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# Recent development in restrictions of competition 'by object' in EU competition case law, and the role of Hungarian cases

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**Abstract:** Complying with the abstract rules of competition law has always been a challenge. The category of 'restrictions of competition by object' is precisely what facilitates compliance. However, parallel with the strengthening of compliance, much more complicated restrictions of competition cases have been dealt with by the competition authorities in the EU. In this context, the need for a precise delineation of the category of restrictions of competition by object has increased over the last ten years. The Hungarian cases have contributed significantly to the development of the European Court of Justice's case law on restrictions of competition by object. In the Hungarian cases referred for a preliminary ruling, the European Court of Justice has confirmed that the classical categories of restrictions of competition by object can be extended. However, until now, case law has not yet provided examples of this extension, only in cases where the classification of the conduct in question as restriction by object was not clear, or where it was not possible to prove sufficient harm to competition.

**Keywords:** EU competition law, restriction by object, Hungarian competition law cases

## 1. INTRODUCTION

According to Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are incompatible with the internal market and are prohibited. The assessment of a restriction of competition by object under this Article has posed one of the most complex practical challenges to competition law in recent decades.<sup>1</sup>

In this study, I present the reasons why restrictions of competition by object have become the focus of attention, and how the practice of the Hungarian Competition Authority (GVH) in this matter has contributed to the development of European competition law practice. I will also demonstrate the consequences of the search for a way forward on the issue of restrictions by object required in Hungary so far.

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## 2. STRENGTHENING OF COMPETITION LAW COMPLIANCE AND ITS CONSEQUENCES

The fact that restrictions of competition by object are so much at the forefront of competition law practice and theory stems, in my view, from the spread of competition law compliance. Compliance with abstract competition rules has always been a challenge. On the one hand, this can clearly be seen in the development of Hungarian competition law from 1990 onwards. During the first decade of this period, the GVH's restrained fining practice was a deliberate decision in view of the low level of competition law awareness in Hungary.<sup>2</sup> On the other hand, the compliance challenges posed by abstract regulation are mitigated by block exemption regulations and, in essence, by the restriction of competition by object itself,<sup>3</sup> which also ensures predictability and certainty for the persons seeking compliance. Of course, the tendency on the part of competition authorities to keep infringements within the category of competition by object is understandable,<sup>4</sup> as in such cases there is no need to carry out difficult effect-based assessments, which can often be defended and are therefore less likely to succeed.<sup>5</sup> However, the clear emergence of restrictions of competition by object over the past decade may have increased deterrence and thus compliance, which has obviously also shaped the behaviour of market players. The *prima facie* restrictions of competition by object based on experiences are the following: horizontal price fixing,<sup>6</sup> market sharing<sup>7</sup> and output restriction.<sup>8</sup> This also includes vertical agreements that restrict trade between Member States, in particular absolute territorial restraints, restrictions on resale and parallel trade passive sales, including internet resale and, finally, vertical resale price maintenance.

Parallel with the strengthening of compliance, competition authorities have started to investigate not only less clear-cut behaviours, but also

behaviours exerted on markets that operated in more sophisticated and complex business environments and are thus characterised by behaviours that are not easy to assess. The cases examined in this study include, for example, competition cases concerning pay-for-delay agreements in pharmaceutical patent litigation, where the foreseeability of their classification as a restriction of competition by object was highly questionable on the basis of past competition law practice.<sup>9</sup> On the other hand, in light of the above, it is not a coincidence that the question of identifying restrictions of competition by object arises in complex service markets such as insurance (see the Hungarian Allianz case<sup>10</sup>) or the financial sector (see Hungarian MIF case<sup>11</sup> or the Commission's CB case<sup>12</sup>).

The above difficulties in assessing restrictions of competition by object have been encountered not only by the Hungarian authority but also by the Commission<sup>13</sup> and other Member-State competition authorities as well.<sup>14</sup> There is no doubt, however, that the Hungarian competition cases referred for preliminary rulings on this issue have made a significant contribution to the development of European competition law practice. Both Hungarian cases referred to the European Court of Justice for a preliminary ruling concerned the insurance and financial sectors, which are complex markets. It is also significant that in these cases the European Court of Justice answers questions posed by the national court, which in many cases makes it difficult to compare the findings of such judgments with those in which the Court reviews a decision adopted by EU Commission.<sup>15</sup> The nature of the preliminary ruling system highlights the links between the legal assessment and the legally relevant facts, namely, that (in reversing the logical order of law enforcement) the legal reasoning behind certain legal questions presupposes certain factual assumptions, without which the question referred to cannot be answered. However, even in such cases, the European Court of Justice tries to provide theoretical guidelines for the interpretation of EU law (see the reasoning of the European Court of Justice on the MIF agreement falling within the scope of restriction by object by its very nature<sup>16</sup>).

