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The Advocate General Bobek provides an analytical framework to assess the appropriateness of ‘by object’ qualifications while clarifying and consolidating the case-law on the dichotomy between ‘by object’ and ‘by effect’ restrictions (*Budapest Bank*)

**ANTICOMPETITIVE PRACTICES, HUNGARY, AGREEMENT (NOTION), CONCERTED PRACTICES, FINANCIAL SERVICES, HARDCORE RESTRICTION, ANTICOMPETITIVE OBJECT / EFFECT, PRELIMINARY RULING (ART. 267 TFEU), ECONOMIC ANALYSIS**

Advocate General Bobek, *Opinion on the Budapest Bank case*, C-228/18, EU:C:2019:678, 5 September 2019

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## Comment

On 5 September 2019, Advocate General (‘AG’) Bobek delivered his Opinion in the *Budapest Bank* case following a request for a preliminary ruling from the Hungarian Supreme Court (‘HSC’). [1] AG Bobek advised on several matters such as the existence of an obligation for National Competition Authorities (‘NCAs’) to expressly indicate which type of collusion they condemn and whether the facilitating, accepting and implementing of an agreement amounts to a concerted practice. However, this Opinion is particularly interesting because of the clarification it brings to the analytical framework to assess whether a practice could be considered a ‘by object’ restriction.

## I. The Parties

Six of the banks involved in the main proceedings intervened in Luxembourg: Budapest Bank Nyrt. (state owned), ING Bank NV Magyarországi Fióktelepe (ING Group), OTP Bank Nyrt. (OTP Group), Kereskedelmi és Hitelbank Zrt. (KBC Bank and Insurance Group), Magyar Külkereskedelmi Bank Zrt., Erste Bank Hungary Zrt. (Erste Group). In addition, both Visa Europe Ltd and MasterCard Europe SA intervened.

## II. The Facts

On 24 April 1996, seven banks – members of Visa’s and MasterCard’s credit card systems – reached an

agreement setting a uniform *multilateral interchange fee* ('MIF Agreement'). A MIF is the amount paid by an acquiring bank to an issuing bank every time a credit card transaction takes place.

On 31 January 2008, the Hungarian Competition Authority ('HCA') initiated an investigation into the MIF Agreement and, a little more than a year later, the HCA concluded that it constituted a restriction of competition 'by object'. In addition, the HCA held that the Agreement also constituted a restriction of competition 'by effect' and imposed fines totalling 1,922 million Hungarian forint (approx. EUR 5.7 million) on the seven banks that initially concluded the MIF Agreement as well as on Visa and MasterCard.

After their appeal against the decision was rejected in first instance, Visa and six of the fined banks appealed to the Budapest High Court, which partially annulled the contested decision and ordered the HCA to conduct a new investigation. According to the High Court, it was not possible for the HCA to qualify the same agreement both as a restriction of competition 'by object' and 'by effect'. Besides, it arrived at the conclusion that the Agreement did not constitute a restriction 'by object'.

The HCA then lodged a further appeal against the annulment of its decision with the HSC. Left in doubt, the HSC decided to stay the proceedings and referred a number of questions concerning the proper interpretation of Article 101 TFEU to the Court of Justice of the European Union ('CJEU'):

- Can a practice be qualified as both restrictive 'by object' *and* 'by effect'?
- Can the MIF Agreement at issue be qualified as a restriction 'by object'?
- Is it necessary to differentiate between participation in an agreement and acting in concert?
- Can Visa and MasterCard be held liable while they were not a direct party to the MIF Agreement?

### III. The Opinion

#### Same conduct can be classified as restricting competition 'by object' and 'by effect'

In relation to the first question, AG Bobek advises the CJEU to rule that it is possible to classify the same conduct to restrict competition both 'by object' *and* 'by effect' at the same time.

*In line with logic and aim of Article 101(1) TFEU*

AG Bobek starts his reasoning by indicating that, in line with (formal) logic, the 'or' contained in Article 101(1) TFEU should be understood as an (inclusive) disjunction. This understanding is supported by the overall aim and purpose of Article 101(1) TFEU, which is formulated broadly and aims to catch all forms of collusion, regardless of their aim and subject matter.

