Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

11 September 2014*

(Appeal — Competition — Agreements, decisions and concerted practices — Article 81(1) EC — Payment cards system in France — Decision by an association of undertakings — Issuing market — Pricing measures applicable to 'new entrants' — Membership fee, mechanism for 'regulating the acquiring function' and 'dormant member "wake-up"' mechanism — Concept of restriction of competition 'by object' — Examination of the degree of harm to competition)

In Case C-67/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 8 February 2013,

Groupement des cartes bancaires (CB), established in Paris (France), represented by F. Pradelles, O. Fauré and C. Ornellas-Chancerelles, avocats, and by J. Ruiz Calzado, abogado,

appellant,

the other parties to the proceedings being:

European Commission, represented by O. Beynet, V. Bottka and B. Mongin, acting as Agents,

defendant at first instance,

BNP Paribas, established in Paris, represented by O. de Juvigny, D. Berg and P. Heusse, avocats,

BPCE, formerly Caisse Nationale des Caisses d'Épargne and de Prévoyance (CNCEP), established in Paris, represented by A. Choffel, S. Hautbourg, L. Laidi and R. Eid, avocats,

Société Générale SA, established in Paris, represented by P. Guibert and P. Patat, avocats,

interveners at first instance,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, C.G. Fernlund, A. Ó Caoimh (Rapporteur), C. Toader and E. Jarašiūnas, Judges,

Advocate General: N. Wahl,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 22 January 2014,

* Language of the case: French.

after hearing the Opinion of the Advocate General at the sitting on 27 March 2014,

gives the following

Judgment

1 By its 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 in *CB* v *Commission*, T-491/07, EU:T:2012:633, ('the judgment under appeal'), by which that 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').

Background to the dispute and the decision at issue

2 The background to the dispute and the essential elements of the decision at issue as apparent from paragraphs 1 to 48 of the judgment under appeal may be summarised as follows.

3 The appellant is an economic interest grouping governed by French law, created in 1984 by the main French banking institutions in order to achieve the interoperability of the systems for payment and withdrawal by bank cards ('CB cards') issued by its members ('the CB system'). That interoperability enables, in practice, a CB card issued by a member of the Grouping to be used to make payments to all traders affiliated to the CB system through any other member of the Grouping and/or 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 to a main member. Under the Grouping's constitutive agreement, BNP Paribas, BPCE and Société Générale SA ('Société Générale') are among the eleven main members.

4 On 10 December 2002, the Grouping notified the Commission pursuant to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87), of various new rules envisaged for the CB system, including three pricing measures ('the measures at issue'), which can be described as follows:

— A device known as the 'Mécanisme de regulation de la function acquéreur' ('mechanism for regulating the acquiring function') ('MERFA') which, according to the Grouping, aimed to encourage members that are issuers more than acquirers to expand their acquisition activities and to take account financially of the efforts of members whose acquisition activity is considerable in relation to their issuing activity. The formula provided for in that regard compared (i) the share of the member's activities in the total acquisition activities under the CB system, those activities being measured in the context of the company identification number or 'SIREN' system ('Système d'identification au répertoire des entreprises') and the operation of ATMs, with (ii) that member's share in the total issuing activities under that system, which are represented by a bank's issue of CB payment or withdrawal cards to a cardholder. MERFA was to apply where the ratio of acquisition activities to issuing activities was less 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 acquisition 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 CB cards in stock in the course or at the end of their sixth year of membership compared with their number of CB cards in stock at the end of their third year of membership;

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

5 On 6 July 2004, the Commission adopted a first statement of objections, sent to the Grouping and to nine main members on which checks had been carried out, in which it alleged that they had concluded a 'secret anti-competitive agreement' which had the 'object of generally limiting competition between the banks party to the agreement and to restrict competition, in a concerted manner, of new entrants (in particular large retailers, online banks and foreign banks) on the market for the issue of [CB cards]'. The Commission considered that 'the notification [of 10 December 2002 had been] made with the aim of concealing the real content of the anti-competitive agreement'. It intended to render the notification 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.

6 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 anti-competitive 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.

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

8 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 relevant market is 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 anti-competitive 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 of 10 December 2002. 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. Secondly, the function of stimulating acquisition 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' fee. That anti-competitive object reflects the genuine objectives of those measures, stated by the main members in the course of their preparation, namely the intention to (i) impede competition of new entrants and to penalise them, (ii) to safeguard the main members' revenue and (iii) to limit the price reduction for bank 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 issue plans for CB cards of new entrants and the prevention of a price reduction for CB cards, both for new entrants and for main members.

— The conditions for the application of Article 81(3) EC are not satisfied. In particular, the justification for the measures at issue, especially as regards MERFA, as a balancing mechanism between the acquisition and issue functions, could not be accepted because the reference issuance/acquiring ratio is that of the main members and not that for an optimal balance for the CB system.