### 3. THE HUNGARIAN INSURANCE CARTEL: ENTERING A NEW ERA?

In its decision of 21 December 2006 in Case No. Vj-51/2005, the GVH established that Allianz and Generali had infringed Hungarian competition law<sup>17</sup> by linking hourly repair fees to the performance achieved (undertaken) in the sale of their insurance policies. According to the decision, this behaviour was considered a restriction of competition by object. Although the original case No. Vj-51/2005 was conducted based on Hungarian competition law provisions only, the EU Court of Justice accepted the legal interpretation of the Supreme Court of Justice due to the similarity of the Hungarian and the EU provisions,<sup>18</sup> which concerned the assessment of vertical agreements as restriction of competition by object. The original decision in Case No. Vj-51/2005 was indeed vague on this point, referring to the effect of the agreements as a whole,<sup>19</sup> while the GVH considered it a restriction of competition by object that in return for the higher hourly charge the access of other insurers to car dealerships as a distribution channel was restricted to the benefit of the insurance companies concerned. The conduct subject to the proceeding was in fact a vertical restraint of competition, which according to the case-law was not considered a restriction by object even at the time of the GVH's decision.<sup>20</sup> In this context, it should be noted that the GVH was not the only competition authority to classify a vertical agreement with an effect-based approach as a by object restriction given its very nature. In the *Maxima Latvija* case, the European Court of Justice ruled in relation to the veto right leading to exclusivity in a Lithuanian shopping centre that this vertical agreement could only be assessed with an effect-based analysis.<sup>21</sup> Although not explicitly referred to by the European Court of Justice, its guidance on the effect-based analysis in this case is essentially the same as the criteria for assessing single branding vertical restriction. In fact, such an assessment would have been required in the Hungarian insurance cartel case had the European Court of Justice not used this case to establish the criteria for ex-

tending the restriction by object category. The European Court of Justice's judgment has also always been surrounded by confusion,<sup>22</sup> because what the Court said, and the context in which it did so, were not in line with each other. As this case was also referred to the European Court of Justice for a preliminary ruling, it is relevant here that the margin of discretion for the European Court of Justice is determined by the question posed by the national court, which in this case was solely concerned with the question of 'by object'. Therefore, in the context of the conduct in question the European Court of Justice does not mention that it is necessary to assess whether it constitutes single branding that restricts competition by effect. On the other hand, the European Court of Justice cites a number of cases (three in total) in which vertical conduct of this kind may be considered a 'by object' restriction. First, if there were evidence of a horizontal market-sharing agreement or concerted practice between the two insurers to be implemented by the vertical agreements in question.<sup>23</sup> The second case is where the insurance companies essentially affirmed the recommended price decisions of the motor vehicle dealers' association on hourly rates for vehicle repairs.<sup>24</sup> The third case is where, as a result of the vertical agreements, the competition on the relevant market is eliminated or significantly weakened, for which the existence of alternative sales channels and their importance, as well as the market power of the companies concerned, must be taken into account. It is this third case that gives rise to the most confusion in the judgment. In any event, the third case is not relevant in the context of the analysis of the effects of the agreements, but rather in the context of the analysis of the object, and therefore it contains an error.

On the one hand, this error is a basis for concluding that the scope of restrictions of competition by object can be extended.<sup>25</sup> On the other hand, it has been suggested that an extension of the categories of restriction by object could be possible by means of an effect-based analysis, which in turn has called into question the existence of separate restrictions of competition by effect.<sup>26</sup> As Advocate General Wahl stated in his Opinion in CB v

Commission one year after the Allianz case, “It is clear that the case-law of the Court and of the General Court, while pointing out the distinction between the two types of restrictions envisaged by Article 81(1) EC, could, to a certain extent, be a source of differing interpretations and even of confusion. Certain rulings seem to have made it difficult to draw the necessary distinction between the examination of the anticompetitive object and the analysis of the effects on competition of agreements between undertakings.”<sup>27</sup>

## 4. EUROPEAN COURT OF JUSTICE PRACTICE FOLLOWING THE ALLIANZ CASE: CONSOLIDATION

More than a year after the judgment of the European Court of Justice in the Allianz case, the Court of Justice made its decision in the Cartes Bancaires (CB) case,<sup>28</sup> which is no longer a preliminary decision, but a Commission decision under the power of review. In this decision, the European Court of Justice appeared to have dispelled the above concerns raised by the Allianz decision, both on the question of extending the categories of restriction by object and on the question of effect-based analysis.