In addition, there are no ontological differences between agreements that are anticompetitive 'by object' or 'by effect'. From a substantive point of view, they both restrict competition in the internal market and should as a principle be forbidden. This understanding goes back to the *LTM* judgment rendered in 1966. [2] It was then that the CJEU pointed out that the use of the disjunctive conjunction 'or' means that a competition authority should first consider the object of an agreement. Where an examination of this object '*does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered*'.

### *Procedural distinction*

AG Bobek contends that the object/effect dichotomy is essentially nothing more than a ‘procedural device’ “*meant to guide the competition authority on the analysis to be carried out under Article 101(1) TFEU depending on the circumstances of the case*”. It allows a competition authority to not carry out a fully-fledged analysis of the effects of an agreement that “*by[its] very nature can be regarded to be harmful to the proper functioning of normal competition*” because those agreements “*may be considered so likely to have negative effects [...] that it may be considered redundant, for the purposes of applying Article 101(1) TFEU to prove that they have actual effects on the market.*” [3] The object/effect dichotomy should thus be understood as an efficiency tool aimed at optimizing the resources of authorities, not as a device to force authorities into fitting an agreement into the right box.

Consequently, this procedural dichotomy does not prevent authorities to qualify an agreement as being restricting ‘by object’ *and* ‘by effect’ as these are not intrinsically different. Of course on the condition that the requirements for both qualifications are fulfilled. [4] AG Bobek indicates that this practice may be justified by reasons of procedural efficiency “*if the anticompetitive object of an agreement is controversial, it may be ‘safer’ for the authority, in case of subsequent litigation, to demonstrate that the agreement is also anticompetitive by effect*”. In other words, if an authority is not sufficiently convinced that a ‘by object’ qualification would be upheld when tested in court, it can be a reasonable approach – from a procedural efficiency point of view – to also establish that the practice is restrictive ‘by effect’.

### **Elements to take into account to assess whether (MIF) agreements can be deemed to restrict competition ‘by object’**

By the second question, the CJEU was asked to clarify whether the MIF Agreement constitutes a restriction of competition ‘by object’ under Article 101(1) TFEU. AG Bobek starts with a disclaimer warning the CJEU of the impossibility to provide a clear-cut answer to this question since the referring court is the only one that possesses the necessary information and expertise to fully understand the MIF Agreement. However, the AG suggests some guidance and criteria as to how the referring court should conduct its review.

#### *Restrictions ‘by object’ unwrapped: a practical guide applying a two-step analysis*

The AG starts his reasoning by recalling that the ‘by object’ qualification should be interpreted restrictively and be limited to “*certain types of coordination between undertakings which reveal a sufficient degree of harm to competition and for which it is thus unnecessary to examine their effects*”. [5]

AG Bobek continues by providing some fundamental practical guidance to assess whether a restriction can be qualified as ‘by object’. It is AG Bobek’s understanding of the case law that competition authorities should carry out a *two-step analysis*:

- First, they should focus on the content of the provisions in the agreement and its objectives. The key aim of this procedural step is to “*ascertain whether the agreement in question falls within a category of agreements whose harmful nature is, in light of experience, commonly accepted and easily identifiable*”.
- In a second step, the authority should check if there are any legal or economic contextual circumstances which may call into question the presumed anticompetitive nature of said agreement. To AG Bobek it is crystal clear that an analysis of the legal and economic context is required even when an agreement appears to constitute a restriction ‘by object’. [6] In his opinion, the assessment of a practice under EU competition rules cannot be

made in the abstract. In this regard, he states that “*a purely formal assessment of an agreement, completely detached from reality, could lead to condemning innocuous or procompetitive agreements*”. *When required to switch from ‘by object’ to ‘by effect’ analysis: prima facie plausible procompetitive explanation*

AG Bobek advises that if there are elements that make it *prima facie plausible* that there is an alternative procompetitive rationale to an agreement, an analysis of its effects becomes necessary. In other words, in the event that the context analysis does cast doubt on the presumed harmful nature, then the competition authority has no other choice but to conduct a fully fledged analysis of the effects of the agreement. [7]

In this regard, AG Bobek notes that the legal standard is that of *prima facie plausibility*, i.e., the countervailing explanation must seem plausible enough at first sight to warrant further examination but it does not need to be fully established, argued, and proven as this is a matter for the fully fledged effects analysis. [8] So once persuaded that an agreement is a plausible source of procompetitive effects, this agreement can no longer be qualified as restrictive ‘by object’.

