 6 July 2004, the Commission adopted a first statement of objections, sent to the Grouping and to nine main members on which inspections had been carried out, in which it alleged that they had concluded a 'secret anticompetitive agreement' which had the object of 'generally limiting competition between the banks party to the agreement and to restrict competition, in a concerted manner, for new entrants (in particular mass-market retail, online banking and foreign banks) on the market for the issue of [CB cards]'. It considered that 'the notification [had been] made with the aim of concealing the real content of the anticompetitive agreement'. It intended to regard the notification as ineffective and to impose a fine on the addressees of that statement of objections. The Grouping responded to that statement of objections on 8 November 2004 and a hearing was held on 16 and 17 December 2004.

8. On 17 July 2006, the Commission adopted a second statement of objections, which was sent only to the Grouping. It stated that the first statement of objections was to be considered to have been withdrawn. That second statement of objections concerned a decision by an association of undertakings establishing a series of pricing measures with an anticompetitive object or effect. The Grouping responded to that second statement of objections on 19 October 2006 and a hearing was held on 13 November 2006.

9. On 20 July 2007, the Grouping submitted an offer of commitments pursuant to Article 9 of Regulation (EC) No 1/2003,[10] which the Director-General of the Commission's Directorate-General for Competition considered to be out of time and unsatisfactory.

10. The Commission therefore adopted the decision at issue in which it took the view that the Grouping had infringed Article 81 EC. That decision included the following considerations:

— the market in question was defined as the market for the issue of payment cards in France;

— the measures at issue constitute a decision by an association of undertakings;

— those measures have an anticompetitive object. That object is evident from the actual formulas envisaged for those measures and runs counter to the objectives of those measures as declared in the notification. First, those measures are not appropriate for encouraging acquisition and they have the effect of either imposing an additional charge on members that are subject to them or limiting the issuing activities of members that would otherwise have been subject to them. Second, the function of stimulating acquiring activity given to MERFA is inconsistent with the function given to interchange fees and with the function of the supplementary membership fee and the dormant member wake-up fee. 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;

— the measures at issue also have the effect of restricting competition. In particular, in the course of the period in which they applied (between 1 January 2003 and 8 June 2004), the measures resulted in a reduction in new entrants' plans to issue CB cards and the prevention of a price reduction for CB cards, both for new entrants and for main members;

— the measures at issue cannot be regarded as ancillary restraints falling outside the scope of Article 81(1) EC, and

10 — Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles [81 EC] and [82 EC] (OJ 2003 L 1, p. 1).

— the conditions for the application of Article 81(3) EC are not satisfied. In particular, the justification for the measures at issue, in particular as regards MERFA, as a balancing mechanism between the acquiring and issuing functions, could not be accepted because the proportion of issuing activity compared with reference acquiring activity is that of the main members and not that of an optimal balance for the CB card system.

11. The Commission concluded that Article 81(3) EC was not applicable to the measures at issue, that the Grouping's decision concerning the measures at issue was contrary to Article 81(1) EC and null and void by operation of law pursuant to Article 81(2) EC and that it was therefore justified in ordering the Grouping to withdraw the measures at issue and to refrain in future from any agreement, decision by an association of undertakings or concerted practice having a similar object or effect.

12. The decision at issue provides:

'Article 1

The pricing measures adopted by the Grouping by decisions of 8 and 29 November 2002 [of the Executive Committee], namely [MERFA], the membership fee per card, the supplementary membership fee and the [dormant member wake-up fee] applicable to members of the [Grouping] that have not developed significant 'CB' activities since they became a member are contrary to Article 81 [EC].

Article 2

The [Grouping] shall immediately bring to an end the infringement referred to in Article 1 by withdrawing the notified pricing measures referred to in that article in so far as it has not already done so.

The [Grouping] shall in future refrain from any act or any conduct having an identical or similar object or effect.'

II – **Procedure before the General Court and the judgment under appeal**

13. By application lodged at the Registry of the General Court on 27 December 2007, the appellant brought an action for annulment of the decision at issue. BNP Paribas, BPCE and SG intervened in support of the appellant.

14. In support of their action, the appellant, supported by the interveners, put forward six pleas in law. The first plea in law alleged infringement of Article 81 EC on account of defects in the method of analysis of the measures at issue and the markets selected, breach of the principle of equal treatment and a failure to state reasons. The second plea in law alleged infringement of Article 81(1) EC on account of errors of law, fact and assessment in the examination of the object of the measures at issue. The third plea in law alleged errors of law, fact and assessment in the examination of the effects of the measures at issue. The fourth plea in law, raised in the alternative, alleged infringement of Article 81(3) EC on account of errors of law, fact and assessment in the examination of the applicability of that provision to the measures at issue. The fifth plea in law alleged a breach of the principle of good administration. The sixth plea in law alleged a breach of the principles of proportionality and legal certainty.

15. Having rejected all those pleas in law, the General Court dismissed the action in its entirety, ordered the Grouping to bear its own costs and to pay those incurred by the Commission and ordered BNP Paribas, BPCE and SG to bear their own costs.

III – **Forms of order sought and procedure before the Court of Justice**

16. By its appeal, the appellant claims that the Court should:

— set aside the judgment under appeal;

— refer the case back to the General Court, unless the Court considers that it is sufficiently well informed to annul the decision at issue, and

— order the Commission to pay the costs incurred before the Court of Justice and the General Court.

17. BNP Paribas, BPCE and SG submitted responses in support of the appellant.

18. The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

19. The parties set out their positions in writing and orally at the hearing on 22 January 2014.

IV – **Assessment of the grounds of appeal**

20. The appellant relies on three grounds in support of its appeal. The first ground of appeal alleges errors in law in the application of the concept of 'restriction of competition by object'. The second ground of appeal alleges errors in law in the application of the concept of 'restriction of competition by effect'. The third ground concerns breaches of the principles of proportionality and legal certainty.

21. As a preliminary point, the appellant submits that the General Court clearly omitted essential details from the description of the facts (paragraphs 1 to 48 of the judgment under appeal), which shows that it never departed from the Commission's position and that it failed to conduct the in-depth review of the law and of the facts required by the Court.[11] Those details consist, first, in the fact that the Commission radically changed its position during the preparatory inquiries,[12] which can be explained by fundamental analytical errors which the Commission failed to note, and, second, in ignoring the results of the discussions at the hearing held before the General Court on 16 May 2012 regarding the concept of restriction by object, in particular in connection with the necessary interpretation of the judgment in *Beef Industry Development Society and Barry Brothers*.[13]

22. It seems to me that these preliminary considerations, which form the backdrop to the questions raised by the present case, cannot be regarded as seeking to invoke one or more grounds of appeal distinct from those formally put forward.

23. It is therefore necessary to examine in turn the three grounds of appeal formally raised, focusing on the first ground which, it would seem, lies at the heart of the proceedings and, in addition, is of particular interest.

11 — See Case C-272/09 P *KME Germany and Others* v *Commission* [2011] ECR I-12789, paragraph 102.

12 — The Grouping states that the Commission did not depart at all from the conclusions reached in the first statement of objections dated 6 July 2004. However, following a hearing held on 16 and 17 December 2004, the Commission was forced to withdraw that statement of objections, which did not have any serious basis.

13 — Case C-209/07 [2008] ECR I-8637.

A – *The first ground of appeal, alleging errors in law in the application of the concept of restriction by object*

24. The appellant, supported by BNP Paribas, BPCE and SG, claims that the General Court committed several errors in law in the application of Article 81(1) EC. It states that the approach taken by the General Court sets a serious precedent in that it effectively prohibits per se any price charged by one operator to another. The appellant argues, more particularly, that the General Court failed to understand that the concept of restriction by object should not be given too broad an interpretation and ignored the analytical framework generally adopted by the Court in order to identify such a restriction.