9 The Commission therefore concluded, in the enacting terms of the decision at issue, as follows:

'Article 1

The pricing measures adopted by the [Grouping] by decision of its Board of Directors on 8 and 29 November 2002, that is to say, [MERFA], the membership fee per card, the additional membership fee and the [dormant members' 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 bring to an end the infringement mentioned in Article 1 by withdrawing the notified pricing measures mentioned in that article, in so far as it has not already done so.

The [Grouping shall] refrain, in the future, from adopting any measure or behaviour having an identical or similar object or effect.'

The procedure before the General Court and the judgment under appeal

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

11 In support of its action, the appellant put forward six pleas in law. The first plea in law alleged infringement of Article 81 EC on account of errors in the method of analysing 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. By its third plea in law, the appellant submitted that the Commission had made 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. By its fifth plea in law, the appellant alleged a breach by the Commission of the principle of good administration. Lastly, the sixth plea in law alleged a breach of the principles of proportionality and legal certainty on account of the directions in Article 2 of the decision at issue.

12 Having rejected all those pleas in law, the General Court dismissed the action in its entirety.

Forms of order sought and procedure before the Court of Justice

13 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.

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

15 BNP Paribas, BPCE and Société Générale seek identical forms of order to those of the appellant.

The appeal

16 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' within the meaning of Article 81(1) EC. The second ground of appeal alleges errors in law in the application of the concept of restriction of competition 'by effect' within the meaning of that provision. The third ground concerns the alleged failure of the General Court to have regard to the principles of proportionality and legal certainty, in so far as it did not annul the direction in the second paragraph of Article 2 of the decision at issue.

17 As a preliminary matter, the appellant, supported on this point by BNP Paribas and BPCE, submits that the General Court omitted elements from the description of the facts in paragraphs 1 to 48 of the judgment under appeal, which therefore 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 which the Court of Justice requires. First, the General Court fails to mention that the radical change in the Commission's position during the investigation between the first and second statements of objections could be explained by fundamental analytical errors found by the Hearing Officer at the end of the hearing of 16 and 17 December 2004, which neither the Commission nor the General Court subsequently corrected. Secondly, the judgment under appeal fails to mention the submissions made at the hearing of 16 May 2012 regarding the concept of a restriction of competition 'by object', in particular, in connection with the interpretation of the judgment in *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643 ('the *BIDS* judgment').

Arguments of the parties

18 By its first ground, the appellant, supported by BNP Paribas, BPCE and Société Générale, submits that, when it assessed the content, objectives and context of the measures at issue, the General Court made several errors in law in the application of the concept of the restriction of competition by 'object' with the meaning of Article 81(1) EC, which led it to prohibit per se any price charged by one operator to another. The first ground of appeal is in three parts.

–The first part of the first ground of appeal alleging errors in law in the assessment of the content of the measures at issue

19 The appellant, supported by BNP Paribas, BPCE and Société Générale, submits, in the first place, that the General Court made several errors in law in the analysis of the 'very object' of the measures at issue.

20 The General Court did not analyse the degree of harm of the measures at issue with reference to their content, but considered only the subjective intentions of certain members of the Grouping. Thus, the General Court erred 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 have an anti-competitive object consisting in hindering competition from new entrants on the market concerned. Indeed, the measures do not include any mechanism harmful for competition. First, the object of the measures is, unlike the measures at issue in the *BIDS* judgment, not to require members to leave the Grouping or to prevent new members from joining, but to increase the number of traders affiliated to the system. Secondly, those measures simply offer the members of the CB system different alternatives for contributing fairly to the system, leaving them to choose their contribution according to their own individual strategy.

21 In addition, the appellant considers that the General Court distorted the evidence when concluding, in paragraphs 127, 170 and 178 to 183 of the judgment under appeal, that a number of obstacles made it very difficult in practice for a new entrant to expand its acquisition activities, relying principally on the statements made by the Commission and rejecting the evidence to the contrary without any valid explanation.

22 In the second place, the appellant submits that the General Court erred in law in taking into consideration elements preceding the adoption of the measures at issue, as they emerged from the documents seized during the inspections made at the Grouping's premises and at the premises of some of its members.

23 First of all, in taking into account, in paragraphs 186 and 256 of the judgment under appeal, the individual 'internal' comments of certain main members prior to the adoption of the measures at issue in order to analyse the object of those measures, the General Court vitiated its examination of whether there was an anti-competitive object, since those comments reflect not the intention of the Grouping itself, but the intention of certain of its members. However, it is only because a decision constitutes the faithful intention 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 final decision alone, namely the notified measures, fully demonstrates the Grouping's intention. Moreover, the origin of the measures was taken into account not in order to support the analysis of their object, but as a substitute for analysing their content.

24 In addition, the appellant submits that the General Court distorted the evidence by making inappropriate selections from the preparatory comments, the documents seized and the statements made by new entrants. In the appellant's view, 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 as to the restriction of competition, which should have been taken into consideration by the General Court. That distortion is all the more obvious 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.