Indeed, the European Court of Justice ruled that the restriction of competition by object must be interpreted restrictively.<sup>29</sup> Furthermore, it can be inferred from the judgment of the European Court of Justice that under the “sufficient degree of harm” test set out in the Allianz case,<sup>30</sup> circumstances to be assessed<sup>31</sup> are not relevant to the effect-based analysis, but to the assessment of whether the agreement in question, inherently, pursues an objective by its very nature. (This conclusion was later also confirmed during the Generics<sup>32</sup> and MIF cases.<sup>33</sup>) Since the Court of Justice referred to the Allianz case in this context during the CB case, it is worth revisiting the Court’s findings in the Allianz case in this respect. Accordingly, there must be a sufficient degree of harm *in terms of competition* (highlighted by me)<sup>34</sup> to establish a restriction of competition by object without an

effect-based analysis. In other words, a restrictive interpretation of restrictions of competition by object means that it must be possible to show a *prima facie* adverse effect on competition.<sup>35</sup> Also in the Allianz case, the European Court of Justice emphasised that taking into account the economic and legal context in which the vertical agreements at issue in the main proceedings form a part – i.e. *the competition in the automobile insurance market* (highlighted by me) – are sufficiently harmful as to amount to a “restriction of competition by object”.<sup>36</sup> This means that for qualifying a restriction of competition as ‘by object’ it presupposes that the conduct in question is placed in the appropriate market context and it is established that, in light of experience, competition interpreted this way reveals a sufficient degree of harm.<sup>37</sup> In this context, the European Court of Justice emphasises in the CB case that the question of defining the relevant market cannot be confused with the question of the market context to be considered when determining whether conduct constitutes a restriction by object, since it may also take place on a related market other than the relevant market.<sup>38</sup> In other words, it appears that the decision in the CB case corrects the decision in the Allianz case in that the categories of restriction by object cannot be extended, and the conducts under investigation must form part of a market context in which a substantive restriction of competition can be established under the classic categories (i.e. price fixing, market sharing, output restriction). In other words, circumstances which appeared to be an effects analysis in the Allianz case are in fact the appropriate market context for establishing restriction by object (and thus the applicable standard of proof). (This was later explicitly stated by the European Court of Justice in the Generics case.<sup>39</sup>) The arguments used by the Court in the CB case to reject the relevance of the BIDS judgment point to this. In particular, that, unlike the BIDS case, there was no suggestion in the CB case that the mechanism to encourage the exit of competitors was intended to bring about an appreciable change in the structure of the relevant market and that therefore, these measures show a degree of harm comparable to that of the BIDS agreement.<sup>40</sup> According to the European Court of Justice, meas-

ures which oblige issuers to pay money, making it difficult for new entrants to expand their acquiring activities, fall in line with the Advocate General's Opinion, "such a finding falls within the examination of the effects of those measures on competition and not of their object."<sup>41</sup> It is not a coincidence that following the reopened CB case<sup>42</sup> the General Court upheld the Commission's decision related to the effect-based approach, on the grounds that the additional fee charged to new entrants reduces the incentive to issue cards or increases the cost of issuing cards, thereby reducing the competitive pressure on market players.<sup>43</sup>

Following the decision on the CB case, which appeared to be a correction to the Allianz case, the possibility of expanding the categories of restriction by object seemed to be taken off the agenda. The European Court of Justice's judgment of 23 January 2018 in the Hoffmann-La Roche case – also a preliminary ruling – then raised the question of the extendibility of the restriction by object category again,<sup>44</sup> despite the Court's continued emphasis on the restrictive interpretation already given to the CB case.<sup>45</sup> In this case, the Italian competition authority established a market sharing cartel between two pharmaceutical companies aimed at disseminating misleading information about the side effects of using one of these medicines for indications not covered by the authorisation of the other medicine, in order to reduce the competitive pressure resulting from this use on the use of the other medicine. The difficulty in interpreting the European Court of Justice's judgment in this case arises from the fact that the reasoning of the European Court of Justice's judgment does not mention market sharing, yet despite its devious appearance, it clearly was.<sup>46</sup> In contrast to the Hungarian Allianz and Commission CB cases, this conduct did not concern part of a complex and sophisticated market, but a restriction of competition by object which was difficult to identify but could otherwise be captured. In other words, this case is also an example, like the CB decision, that there is no extension of the categories of restriction by object, it must be possible to identify the classical categories of re-

striction by object (price fixing, market sharing, output restriction) in a meaningful dimension of competition. This is indicated by the fact that in the present case, the European Court of Justice confirmed the relevance of the 'degree of harm' test introduced in the Allianz case, which in the CB case led to the need to place the conduct in question in the appropriate market context (to capture a meaningful dimension of competition) in order to identify it as falling within a classical restriction by object category.<sup>47</sup>