25. Before examining all the complaints raised against the analytical framework adopted by the General Court in reviewing the measures at issue, I believe that a number of preliminary observations should be made in connection with the approach which, it seems to me, must be taken when examining the existence of a restriction of competition by object within the meaning of Article 81(1) EC.

1. General observations on the definition of the concept of anticompetitive object within the meaning of Article 81(1) EC

26. It is well established that any system to prohibit and penalise collusive practices covers conduct which has an effect that restricts competition.[14]

27. In order to identify conduct which has an effect that restricts competition, two methodological approaches are generally conceivable.

28. The first is a casuistic approach involving a detailed and thorough examination of the actual and potential anticompetitive effects of the conduct of undertakings. Whilst such an approach has the considerable advantage of being directed precisely at practices which clearly have the effect of restricting competition, it involves the mobilisation of significant resources and is not a guarantee of procedural economy. It may thus ultimately represent an obstacle to detection of anticompetitive conduct.

29. These disadvantages have led to the adoption of a second approach, which is to some extent less tailored to individual cases, by reference also to conduct which is generally considered, on the basis of economic analysis, to have harmful effects on competition.

30. In such a system, there is no difference, from a substantive point of view, between the conduct of undertakings which is considered to restrict competition following an individual examination and conduct considered to be so on the basis of a standardised approach. Both are prohibited. The distinction which must be drawn is based, first and foremost, on procedural considerations relating to proof of the anticompetitive effects caused by the conduct in question.

31. By way of illustration, in US antitrust law, certain kinds of conduct are regarded as infringements per se. Undertakings that adopt such conduct are not able to challenge, either before the authority responsible for prosecuting competition infringements or before the courts, its classification as conduct restrictive of competition by proving that it has few harmful effects, and indeed some beneficial effects, on competition.

14 — The term ‘restriction’ must be understood as also covering cases where competition is ‘prevented’ or ‘distorted’. Similarly, the restriction at issue here must be understood as relating not only to the undertakings’ freedom of action on the market (restraint of trade), but also to the operation and the structure of the market (restriction of competition).

32. The reference in Article 81(1) EC to agreements, decisions or concerted practices 'which have as their object or effect the prevention, restriction or distortion of competition within the common market' has comparable consequences, even though they are not identical.

33. First, where it is established that the conduct of undertakings has an anticompetitive 'object', that conduct is prohibited in principle, without any need to examine its effects.

34. Second, whilst it is conceivable to weigh pro- and anticompetitive effects in connection with the application of Article 81(3) EC, recourse to the concept of anticompetitive object nevertheless has a number of advantages in so far as it makes it easier to determine the restrictive impact of certain practices followed by the undertakings.

35. First of all, it undoubtedly provides predictability, and therefore legal certainty, for undertakings in that it enables them to know the legal consequences (including prohibitions and sanctions) of some of their actions, such as the conclusion of pricing agreements, and to modify their conduct accordingly. Second, identifying agreements, decisions and concerted practices which have the object of restricting competition also has a deterrent effect and helps to prevent anticompetitive conduct. Lastly, it furthers procedural economy in so far as it allows the competition authorities, when faced with certain forms of collusion, to establish their anticompetitive impact without any need for them to conduct the often complex and time-consuming examination of their potential or actual effects on the market concerned.

36. However, such advantages materialise only if recourse to the concept of restriction by object is clearly defined, failing which this could encompass conduct whose harmful effects on competition are not clearly established.

37. These considerations have a more solid foundation in the lessons which can be drawn from the Court's established case-law.

38. First, and as the Court ruled, at a very early stage, in *LTM*[15] and has reiterated in consistent case-law,[16] the alternative nature of the requirement relating to the existence of an agreement having 'as its object or effect' the restriction of competition within the meaning of Article 81(1) EC, indicated by the conjunction 'or', leads, first, to the need to consider the very object of the agreement, in the economic context in which it is to be applied. The Court stated in this regard that where, however, 'an analysis of the *clauses* of that agreement does not reveal the effect on competition to be *sufficiently deleterious*' (my italics), its effects 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 or restricted or distorted to an appreciable extent. In deciding whether an agreement is prohibited by Article 81(1) EC, there is therefore no need to take account of its actual effects once it appears that its object is to prevent, restrict or distort competition within the common market.[17]

15 — Case 56/65 [1966] ECR 235, 249.

16 — *Beef Industry Development Society and Barry Brothers*, paragraph 15.

17 — See *Beef Industry Development Society and Barry Brothers*, paragraph 16 and the case-law cited.

39. Second, the Court has pointed out that the distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition. [18] Various forms of cooperation between undertakings have thus been considered to entail, by their very object, a restriction of competition by object. Not only have types of horizontal cooperation other than those referred to in Article 81(1)(a) to (e) EC been considered to have as their object the restriction of competition, [19] but also a number of vertical agreements. [20]

40. Third, the more standardised assessment resulting from recourse to the concept of restriction by object requires a detailed, individual examination of the agreement in question which must, however, be clearly distinguished from the examination of the actual or potential effects of the conduct of the undertakings concerned.

41. In this regard, the Court made clear, at a very early stage, [21] that the examination of the question whether a contract had a restrictive object could not be divorced from the economic and legal context in the light of which it was concluded by the parties. It then held, and has ruled in settled case-law, that the clauses of the agreements in question had in fact to be examined in the light of their context, [22] the underlying idea being that, in examining the compatibility of conduct with the provisions of the treaty with regard to agreements, decisions and concerted practices, purely theoretical and abstract considerations are difficult to defend. [23]

42. To illustrate my remarks, I would refer to the example of an infringement which, in the light of experience, is presumed to cause one of the most serious restrictions of competition, namely a horizontal agreement concerning the price of certain goods. Whilst it is established that in general such a restrictive agreement is highly harmful for competition, that conclusion is not inevitable where, for example, the undertakings concerned hold only a tiny share of the market concerned.

43. Similarly, it was after examining the context that the Court ruled that even though a distribution agreement could, prima facie, be considered to constitute a restriction of competition, it could not be regarded as having the object, by its very nature, of appreciably restricting competition. [24]

44. In my view, consideration of the economic and legal context in order to identify an anticompetitive object must, at the risk of introducing a shift that is detrimental to a proper reading of Article 81(1) EC — I will return to this point in the explanations below — be clearly distinguished from the demonstration of anticompetitive effects under that provision. Consideration of the context in identifying the anticompetitive object can only reinforce or neutralise [25] the examination of the actual terms of a purported restrictive agreement. It certainly cannot remedy a failure actually to identify an anticompetitive object by demonstrating the potential effects of the measures in question.

18 — *Beef Industry Development Society and Barry Brothers*, paragraph 18.

19 — Exchanges of information in order to coordinate the conduct of competitors on the market, among other things, have been regarded as involving such an anticompetitive object (Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529).

20 — See, inter alia, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299; Case 19/77 *Miller International Schallplatten* v *Commission* [1978] ECR 131 (distribution agreements prohibiting parallel trade between Member States and establishing territorial exclusivity); Case 243/83 *Binon* [1985] ECR 2015 (selective distribution system with fixing of minimum resale prices); and Case C-439/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECR I-9419 (selective distribution system prohibiting, in the absence of objective justification, Internet sales of certain products).

21 — See, inter alia, *Consten and Grundig* v *Commission*, p. 343.

22 — See, inter alia, *Miller International Schallplatten* v *Commission*, paragraph 7; Joined Cases 29/83 and 30/83 *Compagnie royale asturienne des mines and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 26; and Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 66.

23 — See, in this regard, the Opinion of Advocate General Roemer in *Consten and Grundig* v *Commission*, p. 363.

24 — Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 19 to 31.

25 — For an illustration of such neutralisation, see Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 97.

45. In other words, and regardless of the conceptual similarities between the alternatives,[26] recourse 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.

