



***The distinction between
restrictions by object and by effect
under Article 101 TFEU***

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The Allianz Hungaria Biztosító case : C-32/11, 14 March 2013

- Facts (1)
- The case concerns a complex bundle of agreements in Hungary, the main parties to which are:
 - two insurance companies, Allianz and Generali;
 - the national association which groups the authorised car dealers (GÉMOSZ),
 - a number of car dealers/repairers acting in a dual capacity:
 - when a car insurance policy is taken out by their customers, the car dealers act as intermediaries for the insurers or as insurance brokers, and
 - when vehicles are repaired after an accident, the dealers act in their capacity as repair shops which receive payment from the insurance companies concerned on the basis of, among other factors, the number and percentage of insurance policies previously concluded on behalf of those companies.

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- Facts (2)
- Since 2002, the car dealers which also operate as repair shops have entrusted **GÉMOSZ** with negotiating annually on their behalf with insurance undertakings a framework agreement relating to the hourly charge for repairs of damaged vehicles to be borne by those insurers.
- In 2004 and 2005, **GÉMOSZ** and **Allianz** concluded a framework agreement on hourly car repair charges.
- **Allianz** concluded also a number of individual agreements with various dealers, pursuant to which their repair shops' hourly charge would increase if the motor insurance policies taken out with Allianz came to a specified percentage of the total number of insurance policies sold by the dealer concerned.
- **Generali** did not conclude any framework agreements with GÉMOSZ but it did conclude individual agreements with the dealers, applying in practice a clause providing for the increase of the hourly repair charge similar to that of Allianz.

- Facts (3)
- Allianz and Generali: held together more than 70% of the car insurance market
- *GÉMOSZ: represented a very substantial part of the car dealers*
- The additional increase of hourly repair rate paid by Allianz to repairers in accordance with the number and percentage of insurance contracts the dealer sells for the insurance company (Allianz) where:
 - Sales <30% : 10 - 11% increase
 - Sales 30 – 50% : 12 – 13 % increase
 - Sales > 50% : 14 – 15 % increase

- Number and nature of agreements in this case:
 - 1). *Bilateral agreements between an insurance company and an individual car repairer.*
 - 2). *Bilateral agreements between an insurance company and GEMOSZ .*
- Other agreements which are not part of the preliminary reference but were examined by the NCA:
 - Decisions by the authorised dealers' association GEMOSZ to recommend the hourly repair rate to its members.
 - Agreements between the insurance companies and the car dealers' insurance brokers (*Peugeot, Opel, Porsche*).

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- Number and nature of affected markets:
 - *Car insurance market*
 - *Car repair service market*
- The 2 agreements link these two markets as they link the level of the remuneration for the car repair services to the remuneration for the car insurance brokerage.
- This link is made possible because the car dealers act in a dual capacity: as insurance intermediaries and as car repair shops.
- ECJ said: this link is an important factor in determining whether the agreements are by their nature injurious to the proper functioning of normal competition, in particular where the independence of these two activities is necessary for the proper functioning of competition (par. 41)

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- ECJ – held that the two agreements can be restrictions by object where (at pars. 36 - 38):
 - following a concrete and individual examination of the wording and aim of those agreements, and
 - of the economic and legal context of which they form a part.
 - In determining the context, account can be taken of the nature of the goods affected, the real conditions of the functioning and the structure of the markets concerned;
 - The parties' intention can be taken into account, although it is not a necessary factor;
 - it is apparent that they are, by their very nature, injurious to the proper functioning of normal competition on one of the two markets concerned.
 - This will be the case when it is sufficient that it has the potential (or is capable of) having a negative impact on competition.
 - Whether and to what extent in fact such a potential effect results can only be relevant for the amount of the fine or in assessing the claim for damages.

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- **ECJ – the considerations taken into account to find a restriction by object:**
 - In the *Car insurance market there are three reasons:*
 - **First**, Allianz and Generali aim to maintain or increase their market share; and
 - If there exists an (horizontal) agreement or concerted practice between Allianz and Generali designed to partition the market by accepting the hourly repair charges recommended by GEMOSZ (par. 44-45).
 - **Second**, even if no horizontal agreement exists, the fact that domestic law requires that dealers acting as intermediaries or insurance brokers must be independent from the insurance companies. This means that those dealers should not act on behalf of an insurer, but on behalf of the policyholder and it is their job to offer the policyholder the insurance which is the most suitable for him amongst the offers of various insurance companies; then
 - it is for the referring court to determine whether in those circumstances and in light of the expectations of those policyholders the proper functioning of the car insurance market is likely to be significantly disrupted by the agreements at issue (pars.46-47).

- In the Car insurance market (par. 48 of ECJ):
- **Third**, those agreements would also amount to a restriction of competition by object in the event that the referring court found that (par. 48):
 - it is likely that, having regard to the economic context, competition on that market would be eliminated or seriously weakened following the conclusion of the agreements with the dealers/repairers.
 - In order to determine the likelihood of such a result, that court should take in particular into consideration:
 - the structure of that market, the existence of alternative distribution channels and their respective importance, and the market power of the companies concerned.

- **ECJ – the considerations taken into account for a restriction by object:**
 - In the *Car repair service market (pars. 49-50)*:
 - the fact that those agreements appear to have been concluded on the basis of *'recommended prices'* established in the three decisions taken by GÉMOSZ from 2003 to 2005;
 - it is for the referring court to determine the exact nature and scope of those decisions, in particular whether in fact they had as their object the restriction of competition by *harmonising the hourly charges* for car repairs;
 - whether, by the agreements at issue, the insurance companies *voluntarily confirmed those decisions, which can be assumed* where the insurance company concluded an agreement directly with GÉMOSZ;
 - The *unlawfulness of those decisions would vitiate those agreements*, which would then also be considered a restriction of competition by object.