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AG Bobek’s opinion in Budapest Bank: On object vs. effect, fish and lilies

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On September 5, 2019, Advocate General Bobek published his opinion in the Budapest Bank case (C-228/18). The opinion provides very clear and practical guidance on the concept of restriction of competition by object – a subject that has long been a bone of contention among competition practitioners, enforcers and courts. The opinion is also noteworthy as it features an unorthodox, though pedagogic, metaphor on restrictions of competition involving fish and lilies. In sum, it is worth a commentary.

Quick refresher on object vs. effect

The concept of restriction of competition by object is rooted in Article 101 TFEU, which prohibits agreements *“[…] which have as their object or effect the prevention, restriction or distortion of competition within the internal market […]”*. The EU courts have consistently interpreted this provision as meaning that, when assessing an agreement or a coordinated practice between competitors, competition authorities should:

- First, examine whether the agreement or coordinated practice reveals a sufficient degree of harm to competition, such that there is no need to examine its effects (restriction of competition by object);
- Second, and if the first examination did not prove successful, examine whether the agreement or coordinated practice is capable of producing anti-competitive effects (restriction of competition by effect).

One of the key milestones in the development of the notion of restriction of competition by object is the judgment of the European Court of Justice (CoJ) in *Groupement des Cartes Bancaires* (C-67/13 P). In this case, the CoJ set out a key principle: the concept of restriction of competition by object must be interpreted restrictively. 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 CoJ also provided guidance on how to assess the existence of a restriction by object, emphasizing in particular the need to evaluate the restriction not in the

abstract but in its economic and legal context.

While *Groupement des Cartes Bancaires* addressed a number of important questions, it did not exhaust the debate on object vs. effect. Against this background, AG Bobek's opinion brings a refreshing and indeed welcome perspective on the topic.

Background

Similar to *Groupement des Cartes Bancaires*, the *Budapest Bank* case concerns multilateral interchange fees (MIF), that is, the amount paid by the bank of the card holder (acquiring bank) to the bank of the merchant (issuing bank) when a credit card transaction takes place.

On 28 August, 1996, seven banks adopted an agreement introducing a uniform MIF agreement, applicable to both Visa and Mastercard (the MIF agreement). Visa and Mastercard were not present at the meeting where the banks concluded the agreement but received a copy. The MIF agreement remained in force from 1996 to 2008.

On September 24, 2009, the Hungarian Competition Authority ("HCA") found that the MIF agreement was a restriction of competition both by object *and* effect. As a result, it imposed a fine on the seven banks as well as on Visa and Mastercard.

The parties appealed the decision before the Budapest High Court, which annulled the decision on the grounds that (i) it is not possible for a conduct to be both a restriction of competition by object and by effect, and (ii) the MIF agreement was not a restriction of competition by object. The HCA lodged a further appeal against this judgment before the Hungarian Supreme Court, which referred a number of questions to the CoJ, including the following:

- Can the same conduct be both a restriction of competition by object and by effect?
- Under what conditions can an agreement, such as the MIF agreement, be deemed to amount to a restriction by object?

The same conduct can be both a restriction of competition by object and by effect

According to the AG, this solution is obvious and stems from, *inter alia*:

- The broad wording of Article 101(1) TFEU, which catches all forms of collusion that may have a negative impact on competition in the EU.
- The fact that agreements that are anti-competitive by object and agreements that are anti-competitive by effect "*are not ontologically different: they both restrict competition*". In this regard, the distinction between object and effect is of a procedural nature, i.e. it is meant to indicate the type of analysis that is required when assessing an agreement under Article 101(1) TFEU.

- The case law of the EU courts, including the *Groupement des Cartes Bancaires* judgment, where the CoJ noted that, for restrictions by object, it would be redundant to prove that they have actual effects on the market, since *"experience shows that such behaviour leads to falls in production and price increases"*. In other words, the CoJ implied that restrictions by object necessarily have anti-competitive effects.

