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カルテル規制：最近の判例紹介（欧州裁判所の動向）

Cartel Regulation: Recent judgments by EU Courts

EU競争法セミナー

～日本企業が知っておくべきEU競争法の最新動向2016～

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ジョーンズ・デイ法律事務所

Alexandre Verheyden（ブリュッセル・ニューヨーク州弁護士会所属弁護士）

大野拓也（パリ弁護士会所属弁護士）

Agenda

- I. Introduction
- II. Object v Effect restrictions
- III. Liability of cartel facilitators
- IV. Commission's inspection powers

Introduction

Judicial review of the Commission's decision by EU Courts

- Annulment actions against the Commission's decision may be brought to the General Court of the EU.
- Judgments by the General Court may be appealed before the Court of Justice of the EU.



- Judicial review by the EU Courts may cancel, reduce, or increase fines imposed by the Commission.
 - e.g., *Guardian* (flat-glass cartel): Reduction from €148 million to €103.6 million (C-580/12 P, 12 November 2014).

I. Object v Effect restrictions

- Article 101(1) TFEU prohibits agreements that have as their **object** **or** **effect** the restriction of competition in the internal market.
- Restrictions by “object”: Types of coordination that are regarded, by their very nature, as being harmful to the proper functioning of normal competition.
 - e.g., price-fixing, market-sharing or output limitation.
- Restriction by “effect”: Types of coordination that have negative effects on competition, in particular on the price, quantity or quality of the goods and services.

I. Object v Effect restrictions

- Why distinguish between **object** and **effect** restrictions?
 - Restrictions by “object”: The Commission does not have to prove their negative effects on competition which are presumed by their very nature.
 - Restrictions by “effect”: The Commission **must prove** their negative effects on competition supported by evidence or an analysis of the structures of the relevant market.
- ⇒ Restrictions “by effect” are generally more laborious to prove.

Restrictions by “object”

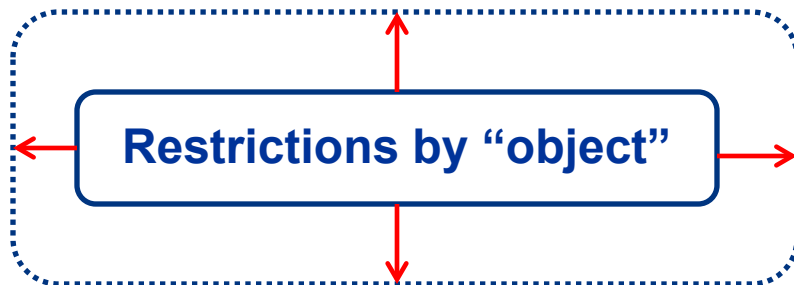
Anticompetitive effects
are presumed

Restrictions by “effect”

Anticompetitive effects
must be proved

I. Object v Effect restrictions

- For the past few years, the **Commission has expanded the category of agreements that can be regarded as restrictions by “object”**. This approach has been generally endorsed by the EU Courts.
 - e.g., T-Mobile Netherlands (C-8/08, 2009) : “[...] *in order for a concerted practice to be regarded as having an anti-competitive **object**, it is sufficient that it has the potential to have a negative impact on competition*”.



I. Object v Effect restrictions

- However, in *Carte Bancaires* (C-67/13 P, 11 September 2014), the Court of Justice stated that **the concept of restriction of competition by “object” should be interpreted restrictively**, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market which are no way established to be, by their very nature, harmful to the proper functioning of normal competition.

Restrictive interpretation



Restrictions by “object”

Restrictions by “effect”

I. Object v Effect restrictions

- Yet, in *Bananas* (C-286/13 P, 19 March 2015), the Court of Justice confirmed that an exchange between competitors of information which is capable of removing uncertainty about future behavior must be regarded as pursuing an anticompetitive **object**, **even though there is no direct connection between that practice and the consumer price.**
 - In this case, the Applicant (Dole) discussed with competitors their own quotation prices and certain price trends in the banana sector.

I. Object v Effect restrictions

- Restrictions by “object” will likely to remain an important enforcement tool for the Commission.
- A coordination between companies that is considered to have as its **object** the restriction of competition may be caught by Article 101(1) TFUE even if it does not produce negative effects on competition.
- It remains to be seen whether the Commission and the EU Courts will continue to expand the category of restrictions “by object”.