#### *Boundary between ‘context analysis’ and ‘fully fledged effects analysis’: no clear-cut answer*

In relation to the second step, AG Bobek recognizes that a key question is: “*Where does the second step in the by object analysis stop and the by effect analysis begin?*”. AG Bobek aims to provide an answer to this still unresolved issue by stressing that the context analysis does not amount to a *de facto* ‘by effect’ analysis, but should be considered a “*basic reality check*” that “*simply requires the competition authority to check, at a general level, whether there are any legal or factual circumstances that preclude the agreement or practice in question from restricting competition*”.

However, AG Bobek concludes by indicating that he cannot answer where the exact boundary between a ‘context analysis’ and a ‘fully fledged effects analysis’ lies as it is impossible to draw, in abstract terms, a bright line between the second step of an object analysis and an effects analysis. The difference between the two is thus more one of degree than of kind. However, in the AG’s opinion this does not impact his conclusion that “*if the elements that the authority observes when looking at the legal and economic context of an agreement alleged to constitute a restriction ‘by object’ point in different directions, an analysis of its effects becomes necessary*”.

To illustrate this, the AG uses the following metaphor “*if it looks like a fish and it smells like a fish, one can assume that it is fish. Unless, at the first sight, there is something rather odd about this particular fish, such as that it has no fins, it floats in the air, or it smells like a lily, no detailed dissection of that fish is necessary in order to qualify it as such. If, however, there is something out of the ordinary about the fish in question, it may still be classified as a fish, but only after a detailed examination of the creature in question.*”

#### *Assessment of the HCA’s analysis of the MIF Agreement*

The AG criticizes the HCA’s analysis on various points. First, the AG indicates that a given practice can only amount to a restriction ‘by object’ when the alleged infringement is ‘clearly defined and explained’. In this case there seems to be a lack of precision in relation to the type of competitive harm that can result from the MIF Agreement, how the various affected markets may interact, the changes that took place on these markets over time, etc.

Second, authorities arguing for a ‘by object’ restriction should put forward a ‘reliable and robust wealth of experience regarding the concerned agreements’. The AG questions whether such bank of experience exists in relation to the concerned practices.

Third, it has been argued that the MIF Agreement also had some procompetitive effects. In this regard, the AG indicates that it is for the referring court to examine those claims to check whether they are credible enough to warrant closer scrutiny.

### **No need to expressly indicate the type of collusion**

In relation to the third question, AG Bobek suggests to answer that it is not required that a competition authority expressly indicates whether an undertaking's conduct constitutes an agreement or a concerted practice. AG Bobek departs from the point of view that it is unreasonable and unnecessary to characterise a specific form of behaviour as either an agreement or a concerted practice since the legal analysis to be carried out under Article 101(1) TFEU is the same regardless of the characterisation.

### **Facilitating, accepting and implementing an agreement amounts to a concerted practice**

With regard to the final question, AG Bobek argues that it is sufficient for the credit card companies and banks that were parties to the MIF Agreement to reach the threshold of a concerted practice to hold the former responsible for the alleged infringement. He clarifies that this conclusion is not altered by the fact that the credit card companies and the banks operate in a different market, nor by the fact that the contribution of the credit card companies to the infringement was relatively smaller than the contribution of the banks.

## **IV. Comment**

The main achievement of AG Bobek's Opinion is that it aims to establish a functional analytical framework to assess whether or not a practice should be considered a restriction 'by object'. In our opinion, he succeeds in its goal by offering authorities the practical two-step analytical framework set-out above. It has to be seen whether the CJEU will confirm the framework suggested by the AG.

In addition, and mainly in relation to the second step of the test, the AG offers the following obvious and 'less obvious / novel' teachings.

*Obvious teaching – an assessment of a practice can never be made in the abstract*

The AG confirms established case law that the anticompetitive nature of a practice should always be sense tested against the "legal and economic context in which [it] was implemented". [9] Only if the anticompetitive nature of the practice cannot be called into question by the context, a 'by object' qualification will be appropriate.

*Less obvious / novel teaching – boundary between 'context analysis' and 'fully fledged effects analysis': no clear-cut answer*

The AG attempts to clarify where the 'context analysis' stops and the 'by effect analysis' begins to come to the conclusion that it is impossible to draw, in abstract terms, a bright line.