This was followed by a European Court of Justice decision on 30 January 2020 in the context of a preliminary ruling, also concerning the pharmaceutical market. The Generics case is an example of how a settlement agreement in the context of a serious dispute before a national court concerning a manufacturing process patent may be treated as equivalent to such market-sharing or market-exclusion agreements.<sup>48</sup> In this case – unlike the previous Hoffmann-La Roche case – the European Court of Justice thus expressly stated that the purpose of its analysis was not to extend the category of restriction of competition, but to examine whether the conduct in question fell within the existing category of restriction by object, which further confirmed that the path to extending the category of restriction by object as envisaged in the Allianz case did not exist. And for the purposes of identification, the "degree of harm" test set out in the Allianz case was applied in this case as well,<sup>49</sup> the aim of which is to place the behaviour in question in a meaningful competition dimension (context) and, in light of this, to classify the harm in one of the classical restrictions by object categories. What is so interesting about this "degree of harm" test in the Generics case is that the Court considered the reference to a pro-competitive effect as part of the background test to be applied in the context of the harm test.<sup>50</sup> Based on the Generics case, these effects must not only be proven, relevant and specific to the agreement concerned, but they must also be sufficiently significant.<sup>51</sup> However, the objective pursued by this agreement before and after this decision is a separate assessment aspect of the degree of harm assessment and not part of the background analysis.<sup>52</sup>

## 5. ANOTHER HUNGARIAN CASE: THE NEW AGE OF THE ALLIANZ CASE DOES EXIST

After such antecedents, the other Hungarian case was ruled by the European Court of Justice on 2 April 2020, also in the context of a preliminary ruling and again in relation to a complex market. In its judgment in the Hungarian MIF case, the European Court of Justice maintained that the category of restriction by object must be interpreted restrictively<sup>53</sup> and that the conduct in question must be placed in a market context in which, in light of experience, it must be possible to demonstrate a restriction of competition with a sufficient degree of harm.<sup>54</sup> At the same time, contrary to what was suggested by previous judgments, the European Court of Justice has made clear what was already stated in the first Hungarian case, namely that “it is likewise apparent from the wording of Article 101(1)(a) TFEU and, more specifically, from the words ‘in particular’ that, as has been stated in paragraph 54 of the present judgment, the types of agreements mentioned in Article 101(1) TFEU do not form an exhaustive list of prohibited collusion, since other types of agreements may also be classified as restrictions ‘by object’ where such a classification is made in accordance with the requirements stemming from the case-law of the Court recalled in paragraphs 33 to 39, 47 and 51 to 55 of the present judgment. Accordingly, nor can it be ruled out from the outset that an agreement such as the MIF Agreement may be classified as a restriction ‘by object’ in that it neutralised one aspect of competition between two card payment systems.”<sup>55</sup> Thus, in the MIF case, the Court of Justice made it clear that a practice either succeeds in falling within the restriction by object category<sup>56</sup> or, in the absence of this, a category extension analysis must be carried out, i.e. it must be possible to show that the new type of behaviour is restriction by object because it reaches the experiential degree of harm of the classical type.<sup>57</sup> It is therefore no coincidence that the extension of the restriction by object category

and the assessment of behaviours that cannot be clearly identified as restriction by object are the same test. This was confirmed by the European Court of Justice in the MIF case.<sup>58</sup> In the MIF case, the Court also confirmed what it had previously ruled in the Generics case, that an effect-based analysis is not necessary to classify an agreement as a restriction of competition by object.<sup>59</sup> In any event, there must be sufficiently solid and reliable experience to conclude that the agreement is by its very nature harmful to the proper functioning of competition.<sup>60</sup> Based on the above, there is therefore sufficient experience with the categories already known as restriction by object.<sup>61</sup> And in the case of non-existent types of market behaviour, this experience must be gained from an examination of whether the conduct in question is, by its very nature, sufficiently harmful to the proper functioning of competition.<sup>62</sup>