Examples of classic restrictions by “object”

- Price fixing
- Market sharing
- Output limitation

Examples of “new” restrictions by “object”

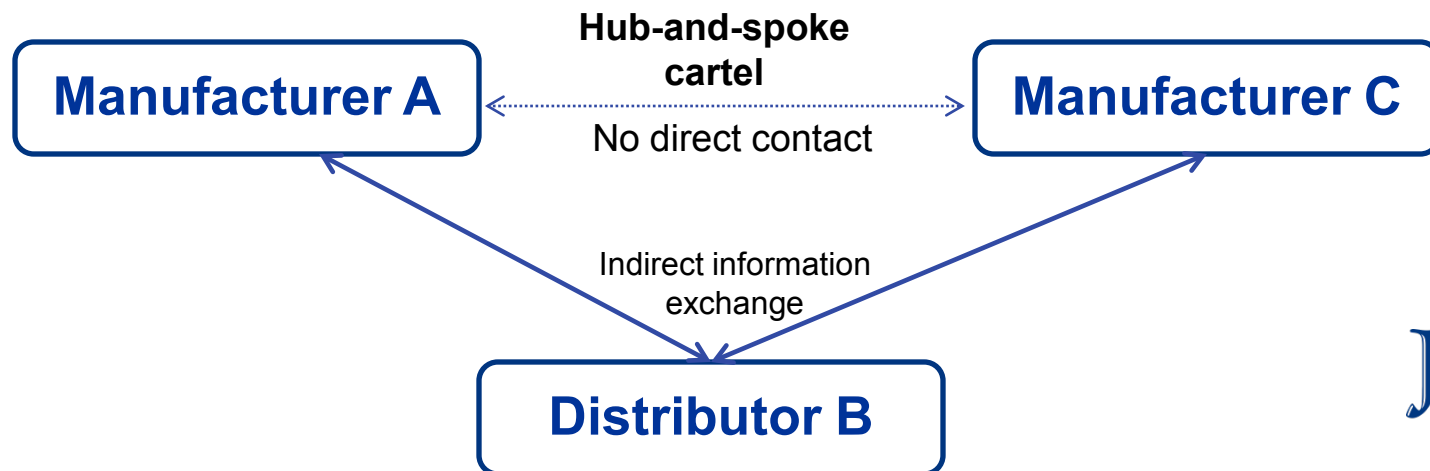
- Exchange of information that reduces uncertainty about future conduct
- Pay-for-delay agreements

II. Liability of cartel facilitators

- In *AC-Treuhand* (C-194/14 P, 22 October 2015), the Court of Justice stated that **a consultancy firm may be held liable for infringement of Article 101(1) TFEU** where such a firm contributes, in full knowledge of the relevant facts, to the implementation and continuation of a cartel even if that firm is not active on the cartelized market.
 - In this case, AC-Treuhand, a consultancy firm, **played a role of facilitator in the heat stabilizer cartel** by organizing meetings, collecting and supplying data on sales and moderating tensions between producers, for which it received remuneration.

II. Liability of cartel facilitators

- This judgment may suggest that any third party to cartel participants can be held liable for infringements of Article 101(1) TFUE for a role of cartel facilitators (e.g., trade associations, suppliers, distributors, banks, brokers, etc.).
- This judgment may also help the Commission pursue **hub-and-spoke cartels** whereby companies operating at the same level of the production/distribution chain (A and C) exchanges sensitive information via a common trading partner operating at a different level of the production/distribution chain (B).



III. Commission's inspection powers

- **The Commission has broad powers of inspection (dawn raid)** which is one of the major investigatory tools to uncover competition law infringements. **Obstructions of inspections may severely be sanctioned.**
- e.g., In *EPH and EPIA* (T-272/12, 26 November 2014), the General Court confirmed a **€ 2.5 million fine** imposed on EPH and EPIA for their obstructions of a Commission's inspection. In this case, EPH and EPIA
 - negligently failed to block the email accounts of certain key persons; and
 - internationally diverted new emails which were supposed to arrive in the blocked accounts.

III. Commission's inspection powers

- In this case, obstructions occurred because certain employees were not aware that an inspection was underway and that they were under the duty of cooperation with the inspection.
 - ⇒ In the event of an inspection, companies should ensure that all employees cooperate with the investigators of the Commission. The duty of cooperation arises as soon as the inspection decision is communicated, not from when a particular individual becomes aware of it.

III. Commission's inspection powers

- However, the Commission's inspection powers **are not unlimited** and **should respect companies' rights of defense**.
- e.g., The Commission must state reasons for the decision ordering an investigation by specifying its subject-matter and purpose, although such statement does not require details on the type of conduct suspected, on the effect such conduct might have or on the type of documents which the Commission was entitled to examine (*Nexans*, C-37/13 P, 25 June 2014).
- e.g., A search may be made **only for those documents coming within the scope of the subject-matter of the inspection** (*Deutsche Bahn*, C-583/13 P, 18 June 2015).

ありがとうございました。

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