25 BNP Paribas, BPCE and Société Générale add that the General Court was incorrect to hold, in paragraphs 124 and 146 of the judgment under appeal, that the concept of the restriction of competition 'by object' must not be interpreted restrictively. That concept can apply only to

agreements which, inherently, pursue an objective the very nature of which is so serious or harmful that the negative impact of the agreements on the functioning of competition is clear beyond doubt, there being no need therefore to assess their potential effects.

26 The Commission contends, as regards, in the first place, the analysis of the object of the measures at issue, that, in the present case, the General Court confirmed the existence of a restriction of competition by object without relying on the statements of the Grouping's members, but after examining the actual formula of MERFA, under which all the banks whose relative acquisition activity is considerably less than their relative issuing activity are automatically subject to that levy. The real object of MERFA is therefore to dictate a line of conduct — limit the issue of cards or choose to bear an additional charge not borne by the main members — restricting the opportunity for new entrants to compete freely with the main members. The appellant fails to prove that measures seeking the exclusion of certain new entrants on the issuing market do not constitute restrictions of competition 'by object'. As regards the contention that the measures have only an incentive effect, the Commission observes that the General Court analysed its conclusion that there were major obstacles to expanding acquisition and upheld it. The General Court concluded that there were only two options for new entrants, namely to pay for or limit their issuing activity. In those circumstances, the General Court correctly pointed out the similarity between the measures giving rise to the *BIDS* judgment and the measures at issue, inasmuch as they constitute an obstacle to the natural development of market shares of the producers, deterring them, because of the dissuasive levy, from exceeding a certain volume of production.

27 The Commission contends, in addition, that the appellant has failed to prove that the General Court distorted matters in a manner obvious from the documents on the court file. In order to reach the conclusion, in paragraph 127 of the judgment under appeal, that the expansion of acquisition activity was very difficult, the General Court analysed, in paragraphs 160 to 194 of that judgment, all the appellant's arguments. Those paragraphs remain undiscussed, without being seriously contested.

28 As regards, in the second place, the origin of the measures, the Commission contends that the appellant seeks to have re-examined the considerations of fact set out in paragraphs 256 and 257 of the judgment under appeal, which may no longer be challenged at the appeal stage. In any event, the finding that an agreement seeks to restrict competition is not called in question by the fact that the intention to restrict competition has not been established in respect of all the parties to the agreement. In addition, it appears unambiguously from the judgment under appeal that the comments and subjective intentions of certain members of the Grouping were taken into account by the General Court as additional confirmation only. Lastly, the appellant fails to identify any of the evidence allegedly distorted and to explain the reasons for the doubt raised. The complaint alleging distortion is therefore inadmissible.

–The second part of the first ground of appeal, alleging errors of law in the assessment of the objectives of the measures at issue

29 The appellant submits that General Court was wrong, whilst recognising that the fight against free-riding in the CB system constitutes a legitimate objective, to decline to assess that objective in the light of Article 81(1) EC. The General Court therefore took the view that measures against free-riding are anti-competitive by nature. It 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 acquisition activity and seek to optimise acquisition and issue 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 system, and are balanced, since they leave it to each member of the Grouping to choose the option appropriate to its individual situation.

30 Société Générale adds that the General Court may not claim both that the objectives of the measures at issue fall exclusively within the analysis carried out under Article 81(3) EC and take the view, at the same time, that the Commission was entitled to take account of the parties' intentions in order to assess the restrictive nature of the measures. In addition, the General Court ought to have reviewed the Commission's premiss that the measures at issue were not appropriate for encouraging acquisition activity. In order to ascertain whether an agreement falls within Article 81(1) EC, it is necessary to look at the objectives which it seeks to achieve.

31 The Commission submits that the appellant, which did not plead the theory of ancillary restraints before the General Court, does not prove that the limitation of freedom of action imposed on new entrants to the benefit of the incumbent banks was necessary and indispensable in order to pursue the objective of combatting free-riding in the CB system. In fact, the measures at issue are inappropriate in order to achieve the objectives sought and discriminate in favour of the main members. The appellant's assertions have already been refuted by the General Court and are not based upon any reasoning or evidence. They run counter to the findings of fact made by the General Court.

– The third part of the first ground, alleging errors of law in the assessment of the context of the measures at issue

32 The appellant, supported by BPCE and Société Générale, submits that the General Court erred in law in that, first, it failed to carry out an overall analysis of the CB system and, secondly, it overlooked the mixed effects on competition of the Grouping's measures, by focussing solely on the activity of card issue and failing to take account of either the legitimate objective of protecting the CB system against free-riding or the existence of strong competition on the acquisition side.