However, with his 'fishes and lilies' metaphor, it can be said that he partially addresses the grievances from some critics who compare the qualification practice of competition authorities to inductive reasoning tests as the 'duck test' ("if it looks like a duck, swims like a duck and quacks like a duck, then it probably is a duck") or the 'elephant test' ("it is difficult to describe, but you know it when you see it"). The AG's metaphor adds to these tests that "if

[...], *there is something rather odd about this particular fish [duck / elephant], such as that it has no fins [duck beak / trunk], it floats in the air, or it smells like a lily, [...], it may still be classified as a fish [duck / elephant], but only after a detailed examination of the creature in question."*

*Less obvious / novel teaching – threshold to switch from ‘by object’ to ‘by effect’ analysis: prima facie plausible procompetitive explanation*

The answer to the question: ‘what legal standard has to be met to call into question the anticompetitive nature of a practice?’ could have the biggest impact in practice. The AG advises that to put the anticompetitive nature of a practice into question, an undertaking will have to provide a *prima facie plausible* procompetitive rationale for the implemented practice. In other words, the invoked countervailing explanation will have to seem *plausible* enough *at first sight* to warrant further examination but it does not need to be fully established, argued, and proven as this is a matter for the fully fledged effects analysis.

In case the CJEU upholds AG Bobek’s Opinion – in similar clear wording –, this would finally confirm that a ‘by object’ qualification is only appropriate if an undertaking cannot refer to any procompetitive purpose for a practice considered anticompetitive by its nature. [10] However, even in this case, it remains to be seen whether the CJEU will confirm the legal standard – ‘*prima facie plausible*’ – that a procompetitive purpose invoked by an undertaking has to meet before it can be upheld. We feel that the way to go would be to confirm this rather easy to meet standard as this would underline the exceptional nature of ‘by object’ restriction as underlined in *Cartes Bancaires*.

The importance of such guidance cannot be underestimated as the distinction between anti-competitive practices that are restrictive ‘by object’ and those that are restrictive ‘by effect’ is key for the allocation of the burden of proof between authorities and the concerned parties. [11]

[1] AG Opinion of 5 September 2019, *Budapest Bank and Others*, C-228/18, EU:C:2019:678.

[2] Judgment of 30 June 1966, *Société Technique Minière v Maschinenbau Ulm*, C-56/65, EU:C:1966:38.

[3] Judgment of 11 September 2014, *Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, §50-51 and Judgment of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, §19.

[4] In this regard, the AG indicates that the existence of alternative legal boxes is no licence for vagueness. Authorities still need to adduce the necessary evidence for both types of restriction and, additionally, evaluate and clearly subsume that evidence under the appropriate legal categories.

[5] Judgment of 11 September 2014, *Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, §58.

[6] Under ‘legal and economic context’, account should be taken of the nature of the goods or services affected, the real conditions of the functioning and structure of the markets in question and, where relevant, the parties’ intention. See amongst others judgment of 26 September

2018, *Infineon Technologies v Commission*, C-99/17 P, EU:C:2018:773, §156 and the case-law cited.

[7] When doing an effect analysis, “the authority has to compare the competitive structure in the market caused by the agreement under scrutiny, with the competitive structure which would have prevailed in its absence. The analysis cannot, therefore, stop at the mere capability of the agreement to negatively affect competition in the relevant market, but must determine whether the net effects of the agreement on the market are positive or negative.”

[8] The quantification of these procompetitive effects takes place at a later stage – under Article 101(3) TFEU – once the anticompetitive effects are established.

[9] Legal and economic context entails the nature of the goods or services affected, the real conditions of the functioning and structure of the markets in question and, where relevant, the parties’ intention.

[10] The same idea was already put forward by AG Saugmandsgaard Øe in 2017 but not explicitly confirmed by the CJEU. See Simon Troch, Lucille Geraerts, “The EU Court of Justice Advocate General Saugmandsgaard Øe indicates that providing misleading information aimed at undermining the reputation of one drug to the benefit of another drug might constitute a restriction by object (*Hoffmann-La Roche*)”, 21 September 2017, e-Competitions Bulletin September 2017, Art. N° 85409.

[11] *Ibid.* and Simon Troch, Cecilia Sbrolli, “The EU Court of Justice rules on limited exclusivity restriction in lease agreements and concludes that it is not a restriction by object (*Maxima Latvija*)”, 26 November 2015, e-Competitions Bulletin November 2015, Art. N° 78000.