46. It is clear that the case-law of the Court and of the General Court, while pointing out the distinction between the two types of restrictions envisaged by Article 81(1) EC, could, to a certain extent, be a source of differing interpretations and even of confusion. Certain rulings seem to have made it difficult to draw the necessary distinction between the examination of the anticompetitive object and the analysis of the effects on competition of agreements between undertakings.

47. In a number of cases, consideration of that context is similar to a genuine examination of the potential effects of the measures at issue.

48. Thus, in *GlaxoSmithKline Services* v *Commission*, the General Court,[27] which had to rule on the anticompetitive object of provisions of an agreement to limit parallel trade in medicines, essentially held that it could not be inferred merely from a reading of the terms of an agreement, in its context, that the agreement was anticompetitive, but that it was 'necessary' to consider its effects. That judgment suggests that, in order to find the existence of an anticompetitive object, the specific effects on competition should be determined in any event.[28]

49. There is good reason to question whether that analysis, which effectively evaluates the necessary consequences of the agreements in question, is more in the nature of an examination of their anticompetitive effects than an analysis of their anticompetitive object.

50. More recently and even more clearly, in *Allianz Hungária Biztosító and Others*[29] the Court ruled that agreements whereby car insurance companies came to bilateral arrangements, either with car dealers acting as car repair shops or with an association representing those dealers, concerning the hourly charge to be paid by the insurance company for repairs to vehicles insured by it, stipulating that that charge depended, inter alia, on the number and percentage of insurance contracts that the dealer had sold as intermediary for that company, could be considered a restriction of competition 'by object' within the meaning of Article 101(1) TFEU. That is the case where, following a concrete and individual examination of the wording and aim of those agreements and of their economic and legal context, it was apparent that they were, by their very nature, harmful to the proper functioning of normal competition on one of the two markets concerned.[30]

51. Here too, it is difficult to distinguish how the examination of the context advocated by the Court, which consists in evaluating the risk of competition on the market in question being eliminated or seriously weakened, having regard, in particular, to 'the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned', differs from the examination of possible anticompetitive effects.

26 — Along these lines, several writers have stressed that the analysis of the object was an application of the analysis of the effects (see, for example, Whish, R., Introduction to the fourth roundtable of the conference 'New Frontiers of Antitrust', 10 February 2012, entitled 'Anticompetitive object vs. anticompetitive effect: does it really matter?', *Concurrences*, No 2, 2012, p. 59 et seq.

27 — Case T-168/01 [2006] ECR II-2969, paragraph 147.

28 — Whilst the Court was led, in the appeal brought in that case, to criticise the analysis of the anticompetitive nature of the object of the agreements in question, it did so only in so far as the General Court had required proof that the agreement entailed disadvantages for final consumers as a prerequisite for a finding of anticompetitive object (see Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* [2009] ECR I-9291, paragraphs 63 and 64).

29 — Case C-32/11 [2013] ECR.

30 — See *Allianz Hungária Biztosító and Others*, paragraph 48.

52. None the less, and despite the fact that, to some extent, case-law has contributed to blurring the boundary between the concepts of restriction by object or restriction by effect, I take the view that recourse to that concept must be more clearly defined.

53. Considering an agreement or a practice to restrict competition on account of its very object has significant consequences, at least two of which should be highlighted.

54. First of all, the method of identifying an 'anticompetitive object' is based on a formalist approach which is not without danger from the point of view of the protection of the general interests pursued by the rules on competition in the Treaty. Where it is established that an agreement has an object that is restrictive of competition, the ensuing prohibition has a very broad scope, that it is to say it can be imposed as a precautionary measure and thus jeopardise future contacts,[31] irrespective of the evaluation of the effects actually produced.

55. This formalist approach is thus conceivable only in the case of (i) conduct entailing an inherent risk of a particularly serious harmful effect or (ii) conduct in respect of which it can be concluded that the unfavourable effects on competition outweigh the pro-competitive effects. To hold otherwise would effectively deny that some actions of economic operators may produce beneficial externalities from the point of view of competition. In my view, it is only when experience based on economic analysis shows that a restriction is constantly prohibited that it seems reasonable to penalise it directly for the sake of procedural economy.[32]

56. 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.

57. Second, such classification relieves the enforcement authority of the responsibility for proving the anticompetitive effects of the agreement or the practice in question. An 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 anticompetitive conduct.

58. Because of these consequences, classification as an agreement which is restrictive by object must necessarily be circumscribed and ultimately apply only to an agreement which inherently presents a degree of harm. This concept should relate only to agreements which inherently, that is to say without the need to evaluate their actual or potential effects, have a degree of seriousness or harm such that their negative impact on competition seems highly likely. Notwithstanding the open nature of the list of conduct which can be regarded as restrictive by virtue of its object, I propose that a relatively cautious attitude should be maintained in determining a restriction of competition by object.

59. Such caution is all the more necessary because the analytical framework that the Court is led to identify will be imposed both on the Commission and on the national competition authorities, whose awareness and level of expertise vary.

31 — The importance of these consequences has already been pointed out by Advocate General Cruz Villalón in point 64 of his Opinion in *Allianz Hungária Biztosító and Others*.

32 — The Commission seems to have adopted this approach in the Guidelines on the application of Article 81(3) EC of 27 April 2004 (OJ 2004 C 101, p. 97). It states inter alia that '[r]estrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the *serious nature of the restriction and on experience* showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules' (emphasis added).

60. The advantage in terms of predictability and easing the burden of proof entailed by identifying agreements that are restrictive by object would appear to be undermined if that identification ultimately depends on a thorough examination of the consequences of that agreement for competition which goes well beyond a detailed examination of the agreement.

61. In any event, it should be noted that, despite the apparent extension of the conduct that is classified as restrictive by object, the Court has consistently held, from *LTM* to *Allianz Hungária Biztosító and Others*, that the analysis of the object must reveal 'a sufficient degree of harm'. [33]

62. Lastly, I would observe that such an interpretation does not effectively 'immunise' certain conduct by exempting it from the prohibition under Article 81(1) EC. Where it has not been established that a certain agreement is not specifically — that is to say in the light of its objectives and its legal and economic context — capable of preventing, restricting or distorting competition on the market, only recourse to the concept of restriction by object is ruled out. The competition authority will still be able to censure it after a more thorough examination of its actual and potential anticompetitive effects on the market.

2. Assessing the existence of a restriction by object in the present case

63. I note that, by its first ground of appeal, the appellant criticises, in general terms, the non-restrictive view of the concept of restriction by object taken by the General Court. More specifically, it calls into question errors which, in its opinion, vitiated the General Court's examination of the content, the objective and the context of the measures at issue.

64. In other words, it must first be ascertained whether, in general terms, the General Court was entitled, in paragraphs 124 and 146 of the judgment under appeal, to consider that 'the concept of infringement by object should not be given a strict interpretation'. It should then be determined whether, irrespective of that assertion, the General Court was able, without committing errors in law, to confirm the existence of an infringement by object within the meaning of Article 81(1) EC in the present case.

a) Strict or broad interpretation of the concept of anticompetitive object?

65. It should be stated at the outset that the case-law, which shows an ambivalence between the desire not to set out a closed list of restrictions by object and the need to respect the *ratio legis* of Article 81(1) EC, which inter alia requires the conduct in question to present a certain degree of harm, does not always clearly answer the question whether or not the concept of restriction by object must be given a strict interpretation, even though certain Advocates General have supported one approach or the other. [34]

33 — That requirement 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).