33 In the first place, the appellant alleges that the General Court erroneously took into account the legal context of the dispute by misinterpreting the case-law. In particular, it ought to have found that the measures at issue were radically different from the harmful practices addressed in previous decision-making practice. The General Court seeks to no avail to compare the present case to the judgment in *BIDS*. In addition, the judgment under appeal is 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 Commission Decision of 9 August 2001 in *Visa International* (Case No COMP/29.373) and the Commission Decision of 24 July 2002 in *Visa International - Multilateral Interchange Fee* (Case No COMP/29.373) 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 the competition rules as such.

34 In the second place, the appellant submits that the General Court erroneously took into account the economic context by ignoring the two-sided operation of the payment systems. The General Court incorrectly limited its analysis to the issue market alone, without taking into account the acquisition market. Having acknowledged the two-sided nature of the CB system, the General Court could not have concluded that only one of those two aspects of the system was exclusively relevant in order to analyse the object of the measures at issue correctly. Had it taken both aspects into account, it would have found that those measures sought in fact to protect that system, not to hinder the competition between CB card issuers.

35 BPCE and Société Générale add in that regard that, in holding, in paragraph 105 of the judgment under appeal, that the requirements of balance between those activities must not be examined in the light of Article 81(1) EC, since the only market taken into account is the card issue market, the General Court confused the concepts of the definition of the relevant market and the analysis of the

legal and economic context of an agreement. It is not apparent from the case-law that, for the purposes of the application of Article 81(1) EC, the definition of a relevant market could enable economic or legal factors to be excluded from the analysis necessary in order to identify an anti-competitive object solely because they relate to a different market.

36 In the third place, the appellant takes the view that the General Court erroneously took into account the economic context in not exercising its power of review over complex economic assessments. It is for the EU judicature to review whether the evidence relied on contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. In the present case, the General Court did not conduct any 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.

37 The Commission submits, in the first place, that the appellant's reading of the judgment under appeal is cursory, since the General Court did not find that there was a mixed effect on competition. It showed that the measures have no pro-competitive effect and that there is no free-riding on the CB system. The fight against free-riding is therefore incapable of justifying a discriminatory measure which restricts the conditions for entry onto the market. In addition, the types of agreements envisaged in Article 81(1) EC do not constitute an exhaustive list of prohibited collusion. The measures at issue are close to the collusive practices which were characterised as a restriction by object in the judgment in *BIDS*, for the reasons stated in paragraphs 197 and 198 of the judgment under appeal. Notwithstanding the complexity of the measures at issue, it is clearly apparent that they are exclusionary agreements seeking to deter any new entry of competitors onto the market. As regards compliance with the obligation to state reasons, the General Court explains in paragraphs 94 to 99 of the judgment under appeal, the reasons for which the decisions in *Visa International* and *Visa International - Multilateral Interchange Fee* are markedly different from the measures at issue. Lastly, as regards the fact that commitments were envisaged, the General Court was not seised of that question and that ground of challenge is therefore inadmissible. In any event, the Commission has a broad margin of assessment in the matter and nothing supports the conclusion that an alleged lack of seriousness of the infringement led the Commission to initiate a commitments procedure.

38 In the second place, as regards the two-sided nature of the CB system, the Commission states that the General Court analysed and reviewed the grounds on which the Commission did not accept certain studies submitted by the Grouping. The complaint that the General Court did not respond to the economists' position is therefore 'without merit' and, in any event, relates to an issue of fact that cannot be reviewed by the Court of Justice in the context of an appeal. In addition, in the present case, the infringement relates only to the issue market. The General Court rejected the proposition that the acquisition and issue activities formed part of a single local banking services market.

39 In the third place, as regards the review by the General Court of the complex economic assessments, the Commission contends that it is apparent from paragraphs 320 and 321 of the judgment under appeal that the General Court read and analysed the two additional studies submitted by the appellant in order to show that the positive externalities generated by the acquisition activity were greater than those generated by the issue activity. In addition, when hearing the complaint that those two studies were distorted by the Commission, the General Court rejected it. The appellant does not show that the analysis of the General Court is vitiated by an error of law or a manifest error of assessment.

Findings of the Court

40 By its first ground of appeal, all three parts of which should be examined together, the appellant, supported by BNP Paribas, BPCE and Société Générale, submits in essence that the judgment under appeal is vitiated by errors of law in that the General Court, in breach of Article 81(1) EC, held that

the measures at issue had as their 'object' the restriction of competition within the meaning of that provision, therefore wrongly refraining from examining the actual effects of those measures on competition.

–Preliminary observations

41 It must be noted at the outset that it follows from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that 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, secondly, to assess those facts. However, when the General Court has found or assessed the 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 (see, in particular, judgment in *Alliance One International and Standard Commercial Tobacco* v *Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 84 and the case-law cited).

42 In addition, it must be noted that, in accordance with the rules of the EU and FEU Treaties, relating to the division of powers between the Commission and the Courts of the European Union, it is for the Commission, subject to review by the General Court and the Court of Justice, to ensure application of the principles laid down in Articles 81 EC and 82 EC (see, to that effect, in particular, judgment in *Masterfoods and HB*, C-344/98, EU:C:2000:689, paragraph 46).