Therefore, competition authorities may examine an agreement under either or both the by object and by effect standards. This is a common practice that aims at achieving procedural efficiency, as an appeal court may take the view that the agreement does not meet the standard of a by object infringement but do meet those of a by effect infringement.

However, the AG stresses that *"the existence of alternative legal boxes is no licence for vagueness, in particular when imposing administrative sanctions".* This is an important caveat, specifically because the European Commission (EC) and national competition authorities have been criticized for expanding the concept of restriction by object in order to avoid embarking on the more challenging effects-based analysis. As such, this comment echoes the findings of the CoJ in *Groupement des Cartes Bancaires*, which made clear that the concept of restriction by object should be interpreted restrictively.

More on restrictions by object

The opinion then focuses on the million-dollar question, namely: how to assess whether an agreement is a restriction of competition by object? In this regard, the AG offers a number of important clarifications:

- Based on the case law, the finding of a restriction of competition by object requires a **two-step analysis**:
  - First, one must look at the content of the agreement and its objectives, in order to assess whether the agreement falls within a category of agreements whose harmful nature is, in the light of a reliable and robust wealth of experience, commonly accepted and easily identifiable.
  - Second, one must assess the agreement in its legal and economic context by taking into account the nature of the goods or services affected, the real conditions of the functioning and structure of the markets in question, and, if applicable, the intentions of the parties. This *in concreto* assessment is indispensable because an abstract assessment, *"completely detached from reality"*, could lead to prohibiting neutral or even pro-competitive agreements.
- The second step of the analysis, i.e. assessing an agreement in its legal and economic context, **does not amount to a *de facto* by effect analysis**. Rather, this assessment is *"a basic reality check"* that *"no specific circumstances may cast doubt on the presumed harmful nature of the agreement in question".* The AG nevertheless acknowledges that the boundary between a basic reality check and a by effect analysis is not a clear one and will vary depending on the circumstances of each case.
- In the event that an analysis of the context does cast doubt on the presumed harmful

nature of the agreement, then the authority has no other choice but to turn to an **analysis of the effects of the agreement**. In this regard, the AG notes that the standard is that of plausibility, i.e. an analysis of the effects is required if there is countervailing explanation that seems plausible enough. This effect analysis must focus (1) on a full-fledged and detailed counterfactual, i.e. what would have been the competitive structure absent the agreement, and (2) the net effects of the agreement as opposed to the mere capability of the agreement to have anti-competitive effects.
- In sum, the paramount difference between a by object and a by effect is more "*one of degree than of kind*", i.e., a question of intensity in the work to be conducted by the antitrust enforcer.

By way of recap of the above, the AG proposes one of the best metaphors of the history of EU competition law:

"[s]implified to a metaphorical extreme, 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."

Conclusion and take away

The distinction between restriction of competition by object and restriction of competition by effect is relatively easy to make in theory. However, in practice, it often proves quite challenging – even in a post-*Groupement des Cartes Bancaires* world, as illustrated by *Budapest Bank*.

Against this background, AG Bobek's opinion is most welcome in that:

- It makes sense of a complex, and sometimes vague, case law on object versus effect. Specifically, the opinion proposes a clear and workable roadmap to establishing the existence of a restriction of competition by object or by effect – or both.
- It further reiterates the importance of assessing any practice not in the abstract but in its economic and legal context, specifically in a by object inquiry.
- Finally, it provides an important reminder that the concept of restriction by object should be interpreted restrictively, which is essential not only for a robust and sound antitrust enforcement but also for the preservation of the rights of defence. This restrictive interpretation echoes the calls that have arisen in the review of the Vertical Block Exemption Regulation (VBER) and accompanying guidelines, where a number of stakeholders have been advocating in favour of a more flexible approach towards, for example, resale price maintenance, taking greater account of its potential pro-competitive effects.

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