34 — It should be noted, for example, that in his Opinion in *Allianz Hungária Biztosító and Others*, Advocate General Cruz Villalón advocated a strict approach, concluding that the category of restrictions of competition by object must be interpreted strictly and must be limited to cases in which a particularly serious inherent capacity for negative effects can be identified (see point 65 of that Opinion). In *T-Mobile Netherlands and Others*, Advocate General Kokott seems, on the other hand, to have supported a less clear-cut approach, stating that '[c]ertainly, the concept of a restricted practice having an anticompetitive object may not be subject to unduly broad interpretation, given the serious consequences which may befall an undertaking in the case of an infringement of Article 81(1) EC. However, nor may that concept be subject to unduly strict interpretation, if the primary law prohibition on "infringement by object" is not to be erased through interpretation and, as a consequence, Article 81(1) EC deprived of an element of its practical effectiveness' (see point 44 of that Opinion).

66. With regard, in particular, to *Beef Industry Development Society and Barry Brothers*, the General Court was wrong, in my view, to refer to that judgment in support of the conclusion that the concept of infringement by object should not be interpreted narrowly.

67. It is true that, as is clear from paragraph 22 of that judgment, the Court sought to respond to the argument put forward by *Beef Industry Development Society and Barry Brothers* that 'the concept of infringement by object should be interpreted narrowly' and that 'only agreements as to horizontal price fixing, or to limit output or share markets, agreements whose anticompetitive effects are so obvious as not to require an economic analysis come within that category'.

68. I note, however, that whilst the response given by the Court in paragraph 23 of that judgment, according to which 'the types of agreements covered by Article 81(1)(a) to (e) EC do not constitute an exhaustive list of prohibited collusion', clearly indicates that the concept of restriction of competition is not limited to the most flagrant, cartel-type restrictions (hard core infringements) covered by that provision and cannot be contained in an exhaustive list, it does not necessarily prejudge the issue of the restrictive character of the interpretation of the concept of restriction of competition by object.

69. A different conclusion must be reached on reading that judgment. In the final analysis, it was the examination of the actual terms of the arrangements in question that led the Court to find that they had as their object the restriction of competition.

70. It is true that the arrangements at issue in *Beef Industry Development Society and Barry Brothers* ('the BIDS arrangements') had specific characteristics in that they pursued an objective of rationalising the beef industry by reducing production overcapacity.

71. Nevertheless, those arrangements were comparable to agreements to limit production within the meaning of Article 81(1)(b) EC. Following a detailed examination of the terms of the BIDS arrangements, the Court was led to conclude that they had an anticompetitive object. It took the view, inter alia, that those arrangements provided for a mechanism intended to encourage the withdrawal of competitors. The matters brought to the Court's attention showed that the BIDS arrangements pursued two main objectives: first, to increase the degree of concentration in the sector concerned by reducing significantly the number of undertakings supplying processing services and, second, to eliminate almost 75% of excess production capacity.[35] The BIDS arrangements were intended therefore, essentially, to enable several undertakings to implement a common policy which had as its object the encouragement of some of them to withdraw from the market and the reduction, as a consequence, of the overcapacity which affected their profitability by preventing them from achieving economies of scale.[36]

72. The Court concluded that 'that type of arrangement conflicts patently with the concept inherent in the EC Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market'. In its view, in the context of competition, the undertakings which signed the BIDS arrangements would have, without such arrangements, no means of improving their profitability other than by intensifying their commercial rivalry or resorting to concentrations. With the BIDS arrangements it would be possible for them to avoid such a process and to share a large part of the costs involved in increasing the degree of market concentration as a result, in particular, of the levy of EUR 2 per head processed by each of the 'stayers'. In addition, the Court states that the means put in place to attain the objective of the BIDS arrangements included restrictions whose object was anticompetitive.[37]

35 — See *Beef Industry Development Society and Barry Brothers*, paragraphs 31 and 32.

36 — See *Beef Industry Development Society and Barry Brothers*, paragraph 33.

37 — See *Beef Industry Development Society and Barry Brothers*, paragraphs 34 to 36.

73. In short, the measures at issue presented a degree of harm such that they could be found to have an anticompetitive object.

74. In the light of the foregoing considerations, in the judgment under appeal, the General Court was wrong, in my view, to state that the concept of object did not have to be given a strict interpretation.

75. It will have to be examined whether, notwithstanding that assertion, the General Court could, without committing an error in law, confirm the conclusion that the measures at issue had an anticompetitive object.

b) The analytical framework used in the present case to establish the existence of a restriction by object

76. As a preliminary point, it should be noted that although the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, second, to assess those facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them. The appraisal of the facts by the General Court does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice. [38]

77. In this case, it seems to me that, by the present ground of appeal, the appellant is primarily seeking to challenge, first, the errors in law which, in its view, vitiated the classification of the measures at issue as a restriction by object and, second, a distortion by the General Court of the evidence produced before it. These questions cannot, a priori, be exempt from review by the Court.

78. The Court must ascertain whether the General Court properly reviewed whether the Commission had sufficiently established, following a concrete and individual examination of the content, the aim and the economic and legal context of which they formed a part, that the measures at issue achieved a degree of harm such that their negative effects on competition could be presumed.

79. To that end, experience is a perfectly relevant point of reference. 'Experience' must be understood to mean what can traditionally be seen to follow from economic analysis, as confirmed by the competition authorities and supported, if necessary, by case-law.

80. In the present context, it should be stated that the measures at issue are horizontal in nature and that, a priori, they could be considered to be quite capable of entailing an object that is restrictive of competition.

81. Whilst it is well established that certain horizontal agreements between undertakings include obvious restrictions of competition such as price fixing and market sharing [39] and can therefore be regarded as entailing a restriction of competition by object, it is not apparent from the outset that the measures at issue are harmful to competition.

82. It should be examined, however, whether the General Court was justified in confirming the Commission's conclusion regarding the existence of a restriction by object, bearing in mind that that conclusion must be based on an overall assessment of the content of the measures, if necessary in the light of the aims objectively pursued and the economic and legal context.

38 — See, inter alia, Joined Cases C-628/10 P and C-14/11 P *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others* [2012] ECR, paragraphs 84 and 85.

39 — Case C-389/10 P *KME Germany and Others* v *Commission* [2011] ECR I-13125, paragraph 65.

83. In that respect, to structure the present ground of appeal into individual parts, relating, respectively, to each of the three relevant aspects for classification of a measure as restrictive by object, might seem artificial.

84. In my view, they should nevertheless be addressed in turn.

i) The first part: examination of the content of the measures of the Grouping

85. The appellant, supported on several points by BNP Paribas, BPCE and SG, claims that the General Court committed several errors in law in the assessment of the content of the measures at issue.

86. It argues, first, that the General Court committed errors in the analysis of the 'very' object of those measures. The General Court did not conduct an examination of the harmfulness of the measures at issue with reference to their content, but kept to the subjective intentions of certain members of the Grouping. For example, the General Court committed an error in law, in paragraphs 126 and 132 of the judgment under appeal, when it took the view that it is apparent from the actual formulas used in the measures at issue that those measures had an anticompetitive object consisting in hindering competition from new entrants on the market concerned. In addition, the appellant considers that the General Court distorted the evidence by concluding that a number of obstacles made it very difficult in practice for a new entrant to expand its acquiring activity, relying on the statements made by the Commission and leaving aside evidence to the contrary without any valid explanation.

87. Second, the appellant claims that the General Court erred in taking into consideration, in paragraphs 186 and 256 of the judgment under appeal, matters preceding the adoption of the measures at issue, based on documents seized during the inspections made on the premises of the Grouping and on the premises of some of its members.

88. The General Court was wrong, according to the applicant, to take into account the comments made by certain main members prior to the adoption of the measures at issue in order to analyse the object of those measures, as those comments did not reflect the will of the Grouping itself, but only of certain of its members. It is because a decision constitutes the faithful expression of the will of its author that it can be understood as a decision by an association of undertakings. In this case, the circumstances surrounding the preparation and the adoption of the decision are not relevant, as the notified measures alone fully demonstrate the intention of the Grouping. Furthermore, the background of the measures was taken into account instead of an in-depth analysis of the content of the measures.