43 It must also be noted that the principle of effective judicial protection is a general principle of EU law to which expression is now given by Article 47 of the Charter of Fundamental Rights of the European Union (see, to that effect, in particular, judgment in *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 52 and the case-law cited).

44 Consequently, it is apparent from the EU case-law that, when an action is brought before it under Article 263 TFEU for the annulment of a decision applying Article 81(1) EC, the General Court must generally undertake, on the basis of the evidence adduced by the applicant in support of the pleas in law put forward, a full review of whether or not the conditions for applying that provision are met (see, to that effect, judgments *Remia and Others* v *Commission*, 42/84, EU:C:1985:327, paragraph 34; *Chalkor* v *Commission* (EU:C:2011:815), paragraphs 54 and 62; and *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 59). The General Court must also establish that the Commission has stated reasons for its decision (see, to that effect, judgments in *Chalkor* v *Commission* (EU:C:2011:815), paragraph 61 and the case-law cited, and *Otis and Others* (EU:C:2012:684), paragraph 60).

45 In carrying out such a review, the General Court cannot use the margin of assessment which the Commission enjoys by virtue of the role assigned to it in relation to competition policy by the EU and FEU Treaties, as a basis for dispensing with an in-depth review of the law and of the facts (see, to that effect, judgments in *Chalkor* v *Commission* (EU:C:2011:815), paragraph 62, and *Otis and Others* (EU:C:2012:684), paragraph 61).

46 In particular, although the Commission has, in accordance with that role, a margin of assessment with regard to economic matters, in particular in the context of complex economic assessments, that does not mean, as is apparent from the preceding paragraph, that the General Court must refrain from reviewing the Commission's legal classification of information of an economic nature. Although the General Court must not substitute its own economic assessment for that of the Commission, which is institutionally responsible for making those assessments (see, to that effect, in particular, judgments in *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 145, and *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 89 and the case-law cited), it is apparent from now well-settled case-law that not only must the EU judicature establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also

whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, in particular, judgments in *Chalkor* v *Commission* (EU:C:2011:815), paragraph 54 and the case-law cited, and *Otis and Others* (EU:C:2012:684), paragraph 59).

47 The question of whether the General Court was correct to conclude, in the judgment under appeal, that the measures at issue have as their object the restriction of competition within the meaning of Article 81(1) EC must be examined in the light of the abovementioned principles.

–Examination of whether there is a restriction of competition by 'object' within the meaning of Article 81(1) EC

48 It must be recalled that, to come within the prohibition laid down in Article 81(1) EC, an agreement, a decision by an association of undertakings or a concerted practice must have 'as [its] object or effect' the prevention, restriction or distortion of competition in the internal market.

49 In that regard, it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (see, to that effect, judgments in *LTM*, 56/65, EU:C:1966:38, paragraphs 359 and 360; *BIDS*, paragraph 15, and *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 34 and the case-law cited).

50 That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (see, to that effect, in particular, judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160) paragraph 35 and the case-law cited).

51 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market (see, to that effect, in particular, judgment in *Clair*, 123/83, EU:C:1985:33, paragraph 22). Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.

52 Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160), paragraph 34 and the case-law cited).

53 According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 81(1) EC, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see, to that effect, judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160), paragraph 36 and the case-law cited).

54 In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account (see judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160), paragraph 37 and the case-law cited).

55 In the present case, it must be noted that, when the General Court defined in the judgment under appeal the relevant legal criteria to be taken into account in order to ascertain whether there was, in the present case, a restriction of competition by 'object' within the meaning of Article 81(1) EC, it reasoned as follows, in paragraphs 124 and 125 of that judgment:

'124 According to the case-law, the types of agreement covered by Article 81(1)(a) to (e) EC do not constitute an exhaustive list of prohibited collusion and, accordingly, the concept of infringement by object should not be given a strict interpretation (see, to that effect, [judgment in *BIDS*], paragraphs 22 and 23).

125 In order to assess the anti-competitive nature of an agreement or a decision by an association of undertakings, regard must be had *inter alia* to the content of its provisions, its objectives and the economic and legal context of which it forms a part. In that regard, it is sufficient that the agreement or the decision of an association of undertakings has the potential to have a negative impact on competition. In other words, the agreement or decision must simply be capable in the particular case, having regard to the specific legal and economic context, of preventing, restricting or distorting competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between [that agreement or decision] and consumer prices. In addition, although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the Commission or the Community judicature from taking it into account (see, to that effect, [judgments in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343], paragraphs 31, 39 and 43, and [*GlaxoSmithKline Services* v *Commission*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610] paragraph 58 and the case-law cited).'

56 It must be held that, in so reasoning, the General Court in part failed to have regard to the case-law of the Court of Justice and, therefore, erred in law with regard to the definition of the relevant legal criteria in order to assess whether there was a restriction of competition by 'object' within the meaning of Article 81(1) EC.

