St.Gallen ICF 2016

Restriction of competition by object or effect

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The 2016 St.Gallen International Competition Law Forum ICF will serve as the backdrop for discussions on a variety of current competition law, economics and policy topics. One of the panels is going to focus on restriction of competition by object or effect. How has the application of these principles changed over time? Did recent court cases lead to clarification?

The following interview between DR. FRANK MONTAG (Partner, Freshfields) and DR. MARCEL MEINHARDT (Partner, Lenz & Staehelin) offers you some food for thought and a starting point for our panel discussion. During the St.Gallen ICF itself, additional input will be offered by Dr. WOLFGANG KIRCHHOFF (Judge, German Federal Court) and PROF. DR. INGEBORG SIMONSSON (Judge, Stockholm City Court; Associate Professor, Stockholm University).

Join us in St.Gallen on May 19th and 20th for the "RESTRICTION OF COMPETITION BY OBJECT OR EFFECT" panel. More information about the conference and a list of the remaining panels and speakers is available on www.sg-icf.ch.

FRANK MONTAG: In how far do you perceive the *Cartes Bancaires* judgement as a rupture with the settled case law?

MARCEL MEINHARDT: The recent Court of Justice of the European Union (CJEU) *Cartes Bancaires* judgement constitutes a landmark ruling insofar as it limits the broad application of the notion "by object" restriction. The CJEU clarifies that showing that a certain measure is "capable" of restricting competition is not sufficient to find a "by object" restriction. Rather, the measure in question has to "inherently" or "in itself" reveal a sufficient degree of harm to competition that would make the examination of its effects redundant. The CJEU thereby distances itself from the previous expansive interpretation of restriction by object. On the basis of this more restrictive approach, rulings such as *T-Mobile*, *Irish Beef*, *GlaxoSmithKline* or *Allianz Hungária* would arguably now fall short of qualifying as "by object" restrictions.

FRANK MONTAG: Is there now a clear-cut differentiation between a restriction by object and one by effect, as a result of the decision in *Cartes Bancaires*?

MARCEL MEINHARDT: No, but the ruling provides very valuable clarifications on what is not a "by object" restriction of competition. This should prompt the European Commission, but also the Swiss Competition Commission, to reflect on the need to depart from its recent practice of applying the notion of "by object" restrictions to cases and situations with no prior relevant experience revealing a sufficient degree of harm to competition. Instead, this ruling invites the Commission as well as the national competition authorities to (re)focus on the actual effects of the conduct, which over the last decade have received insufficient attention in novel and complex cases. While this will require more work and economic analysis, it makes perfect sense in the so-called effects-based era that sophisticated antitrust enforcers have publicly embraced. Besides, this is a fair price to pay also to avoid false positives that can result from a too formalistic application of the "by object" restriction test.

FRANK MONTAG: Do you see a difference between the interpretation of the notion "restriction by effect" by the European Commission and by the CJEU?

MARCEL MEINHARDT: The Commission traditionally centred its assessment regarding a restriction of competition by effect on the impact of the agreement on the process of rivalry between the parties and/ or from third parties through either foreclosure of potential new entrants or hindrance of existing players in the market as well as on the impact of the agreement on the internal market. The CJEU has broadly endorsed the Commission's traditional interpretation but it modified the approach in a number of significant respects. Most importantly, the CJEU held in *Société Technique Minière* and in *Brasserie de Haecht* that restrictions of rivalry were not, in and of themselves, restrictions of competition for the purposes of Article 101 (1) TFEU (Treaty on the Functioning of the European Union). Rather, restrictions had to be assessed in their specific market context.

FRANK MONTAG: Where do you see obscurities in the case-law regarding exceptions from a restriction by effect, especially in the case-law on ancillary restraints?

MARCEL MEINHARDT: When considering whether an agreement has the effect of restricting competition, it is possible to successfully argue that restrictions, which are necessary to enable the parties to an agreement to achieve a legitimate commercial purpose, fall outside Article 101(1). There are various kinds of legitimate purposes: For example the penetration of a new area as in *Société Technique Minière v Maschinenbau Ulm*, a selective distribution system with restrictive provisions if they satisfy objective, qualitative criteria and are applied in a non-discriminatory manner as in *Metro SB-Grossmärkte v Commission*, the sale of a business as in *Remia BV and Verenidge Bedrijven and Nutricia v Commission* or the successful establishment of a group purchasing association as in *Gøttrup-Klim Grovvareforeninger v Dansk Landburgs Grovvareselskab AmbA*. The idea that unifies these judgements is that the restrictions found to fall outside Article 101 (1) were ancillary to a legitimate commercial operation.

A most interesting and controversial judgement is *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten*. The first part of the judgement reads as though the CJEU would conclude that Article 101 (1) was infringed, whereas the second part of the judgement explains why Article 101 (1) would

not be infringed if the rule in question could reasonably be considered to be necessary in order to ensure the proper practice of the legal profession. The judgement basically states that it is possible to balance non-competition objectives against a restriction of competition and to conclude that the former outweigh the latter with the consequence that there is no infringement of Article 101 (1). This balancing of any restriction of competition against the reasonableness of regulatory rules could be read as a rule of reason under Article 101 (1).

In contrast to the above mentioned cases, the restriction in *Wouters* was not necessary for the execution of a commercial transaction or the achievement of a commercial outcome on the market; instead it was ancillary to a regulatory function "to ensure that the ultimate consumers of legal services and the sound administration of justice are proved with the necessary guarantees in relation to integrity and experience". This seems to be a different application of the concept of "ancillary" from that in the in the earlier case law.

FRANK MONTAG: Does a rule of reason exist in the context of the assessment of a restriction by effect?

MARCEL MEINHARDT: In *Continental TV Inc v GTE Sylvania* the US Supreme Court defined the rule of reason as a case-by-case evaluation in which the factfinder weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. In particular, this means that it is necessary to balance the agreement's pro- and anti-competitive effects.

The judgement of the CJEU in *Wouters v Algemene Raad van de Nederlandsche Orde van Ad-vocaten* could be read as applying a rule of reason under Article 101 (1). By contrast, in *Métropole Télévision v Commission*, the General Court expressly rejected the suggestions that a rule of reason existed under Article 101 (1). It said that the pro- and anti-competitive aspects of a restriction of competition should be weighed at the stage of considering whether an agreement satisfies the terms of Article 101 (3). Article 101 (3) would lose much of its effectiveness if such an examination had to be carried out already under Article 101 (1) of the Treaty.

Dr. Frank Montag is a senior partner in Freshfields antitrust group, based in Brussels. He serves as chairman of the Studienvereinigung Kartellrecht and has been a non-governmental adviser to the delegations of the European Commission, the US Department of Justice and Germany's Bundeskartellamt at the International Competition Network (ICN) conferences since 2001.

Dr. Marcel Meinhardt, Partner at Lenz & Staehelin, is a leading expert in all areas of Swiss and European merger control work and competition law. He advises on regulatory issues and is responsible for merger notifications as well as multi-jurisdictional merger filings. He has acted in high profile cases on alleged abuses of dominant positions, vertical restraints and cartels.