89. The appellant also considers that the General Court distorted the evidence by making inappropriate selections from the preparatory comments, the documents seized and statements made by new entrants. In the appellant's opinion, a number of pieces of evidence describing the need to combat free-riding and the concern to respect competition law demonstrate the existence of genuine doubt regarding the restriction of competition, which should have been taken into consideration by the General Court. That distortion was all the more manifest because the General Court relied on the same evidence as that used by the Commission without departing from the conclusions of the first statement of objections.

90. In the judgment under appeal, the General Court essentially concluded that the anticompetitive object of the measures at issue consisted in impeding competition from new entrants on the French market for the issue of CB cards.

91. The General Court thus endorsed the conclusion that the anticompetitive object of the measures at issue was apparent from the envisaged calculation formulas for the measures at issue (see paragraphs 126 to 133 of the judgment under appeal). It also held that it was only by way of confirmation that the Commission had relied on the documents collected during the inspections relating to the comments made by the main members in the course of the preparations for the measures at issue (see paragraphs 123 to 154 of the judgment under appeal).

92. As regards, first, the examination of the calculation formulas used in the measures at issue, and as an extension to what I have already indicated, it would seem that the General Court failed to verify that those measures included a mechanism that was anticompetitive by nature.

93. It is true that the General Court noted, in paragraph 132 of the judgment under appeal, that the Commission had taken the view, in the light of the formulas envisaged by the measures at issue and on account of the difficulties with expanding acquiring activities, that those measures required members of the Grouping that were subject to them either to limit their issuing activities or to bear (issuing-related) costs which were not borne by other members of the Grouping, including the main members. The General Court also stated that '[t]hose formulas thus limited the opportunity for members that were subject to them to compete (on price), on the issuing market, with members of the Grouping that were not subject to them. The Commission concluded that the measures at issue had an anticompetitive object consisting in impeding competition for new entrants (see recitals 212, 213 and 222 of the [decision at issue])'.

94. Similarly, in paragraph 133 of the judgment under appeal, the General Court endorsed the Commission's conclusion that 'the function given by the Grouping to MERFA (incentive to expand acquisition) was inconsistent with the existence of interchange fees which encouraged issuing (see recitals 226 to 230 of the [decision at issue]) and by the fact that the supplementary membership fee and the dormant member wake-up fee penalised banks that had not issued a sufficient number of cards in the recent past (see recitals 231 and 232 of the [decision at issue])'.

95. Whilst these findings certainly describe the content of the measures at issue, which essentially seek to impose certain charges on certain banks and to stimulate acquiring activity, it seems to me that both the Commission and the General Court failed to demonstrate how, by virtue of their very wording, those measures restricted competition. It is clear from the terms of the notified measures, as described by the Commission and examined by the General Court, that their object consisted in requiring a financial contribution from members of the Grouping to finance the operating costs of the CB card payment system. As I will show below (see, inter alia, points 130 and 131 of this Opinion), the simple fact that certain members of the Grouping may be prompted, by reason of the enactment of the measures at issue, either to limit their issuing activities or to bear (issuing-related) costs which are not borne by other members of the Grouping cannot be regarded as restrictive by object.

96. Second, as regards the consideration of the 'background', that is to say the comments made by the main members in certain preparatory documents for the measures at issue that were collected during inspections, the reasoning adopted by the General Court is being challenged in the present appeal on several points.

97. It should first be examined whether or not the General Court erred in law in attributing some of the comments made by those main members, prior to the drawing up of the measures at issue, to the Grouping as a whole. Second, it is necessary to explore the importance given to those comments in the assessment of the content of the measures and, lastly, their relevance with a view to determining a restriction by object.

98. First, with regard to the question whether the comments made by the lead institutions actually reflect the will of the Grouping itself, the argument that the General Court committed an error in law by equiparating the intention of the Grouping with the comments made by the main members seems fairly persuasive.

99. I would note in this regard that the General Court simply stated that 'since the main members are members of the informal body, namely the [Electronic Banking Steering Committee] which prepared the measures at issue and of the Executive Committee which adopted them, the intention expressed by the main members essentially corresponds to the intention of the Grouping as regards the adoption of the measures at issue' (paragraph 256 of the judgment under appeal). It concluded that the Commission was not inconsistent in classifying the measures at issue as decisions by an association of undertakings and in thus acknowledging, by such classification, that the measures at issue constituted the expression of the intention of the entire Grouping, whilst relying on the comments made by the main members to corroborate the fact that they had as their object the exclusion of new entrants (paragraph 257 of the judgment under appeal).

100. In order to confirm the conclusion reached by the Commission as to whether the comments made by the main members can be attributed to the Grouping as a whole, it seems to me that the General Court ought to have verified that the comments made by certain main members constituted the faithful expression of the will of the Grouping, failing which they cannot be linked to the decision by an association of undertakings at issue in the present case. [40] It should be stressed in this regard that, as the General Court pointed out in paragraph 7 of the judgment under appeal, the Electronic Banking Steering Committee is an informal body without any decision-making powers.

101. Second, as regards the importance given to the intention expressed by the comments made by the main members in determining the anticompetitive object of the measures at issue, the General Court's conclusion that it was only by way of confirmation that the Commission relied on the documents collected during the inspections, which contained the comments made by the main members in the course of the preparations for the measures at issue (paragraphs 134 and 267 of the judgment under appeal), is far from obvious.

102. It is true that, if one just looks at the structure of the part of the decision at issue devoted to examining the existence of a restriction of competition by object, [41] it would appear that the Commission, first, stated that the actual formula used in the measures ran counter to the objectives declared in the notification [42] and, second, explained why, in its view, the anticompetitive objective which is apparent from the actual formula used in the measures corresponds fully to the actual objectives of the measures as expressed by the comments made by the main members in the course of their preparation. [43] Similarly, the Commission stated that 'the anticompetitive object of MERFA was corroborated by the statements made by the main members in the course of the preparation of the measures'. [44]

103. However, the Commission ultimately seems to have given as much importance to the documents stemming from the 'background' to those measures as to the examination of the formula used in the measures at issue.

40 — See, to this effect, *Wouters and Others*, paragraph 64.

41 — Paragraphs 193 to 251 of the decision at issue.

42 — Part 10.2.1.1 corresponding to paragraphs 199 to 234 of the decision at issue.

43 — Part 10.2.1.2 corresponding to paragraphs 235 to 250 of the decision at issue.

44 — Paragraph 234 of the decision at issue.

104. This appears fairly clearly from paragraphs 193 and 198 of the decision at issue which, summarising the Commission's approach in determining the anticompetitive object, refer to the preparatory documents. Furthermore, and as SG stressed in its written submissions, the purpose of the part dedicated to examining the formulas was to provide negative evidence that the measures at issue did not correspond to the stated objective, the positive evidence of the anticompetitive object of the measures at issue being largely based on material evidence stemming from the preparatory documents emanating from the main members. [45]

105. Similarly, it seems that, in order to interpret the content of the measures at issue, the General Court endorsed the considerations relating to the formulas used by those measures, read in the light of the documents collected in the course of the inspections and referring to the comments made by the main members. [46]

106. In any event, it would seem essential to ascertain, third, whether the comments made by the main members, as evidence of the background to the measures at issue, could be regarded as relevant in determining the existence of a restriction by object.

107. In this regard, I take the view that even assuming that those comments are actually representative of the intention of the Grouping, which seems to me must be ruled out (see point 100 of this Opinion), they could not be regarded as sufficient to demonstrate the existence of an anticompetitive agreement and, *a fortiori*, of an agreement entailing a restriction of competition by object.