57 First, in paragraph 125 of the judgment under appeal, when the General Court defined the concept of the restriction of competition 'by object' within the meaning of that provision, it did not refer to the settled case-law of the Court of Justice mentioned in paragraphs 49 to 52 of the present judgment, thereby failing to have regard to the fact that the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition 'by object' is the finding that such coordination reveals in itself a sufficient degree of harm to competition.

58 Secondly, in the light of that case-law, the General Court erred in finding, in paragraph 124 of the judgment under appeal, and then in paragraph 146 of that judgment, that the concept of restriction of competition by 'object' must not be interpreted 'restrictively'. The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition. The fact that the types of agreements covered by Article 81(1) EC do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant.

59 It is, however, necessary to examine whether those errors of law were capable of vitiating the General Court's analysis as regards the characterisation of the measures at issue in the light of Article 81(1) EC.

60 In that regard, it must be noted, as is apparent from paragraphs 198, 227 and 234 of the judgment under appeal, that the General Court found that the measures at issue have as their object the restriction of competition within the meaning of Article 81(1) EC in that, essentially, they hinder the competition of new entrants on the market for the issue of payment cards in France.

61 As is apparent from paragraphs 137, 204, 220, 223, 238 and 267 of the judgment under appeal, the General Court found, after reproducing, in paragraphs 126 to 133 of that judgment, the content of several recitals of the decision at issue, that that anti-competitive object stemmed from the very calculation formulas which were provided for the measures at issue.

62 In those circumstances, the General Court held, in particular, in paragraphs 76 and 140 to 144 of the judgment under appeal, that the fact that the measures at issue pursue a legitimate objective of combating free-riding of the CB system did not preclude their being considered to have an object restrictive of competition, all the more so since that object, as was apparent form the very formulas provided for the measures at issue, ran counter to the stated objectives of the Grouping.

63 The General Court also held, in paragraphs 104 and 105 of the judgment under appeal, that the requirements of balance between the issuing and acquisition activities within the CB system did not have to be examined in the context of Article 81(1) EC, since the only market taken into account was the downstream market for the issue of payment cards.

64 Lastly, the General Court also held, in particular, in paragraphs 134, 136 and 267 of the judgment under appeal, that it was only on the basis of 'additional confirmation' that, in the decision at issue, the Commission relied on the Grouping's intention, as evidenced by the documents gathered during the inspections, containing the comments of the main members at the preparatory stage of the measures at issue.

65 Although it is apparent from the judgment under appeal that the General Court took the view that the restrictive object of the measures at issue could be inferred from their wording alone, the fact remains that it did not at any point explain, in the context of its review of the lawfulness of the decision at issue, in what respect that wording could be considered to reveal the existence of a restriction of competition 'by object' within the meaning of Article 81(1) EC.

66 In that regard, the General Court did indeed observe, in paragraph 132 of the judgment under appeal, that the Commission found, 'in the light of the formulas provided for the measures at issue and because of the difficulty of developing acquisition activity, that those measures required the members of the Grouping which were subject to them either to limit the issue of cards or to bear costs (linked to issuing) which were not borne by other members of the Grouping, including the main members. Those formulas therefore limited the possibility for the members subject to those measures to compete (on prices), on the issue market, with the members of the Grouping not subject to them'.

67 In addition, the General Court pointed out, in paragraph 133 of the judgment under appeal, that the Commission had stated that the function attributed by the Grouping to MERFA, namely an incentive to expand acquisition, 'was inconsistent with the existence of interchange fees which encouraged issue … and by the fact that the supplementary membership fee and the [dormant] member fee penalised banks that had not issued a sufficient number of cards in the recent past'.

68 The General Court inferred from this, in paragraphs 197, 198, 227 and 234 of the judgment under appeal, that the object of the measures at issue, like those at issue in the *BIDS* judgment, is to impede the competition of new entrants on the market for the issue of payment cards in France, since they require the banks subject to them either to pay a fee or to limit their issuing activities.

69 However, although the General Court thereby set out the reasons why the measures at issue, in view of their formulas, are capable of restricting competition and, consequently, of falling within the scope of the prohibition laid down in Article 81(1) EC, it in no way explained — contrary to the requirements of the case-law referred to in paragraphs 49 and 50 above — in what respect that restriction of competition reveals a sufficient degree of harm in order to be characterised as a restriction 'by object' within the meaning of that provision, there being no analysis of that point in the judgment under appeal.

70 Although, as the General Court correctly found in paragraphs 76 and 140 to 144 of the judgment under appeal, the fact that the measures at issue pursue the legitimate objective of combatting free-riding does not preclude their being regarded as having an object restrictive of competition, the fact remains that that restrictive object must be established.