108. Indeed, it is fairly clear from case-law that although the parties' intention is not a necessary factor in determining whether an agreement 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. [47]

109. This possibility of taking into account the intention expressed by the parties is, it would seem, conceivable only as a subsidiary consideration or on a supplementary basis and cannot replace a detailed examination of the terms and the objectives of the conduct in question. 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, [48] 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.

110. 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'.

111. Lastly, in connection with the present part of this ground of appeal, the appellant has claimed that the General Court distorted the evidence produced. That distortion consisted in the fact that, in addition to the documents showing that it was not necessarily difficult to expand acquiring activities, the Commission made inappropriate selections from the comments made by the main members.

45 — See also the description of the content of the contested decision in paragraphs 35 and 36 of the judgment under appeal.

46 — See, in particular, paragraph 186 of the judgment under appeal.

47 — See, in this regard, *Allianz Hungária Biztosító and Others*, paragraph 37 and the case-law cited.

48 — See inter alia *General Motors* v *Commission*, paragraph 77 and the case-law cited.

112. It is sufficient to note in this regard that it is, in principle, for the General Court alone to assess the probative value of the evidence submitted to it. A distortion of the evidence requires that the General Court manifestly exceeded the limits of a reasonable assessment of the evidence,[49] which must be obvious from the documents before it, without there being any need to carry out a new assessment of that evidence. Where an appellant alleges distortion of the evidence by the General Court, it must indicate precisely the evidence alleged to have been distorted by that Court and show the errors of appraisal which, in its view, led to that distortion.[50]

113. In this case, the alleged distortion of the evidence is not obvious from the documents in the file. In addition, the appellant fails to identify precisely the documents which, in its view, demonstrate such distortion. Through its arguments, and even though it claims a distortion of the evidence, the appellant is apparently seeking, in reality, to obtain a reappraisal of that evidence, which falls outside the Court's jurisdiction.

114. It follows from all those considerations, that, on the basis of the examination of the very terms of the measures at issue, as described by the General Court, the conclusion that the Commission demonstrated to the requisite legal standard that those measures are anticompetitive by object is difficult to understand.

ii) The second part: examination of the objective of the measures

115. The appellant claims that the General Court erred in law in its assessment of the objectives of the measures at issue. The General Court was therefore wrong, whilst recognising that the fight against free-riding in the CB card system constitutes a legitimate objective, to decline to assess that objective in the light of Article 81(1) EC. The General Court should have recognised that a restriction of competition by object is ruled out because the measures taken by the Grouping have the effect of stimulating acquiring activity and seek to optimise acquiring and issuing activities. Those measures are appropriate in accordance with the principle of proportionality, since they represent systemic measures taken in the overall interest of the CB card system, and are balanced, because they leave it to each member of the Grouping to choose the option appropriate to its individual situation.

116. According to case-law, to determine whether an agreement comes within the prohibition laid down in Article 81(1) EC, close regard must be paid, in particular, to its objective aims.[51]

117. It should be noted that those objective aims, which must be clear from the measures at issue, should not be confused with the subjective intentions of whether or not to restrict competition or with any legitimate objectives pursued by the undertakings in question. It is well established that an agreement may therefore be regarded as having a restrictive object even if it pursues other legitimate objectives.[52]

118. In the present case, how should the pricing measures taken by the Grouping be understood?

49 — See Case C-260/09 P *Activision Blizzard Germany* v *Commission* [2011] ECR I-419, paragraph 57, and Case C-287/11 P *Commission* v *Aalberts Industries and Others* [2013] ECR, paragraph 52.

50 — See, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 50.

51 — See *Beef Industry Development Society and Barry Brothers*, paragraph 21.

52 — Including legitimate objectives of commercial policy (*General Motors* v *Commission*, paragraph 64) or of protecting public health and reducing the cost of conformity checks (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paragraph 25) and measures to tackle a crisis in a sector (*Beef Industry Development Society and Barry Brothers*, paragraph 21).

119. Contrary to what the Commission implied at the hearing, it cannot really be claimed that the MERFA mechanism presents a degree of harm such that it could be treated in the same way as a cartel [53] concerning prices which, as such, undermines competition. Similarly, for the reasons set out above, I consider that the measures at issue in the present case, which do not include a mechanism to encourage the withdrawal of certain competitors, cannot really be compared to the market rationalisation measures at issue in *Beef Industry Development Society and Barry Brothers*.

120. According to the judgment under appeal, the measures at issue essentially sought to introduce levies on members of the Grouping which, at the stage of both access to and use of the CB card system, are more issuers of CB cards (activity of issuing payment cards and/or withdrawal by card holders) than acquirers (activity of affiliating traders with a SIREN number and operation of ATMs).

121. All these measures were, according to the Grouping, intended to protect the CB card system from the phenomena of commercial free-riding resulting from banks mainly expanding their card issuing activity and benefiting, without consideration, from the advantages stemming from the investments made by other members of the system in respect of acquisition.

122. However, whilst it is established, as the General Court acknowledged (see, inter alia, paragraphs 76 and 77 of the judgment under appeal), that the fight against free-riding may constitute a legitimate objective, such a consideration is not directly relevant in determining the existence of a restriction of competition by object within the meaning of Article 81(1) EC.

123. Consequently, I do not think that the General Court was wholly mistaken in concluding that the objective of fighting against free-riding did not, in general, have to be taken into account in the examination of the measures under Article 81(1) EC, but that it could be taken into consideration in the examination of the possibility of an exemption under Article 81(3) EC.

124. However, that conclusion appears to be meaningful only if it is clearly established, following a detailed examination, that the measures at issue have an anticompetitive object. It is the fact that conduct manifestly has an anticompetitive object that makes its pursuit of other aims irrelevant.

125. Otherwise, that is to say in the case of a restriction by object which is not clearly established (as seems to be the case in this instance) it will be necessary to examine the anticompetitive effects and, in this framework, to assess the necessity and the proportionality of the measures in question having regard to the objective pursued. [54]

126. I find it difficult to see how the measures at issue present the degree of harm required by case-law.

127. First of all, it is common ground that those measures were adopted in order to stimulate acquiring activity in respect of CB cards within a payment system with two sides linked by the existence of network effects. As the General Court noted in paragraph 102 of the judgment under appeal, the Commission itself stated that the issuing and acquiring activities were essential to one another and to the operation of the CB card payment system in general, since, on the one hand, traders would not agree to join the CB card payment system if the number of cardholders was insufficient and, on the other, consumers would not wish to hold a card if it could not be used with a sufficient number of traders.

53 — It would seem, on the other hand, that treatment of the measures in question in the same way as a cartel between the Grouping and its main members had initially (see point 7 of this Opinion) been adopted by the Commission, then abandoned in the course of the preparatory enquiry.

54 — See Case 161/84 *Pronuptia de Paris* [1986] ECR 353, paragraphs 15 to 17, and Case C-250/92 *DLG* [1994] ECR I-5641.

128. Thus, the measures at issue were intended to obtain a financial contribution from members that benefit directly, in terms of card issuing activity, from membership of the payment system as a result of the contributions made by other members in relation to 'acquisition'. Those measures, in particular MERFA, essentially comprise a mechanism requiring a financial contribution from members that are not very active in relation to 'acquisition'.

129. I do not consider that the imposition of a financial contribution on members of a network that benefit, without any consideration, from the contributions made by other members in order to develop the network entails an anticompetitive object.

130. In the present case, it is true that the level of fees charged or the difficulties encountered by some operators in expanding acquisition activities may have the effect of excluding operators that do not pay the charges imposed by the measures at issue. However, unless reliance is placed on the 'essential facilities' theory,[55] which is not invoked at all by the Commission in the present case[56] and whose applicability seems doubtful in any event,[57] this does not appear to be objectionable from the point of view of competition.

131. In any event, whilst it cannot be ruled out that the result of the measures at issue will be to encourage certain members of the Grouping either to limit their issuing activities or to increase their acquiring activities — the latter being an option which could prove difficult in practice and therefore lead to their exclusion from the system — that question would in any case come under the examination of the potentially anticompetitive effects of those measures and not of their object. I believe that the exclusion effects entailed by pricing measures like those at issue in the present case can be examined only at the stage of the examination of the anticompetitive effect.

132. Above all, I must admit to being perplexed by the interpretation, by both the Commission and the General Court, of the measures at issue adopted by the Grouping and intended for all its members, which are, as has been pointed out, either main members or members linked or affiliated to the main members.[58] In so far as the pricing measures affect all members of the Grouping directly or indirectly, I find it very difficult to understand in what respect they might contain a mechanism that is by nature anticompetitive and how they were set up in some way to spare the main members.[59]

133. Accordingly, like the terms of the measures at issue, the objectives of those measures do not support the conclusion that the Commission was right to find the existence of a restriction by object in the present case.

iii) The third part: examination of the context of the measures

134. The appellant claims that the General Court committed several errors in analysing the context of the measures at issue.

55 — I note that, according to that theory, the holder of a resource or a structure must make it available to its competitors where access to that structure is indispensable for carrying on their business (see, to this effect, Case C-418/01 *IMS Health* [2004] ECR I-5039).

56 — See, in this regard, the judgment under appeal, paragraphs 66 and 224.

57 — In its *XXXth Report on Competition Policy 2000*, the Commission had itself stated that '[t]he Commission has established that the CB system is not an essential facility and therefore that the grouping can decide whether or not to grant access to its competitors (provided that it does not discriminate between them)' (paragraph 207 of that report).

58 — See paragraph 3 of the judgment under appeal, which reproduces paragraph 29 of the decision at issue.

59 — See paragraph 130 of the judgment under appeal. BNP Paribas stated, both in its response and at the hearing, that it was in particular the assumption (erroneous in its view) that all main members were not subject to the measures at issue that justified classification as an infringement by object. By confirming that basic assumption, the General Court failed to fulfil its obligation to state reasons.

135. First, the appellant alleges that the General Court erroneously took into account the legal context by misinterpreting, first, the case-law concerning restrictions of competition by object, in particular *Beef Industry Development Society and Barry Brothers*, and, second, questions addressed in previous decision-making practice. In this regard, the judgment under appeal is inter alia vitiated by an inconsistent statement of reasons in so far as, in paragraphs 94 and 99 of that judgment, the General Court stated both that the practices examined in the two 'Visa' decisions [60] are markedly different from those at issue in the present case and that those two decisions concern 'the same or similar situations'. The error of analysis also stems from the fact that the Commission had itself agreed to discuss possible commitments under Article 9 of Regulation No 1/2003, that is to say measures 'to meet the concerns expressed' and not characterising any infringement of competition as such.

136. Second, the appellant considers that the General Court erred in law when taking the economic context into account, in particular by failing to consider the two-sided operation of CB card payment systems.

137. Third, the appellant takes the view that, when taking the economic context into account, the General Court erred in law by failing to exercise its review with regard to complex economic assessments. In the present case, the General Court did not conduct that minimum, objective review of the economic assessments contained in the decision at issue, but, in paragraphs 320 and 321 of the judgment under appeal, simply disregarded certain economic studies produced by the Grouping on account of their alleged inconsistency with other studies.

138. It follows from the examination of the first two parts of the present ground of appeal that, in the light of the content of the measures at issue and the objective, the existence of a restriction of competition by object within the meaning of Article 81(1) EC is not established.

139. In these circumstances, the elements relating to the economic and legal context [61] surrounding the drafting of the measures at issue should not be capable in themselves of establishing the existence of an anticompetitive object. As I mentioned above, the examination of the context cannot remedy the failure actually to identify an anticompetitive object (see point 44 of this Opinion).

140. For the sake of completeness, however, the following points should be made.

141. With regard, first, to the consideration of the legal context, as I have already mentioned, experience, in a broad sense, is a parameter which must be taken into account in order to establish the existence of a restriction by object (see point 55 et seq. of this Opinion).

142. However, whilst experience can undoubtedly confirm the inherently anticompetitive character of certain types of cooperation in the case of patent and/or evident restrictions which, in all likelihood, have an impact on competition, I am not convinced that it is always possible to infer a strong argument from the Commission's decision-making practice. The fact that in the past the Commission did not take the view that a certain kind of agreement was, by virtue of its very object, restrictive of competition cannot in itself prevent it from doing so in the future following an individual, detailed examination of the measures at issue.

60 — Commission decisions relating to a proceeding under Article 81 EC and Article 53 EEA, namely Decision 2001/782/EC of 9 August 2001 (Case No COMP/29.373 — Visa International) (OJ 2001 L 293, p. 24, 'the 2001 Visa decision') and Decision 2002/914/EC of 24 July 2002 (Case No COMP/29.373 — Visa International — Multilateral Interchange Fee) (OJ 2002 L 318, p. 17, 'the 2002 Visa decision').

61 — Although the complaints set out by the appellant are organised in three points, it seems that the third, which seeks to criticise the General Court for failing to exercise its power of review of complex economic assessments, can easily be linked together with the complaint concerning the examination of the economic context.

143. In the present case, the Commission's previous positions with regard to agreements adopted in payment systems, and in particular the Visa 2001 and Visa 2002 decisions, assuming that they relate to measures more or less identical to those at issue in the present case, should not necessarily prejudge the character of those measures as restrictions by object.

144. Nevertheless, caution had to be exercised with regard to the grounds justifying a departure from the conclusions previously reached by the Commission in its previous decisions concerning the payment systems market. The General Court had to ascertain inter alia how the measures at issue, unlike the measures adopted on the same market, whose similarity was, to some extent, recognised by the General Court,[62] presented a degree of harm such that they could be analysed as having an anticompetitive object.

145. As regards the precedent in this instance represented by *Beef Industry Development Society and Barry Brothers*, as I stated above in points 69 to 73 of this Opinion, I take the view that that case clearly differs from the present case in several respects.

146. With regard, second, to consideration of the economic context, the Grouping essentially alleges that the General Court ignored the characteristics of the CB card system and, in particular, the two-sided nature of the system.

147. In this respect, I take the view that, even assuming that it could be inferred from the terms and the objectives pursued by the measures at issue that they had an anticompetitive object, the context of the measures can weaken that conclusion.

148. In this connection, in order to establish the existence of a restriction by object, the Commission cannot simply conduct an abstract examination, in particular in the case of a restriction whose character is not evident.

149. In my view, consideration of the interactions between the 'issuing' aspect and the 'acquiring' aspect in the examination of the context of the measures with a view to identifying a restriction of competition by object seems quite distinct from the examination relating to the definition of the relevant market. It is not a question of challenging the assertion that the issuing and acquiring markets are distinct, but of examining whether sufficient account was taken of the economic context in which the measures were drafted.

150. In this case, and as the appellant mentioned before the General Court, the smooth operation of the CB card system requires issuing and acquiring activities to be performed in a balanced manner. With this in mind, it cannot be ruled out that the respective contributions of each member to the expansion of each of these functions can be taken into account. Whether it is already a member or a new entrant, a member of the Grouping that is active mainly or exclusively in issuing CB cards benefits from the investments made in order to expand the 'acquiring' aspect, which is a necessary pillar to the sustainability of the system.

62 — That is the case even though there appears to be a slight contradiction between the conclusion adopted in paragraph 94 of the judgment under appeal, according to which the measures at issue in the Visa 2001 and Visa 2002 decisions cannot be regarded as comparable, and the conclusion in paragraph 99 of that judgment, according to which 'it does not follow from the obligation to state reasons that the Commission must, in addition to stating the reasons for its decision by reference to the case-file to which the decision relates, specifically set out its reasons for reaching a different conclusion than in a previous case concerning similar or identical situations or the same market participants'.