71 It follows that the General Court, in its characterisation of the measures at issue, not only vitiated the judgment under appeal by defective reasoning, but also misinterpreted and misapplied Article 81(1) EC.

72 It is indeed clear, in particular, from paragraphs 204 and 247 of the judgment under appeal, that the General Court rejected on several occasions the appellant's claim that it was apparent from formulas prescribed for the measures at issue that the latter sought to develop the acquisition activities of the members in order to achieve an optimal rate of balance between issuing and acquisition activities. On the other hand, it is not disputed — as is apparent, in particular, from paragraphs 198, 199, 245, 247 and 327 of the judgment under appeal — that those formulas encouraged the members of the Grouping, in order to avoid the payment of fees introduced by those measures, not to exceed a certain volume of CB card issuing that enabled them to achieve a given ratio between the issuing and acquisition activities of the Grouping.

73 After stating, in paragraph 83 of the judgment under appeal, that the Grouping is active on the 'payment systems market', the General Court found, in paragraph 102 of that judgment, in its assessment of the facts — which is not subject to appeal and is not challenged in these proceedings — that, in the present case, in a card payment system that is by nature two-sided, such as that of the Grouping, the issuing and acquisition activities are 'essential' to one another and to the operation of that system: first, traders would not agree to join the CB card payment system if the number of cardholders was insufficient and, secondly, consumers would not wish to hold a card if it could not be used with a sufficient number of traders.

74 Having therefore found, in paragraph 104 of the judgment under appeal, that there were 'interactions' between the issuing and acquisition activities of a payment system and that those activities produced 'indirect network effects', since the extent of merchants' acceptance of cards and the number of cards in circulation each affects the other, the General Court could not, without erring in law, conclude that the measures at issue had as their object the restriction of competition within the meaning of Article 81(1) EC.

75 Having acknowledged that the formulas for those measures sought to establish a certain ratio between the issuing and acquisition activities of the members of the Grouping, the General Court was entitled at the most to infer from this that those measures had as their object the imposition of a financial contribution on the members of the Grouping which benefit from the efforts of other members for the purposes of developing the acquisition activities of the system. Such an object cannot be regarded as being, by its very nature, harmful to the proper functioning of normal competition, the General Court itself moreover having found, in particular in paragraphs 76 and 77 of the judgment under appeal, that combatting free-riding in the CB system was a legitimate objective.

76 In that regard, as the Advocate General observed at point 149 of his Opinion, the General Court wrongly held, in paragraph 105 of the judgment under appeal, that the analysis of the requirements of balance between issuing and acquisition activities within the payment system could not be carried out in the context of Article 81(1) EC on the ground that the relevant market was not that of payment systems in France but the market, situated downstream for the issue of payment cards in that Member State.

77 In so doing, the General Court confused the issue of the definition of the relevant market and that of the context which must be taken into account in order to ascertain whether the content of an agreement or a decision by an association of undertakings reveals the existence of a restriction of competition 'by object' within the meaning of Article 81(1) EC.

78 In order to assess whether coordination between undertakings is by nature harmful to the proper functioning of normal competition, it is necessary, in accordance with the case-law referred to in paragraph 53 above, to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market.

79 That must be the case, in particular, when that aspect is the taking into account of interactions between the relevant market and a different related market (see, by analogy, judgments in *Delimitis*, C-234/89, EU:C:1991:91, paragraphs 17 to 23, and *Allianz Hungária Biztosító and Others* (EU:C:2013:160), paragraph 42) and, all the more so, when, as in the present case, there are interactions between the two facets of a two-sided system.

80 Admittedly, it cannot be ruled out that the measures at issue, as the General Court found in paragraphs 198, 227 and 234 of the judgment under appeal, hinder competition from new entrants — in the light of the difficulty which those measures create for the expansion of their acquisition activity — and even lead to their exclusion from the system, on the basis, as BPCE argued at the hearing, of the level of fees charged pursuant to those measures.

81 However, as the Advocate General observed in point 131 of his Opinion, such a finding falls within the examination of the effects of those measures on competition and not of their object.

82 It must therefore be found that, while purporting to examine, in paragraphs 161 to 193 of the judgment under appeal, the 'options' left open to the members of the Grouping by the measures at issue — at the end of which it concluded, in paragraph 194 of that judgment, that 'in practice MERFA left two options open to the banks subject to it: payment of a fee or limiting the issue of CB cards' — the General Court in fact assessed the potential effects of those measures, analysing the difficulties for the banks of developing acquisition activity on the basis of market data, statements made by certain banks and documents seized during the inspections, and thereby indicating itself that the measures at issue cannot be considered 'by their very nature' harmful to the proper functioning of normal competition.

83 In that regard, the General Court erred, in paragraphs 197 and 198 of the judgment under appeal, in finding that the measures at issue could be regarded as being analogous to those examined by the Court of Justice in the *BIDS* judgment, in which the Court of Justice held that the arrangements referred to ('the BIDS arrangements'), concluded between the ten principal beef and veal processors in Ireland, members of BIDS [Beef Industry Development Society Ltd], had as their object the restriction of competition within the meaning of Article 81(1) EC.

84 By providing for a reduction of the order of 25% in processing capacity, the BIDS arrangements were intended, essentially, as their own wording makes clear, 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 affects their profitability by preventing them from achieving economies of scale. The object of the BIDS arrangements was therefore to change, appreciably, the structure of the market through a mechanism intended to encourage the withdrawal of competitors in order, first, to increase the degree of concentration in the sector concerned by reducing significantly the number of undertakings supplying processing services and, secondly, to eliminate almost 75% of excess production capacity (*BIDS* judgment, paragraphs 31 to 33).

85 In the judgment under appeal, the General Court made no such finding, nor indeed was it argued before it that the measures at issue, like the BIDS arrangements, were intended to change appreciably the structure of the market concerned through a mechanism intended to encourage the withdrawal of competitors and, accordingly, that those measures revealed a degree of harm such as that of the BIDS arrangements.

86 Although the General Court found, in paragraph 198 of the judgment under appeal, that the measures at issue encouraged the members of the Grouping not to exceed a certain volume of CB card issuing, the objective of such encouragement was, according to its own findings in paragraphs 245, 247 and 327 of that judgment, not to reduce possible overcapacity on the market for the issue of payment cards in France, but to achieve a given ratio between the issuing and acquisition activities of the members of the Grouping in order to develop the CB system further.

87 It follows that the General Court could not, without erring in law, characterise the measures at issue as restrictions of competition 'by object' within the meaning of Article 81(1) EC.

88 Since the intentions of the Grouping could not in themselves, in accordance with the case-law referred to in paragraph 54 above, be sufficient to establish the existence of an anti-competitive object and the General Court moreover itself stated, in paragraphs 134, 136 and 267 of the judgment under appeal, that those intentions had been analysed as additional confirmation only, its findings in that regard, in particular, in paragraphs 251 to 266 of that judgment, cannot justify such a characterisation and there is no need to examine the arguments put forward by the appellant on that point.

89 Taken together, the errors of law committed by the General Court with regard to (i) the relevant legal criteria in order to assess the existence of a restriction of competition 'by object', (ii) the grounds of the judgment under appeal and (iii) the characterisation of the measures at issue with regard to Article 81(1) EC indicate, in addition, a general failure of analysis by the General Court and therefore reveal the lack of a full and detailed examination of the arguments of the appellant and of the parties which sought the annulment of the decision at issue.

90 By simply reproducing on a number of occasions, in particular, in paragraphs 126 to 136 of the judgment under appeal, the contents of the decision at issue, the General Court failed to review, even though required to do so, whether the evidence used by the Commission in the decision at issue enabled it correctly to conclude that the measures at issue, in the light of their wording, objectives and context, displayed a sufficient degree of harm to competition to be regarded as having as their object a restriction of competition within the meaning of Article 81(1) EC and, consequently, whether that evidence constituted all the relevant data which had to be taken into consideration for that purpose.

91 In those circumstances, it is apparent that the General Court failed to fulfil its obligation to observe the standard of review required under the case-law, as set out in paragraphs 42 to 46 above.

92 In the light of all the foregoing, it must be found that, in holding that the measures at issue had as their object a restriction of competition within the meaning of Article 81(1) EC, the General Court erred in law and failed to observe the standard of review required under the case-law.

93 In those circumstances, the first ground of appeal must be upheld.

94 The judgment under appeal must accordingly be set aside, and there is no need to examine the other grounds of appeal put forward by the appellant in support of its appeal.

Referral of the case back to the General Court

95 Under Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court is to quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

96 In that regard, it must be found that the grounds which justify the setting aside of the judgment under appeal cannot lead to the annulment of the decision at issue in its entirety. Those grounds entail the annulment of that decision only in so far as it finds that the measures at issue have as their object the restriction of competition within the meaning of Article 81(1) EC.

97 In accordance with the case-law considered in paragraph 52 above, it is therefore appropriate to ascertain whether, as the Commission found in the decision at issue, the agreements at issue have as their 'effect' the restriction of competition within the meaning of Article 81(1) EC.

98 However, that aspect of the case requires an examination of complex questions of fact based on elements which (i) were not assessed by the General Court in the judgment under appeal since it had found, in paragraphs 270 and 271 of that judgment, that such an examination was superfluous — the General Court taking the view that the Commission had not erred in law in concluding, in the decision at issue, that the measures at issue had an anti-competitive object — and (ii) were not discussed before the Court of Justice, with the result that the stage has not been reached where judgment can be given on that point.

99 Consequently, it is necessary to refer the case back to the General Court and to reserve the costs.

On those grounds, the Court (Third Chamber) hereby:

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

2. **Refers the case back to the General Court of the European Union;**

3. **Reserves the costs.**

[Signatures]