3. Conclusion

151. In conclusion, it is apparent that the General Court erred in law, first, by reaching and adopting a non-restrictive interpretation of the concept of restriction by object and, second, by specifically applying such an approach in its examination of the content, the objectives and the context in which the measures at issue were drafted.

152. The General Court in particular failed to ascertain that, having regard to the terms, the objectives and the context in which the measures at issue were drafted, the Commission was justified in concluding that those measures presented a degree of harm such that their anticompetitive effects could be presumed.

153. The judgment under appeal therefore should be censured in this regard and could be set aside on this ground alone.

154. As the General Court did not consider it necessary to examine whether those measures had an anticompetitive effect, the present case should be referred back to the General Court.

155. However, and in the event that the Court does not endorse my conclusion, I will briefly examine below the second and third grounds of appeal raised by the appellant in the present appeal.

B – *The second ground of appeal, alleging an error in law in the application of the concept of restriction by effect*

156. The appellant, supported by BNP Paribas, maintains that, of the 455 paragraphs contained in the judgment under appeal, only four are devoted to examining the effects of the measures at issue. In addition to an error in law in its examination of the existence of a restriction of competition by effect, the General Court failed to respond, to the requisite legal standard, to all the arguments raised by the appellant, in breach of its obligation to state reasons under Article 36 in conjunction with the first paragraph of Article 53 of the Statute of the Court of Justice of the European Union. In particular, the Commission failed to show that the measures at issue actually caused new entrants to withdraw from the market or to limit their CB card issuing activities.

157. In the present case, precisely because the General Court did not determine whether the measures at issue had anticompetitive effects, and if it were to be held, contrary to my suggestion, that the General Court was able, without committing an error in law, to conclude that the measures at issue had as their 'object' the restriction of competition within the meaning of Article 81(1) EC, the second ground of appeal must be declared ineffective. [63]

158. According to settled case-law [64] and further to what I have already stated, where the anticompetitive object of an agreement is established, there is no need to examine its anticompetitive effects.

159. The General Court did not therefore commit an error in law in concluding, in paragraphs 269 to 272 of the judgment under appeal, that the ground of appeal alleging errors of law, fact and assessment in the examination of the effects of the measures at issue was ineffective, because it had concluded that those measures had as their object the prevention, restriction or distortion of competition within the common market within the meaning of Article 81(1) EC.

63 — In this regard, the Court has stated, in particular, that to examine the anticompetitive object of an agreement before its anticompetitive effect is all the more justified because, if the error of law in the assessment of the object of that agreement turns out to be substantiated, the appeal directed at the grounds of the judgment under appeal relating to the anticompetitive effect of the agreement will fall to be dismissed (see *GlaxoSmithKline Services and Others* v *Commission and Others*, paragraph 56).

64 — See *LTM* and *Beef Industry Development Society and Barry Brothers*, paragraph 16.

160. Nor can it be alleged that the General Court did not fulfil its obligation to state reasons in this regard. In the present case, as the General Court considered it appropriate, and as the case-law authorises it to do so, simply to examine the existence of an anticompetitive object, it was not required to explain why the measures at issue also had anticompetitive effects.

161. In addition, in the present proceedings it is not for the Court to address the question whether, notwithstanding any anticompetitive object of the measures at issue, those measures could be regarded as having anticompetitive effects. In particular, it is not for the Court to ascertain whether the Commission successfully showed that the measures at issue caused new entrants to withdraw from the market or to limit their CB card issuing activities, especially since, as I mentioned above,[65] the Commission devoted a substantial proportion of the decision at issue to examining the effects of the measures at issue.

162. In the final analysis, I take the view that this ground of appeal cannot be upheld in any event.

C – *The third ground of appeal, alleging that the General Court breached the principles of proportionality and legal certainty by failing to annul the order in the second paragraph of Article 2 of the decision at issue*

163. The appellant, supported by BNP Paribas, claims that, by failing to annul the order in the second paragraph of Article 2 of the decision at issue, which requires the Grouping in future to refrain from any act or any conduct having an identical or similar object or effect to the measures at issue, the General Court breached the principles of proportionality and legal certainty.

164. With regard, first, to the principle of proportionality laid down in Article 5(4) TEU, the appellant states that, in accordance with Article 7(1) of Regulation No 1/2003, the General Court should have found that the obligation imposed by the Commission was not necessary having regard to the aim pursued, that is to say 'bringing such infringement to an end', in so far as, even before the adoption of the decision at issue, the Grouping had suspended the measures and that decision requires, in the first paragraph of Article 2, that the infringement be brought to an end immediately by withdrawing the notified pricing measures. Similarly, the General Court should have found that the order is disproportionate in that it applies to measures with a 'similar' effect. It is all the more necessary to define the order more closely in this case because the measures at issue give rise to major analytical differences between the General Court and the Grouping.

165. Second, as regards the principle of legal certainty, the appellant takes the view that the General Court should have found that the decision at issue was highly ambiguous as regards the scope of the order imposed, which creates legal uncertainty for the Grouping in respect of the measures that it is permitted to adopt in future in order to ensure its competitiveness and its development. The uncertainty in the present case resides in the extremely general and imprecise nature of the characterisation of the measures which the Grouping may not take in future, which could encompass any rebalancing measure considered necessary in future to strengthen the competitive position of the CB card system or to ensure its development. The Grouping is therefore prevented from taking measures to combat the phenomena of free-riding to which that system is exposed.

166. It should be pointed out that, by its third ground of appeal, the appellant seeks to criticise the Commission for not defining more precisely the scope of the order in the second paragraph of Article 2 of the decision at issue without, however, identifying an error in law committed by the General Court, inter alia in connection with the necessary interpretation of the Court's case-law.

65 — See point 2 of this Opinion.

167. It must be stated that this ground of appeal thus essentially reproduces the arguments put forward in support of the action before the General Court in connection with the second part of the sixth plea in law [66] and should, on that ground alone, be declared inadmissible.

168. That said, the present ground of appeal raises an interesting problem, closely linked with the examination of the first ground of appeal, in connection with the Commission's powers to make an order and the necessary review of the exercise of those powers by the General Court.

169. Whilst the parties agree, it would seem, that the principles of proportionality and legal certainty are applicable, the question arises as to the scope of those principles where the Commission has established the existence of an agreement, decision or concerted practice which is restrictive 'by object' within the meaning of Article 81(1) EC.

170. As regards respect for the principle of proportionality, the need to ensure the effectiveness of a decision establishing the existence of an infringement of Article 81(1) EC leads me to conclude that, once the existence of a restriction 'by object' has been clearly established, the Commission is entitled to order the undertakings concerned not only to suspend and withdraw the execution of the measures at issue, but also to refrain in future from any act having a similar object.

171. Once again, I would point out that the alleged 'anticompetitive' object of the measures in question must have been clearly identified and defined, something which, as I mentioned in connection with the examination of the first ground of appeal, does not appear to me to have occurred in the present case.

172. That requirement would also seem to be valid from the perspective of the principle of legal certainty.

173. Provided that the anticompetitive object of the measures at issue is sufficiently identified and identifiable, the Commission must be entitled to order the undertakings concerned to refrain from any similar conduct. The validity of such an approach seems more open to criticism (i) where the anticompetitive object is not, or not sufficiently, defined or (ii) where, as in the present case, the undertakings themselves are required to identify the scope of the order in question.

V – **Conclusion**

174. In the light of the foregoing considerations, I propose that the Court should:

(1) set aside the judgment of the General Court of the European Union of 29 November 2012 in Case T-491/07 *CB* v *Commission*;

(2) refer the case back to the General Court of the European Union;

(3) order that the costs be reserved.

66 — See paragraphs 435 to 452 of the judgment under appeal.