Although the European Court of Justice acknowledged the possibility of extending the restriction by object category in the MIF case, it remained based on the usual contextualisation of the specific conduct in question (namely the market circumstances and the dimension of competition that can be captured). In this context, the Court reviewed the way competition operates in the card payment market and concluded that there are three tangible dimensions of competition in the field of open payment card schemes: the “inter-system market”, in which card schemes compete with each other, the “issuer market”, in which issuing banks compete for a customer base of cardholders, and finally the “acquirer market”, in which acquiring banks compete for a customer base of merchants.<sup>63</sup> The GVH has, moreover, distanced itself from the Commission’s decision on the Mastercard case<sup>64</sup> and basically (but not exclusively) approached the case on a ‘by object’ basis. According to the Court, it is not unlawful to establish that conduct amounts to a restriction both by object and by effect, however this “in no way detracts from the obligation incumbent on that authority [or court], first, to support its findings for that purpose with the necessary evidence and, second, to specify to what extent that evidence relates to each type of restriction thus

found to exist.”<sup>65</sup> The Commission’s decision in 2007 concluded that by fixing the MIF, the MSC’s minimum price setting had the effect of restricting competition for merchants arising on the side of issuers. In the Hungarian MIF case, the GVH found that setting the same indirect merchant service charge could amount to a restriction by object. However, the Court did not see in which of the above three dimensions of competition in the card payment system the standardisation of a card payment cost element (MIF) and the simultaneous setting of a minimum merchant service charge (MSC) threshold had been found to have a sufficient negative effect on competition (i.e. price fixing, market sharing, output restriction).<sup>66</sup> Especially since the parties argued that the fixing of the MIF did not allow the MSC to increase.<sup>67</sup> The fact that this particular by object restriction was not apparent does not preclude the identification of other anti-competitive objectives<sup>68</sup> because the Court did not have sufficient data to do so.<sup>69</sup> In this context, it may be relevant that the Hungarian MIF case differed from similar cases in Europe in that the MIF did not take the form of a decision by the card companies as an association of undertakings, but rather as an agreement between the two competing card companies. This is significant, also in view of the fact that the Court of Justice upheld the Commission’s conclusion that the MIF was not a necessary element in the operation of the card payment system.<sup>70</sup> In light of this, the agreement between the two card issuers could be interpreted as an unnecessary cost element in the MIF.

In the Lundbeck case, which followed the MIF case, the European Court of Justice further confirmed the above conclusions in March 2021. On the one hand, it did not allow the extensibility of the restriction by object category to be limited by stating that reaching the appropriate degree of harm can only occur in the case of conduct which has already been sanctioned by the Commission.<sup>71</sup> The Court therefore emphasises that “in order for a given agreement to be characterised as a ‘restriction by object’, all that matters are the specific characteristics of that agreement from which must be inferred

the potential harmfulness of that agreement for competition, where necessary as a result of a detailed analysis of that agreement, its objectives and the economic and legal context of which it forms part.”<sup>72</sup> On the other hand, it has been further confirmed that the “degree of harm” test required to qualify as a restriction of competition by object and the effects-based infringement analysis have different content when the Court of Justice underlined that “an examination of the ‘counterfactual scenario’, the purpose of which is to make apparent the effects of a given concerted practice, cannot be required in order to characterise a concerted practice as a ‘restriction by object’, since an approach to the contrary would be to deny the clear distinction between the concepts of ‘restriction by object’ and ‘restriction by effect’ which arises from the very wording of Article 101(1) TFEU”.<sup>73</sup>

## 6. CONCLUSIONS

Over the last decade, as competition law compliance in the field of competition restrictions has strengthened, competition authorities have turned to competition law investigations of practices that are less clear-cut. On the other hand, they have focused their investigations on practices in markets with more complex and sophisticated operations, which are not characterised by *prima facie* practices. The competition authorities are interested in establishing restriction by object, but the Court of Justice has consistently held that this category 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.”<sup>74</sup> The Court of Justice has therefore not been reluctant about the possibility of extending the category of restrictions of competition by object and has sought to provide guidance on this, even if the interpretation of these restrictions has been the subject of much uncertainty over the last ten years, and has been the victim of some cases.

Since the European Court of Justice's judgment in the Hungarian insurance cartel case, anti-competitive by object is an open category: the competition authority or the court may also declare market conduct as anti-competitive by object that is not yet characterised as having an anti-competitive object. In addition, a distinction must be made between *prima facie* and *non prima facie* restrictions of competition by object.<sup>75</sup> In the *prima facie* category of restrictions of competition by object, there is a sufficiently strong and substantial body of evidence to show that the agreements in question can be regarded as generally and objectively anti-competitive.<sup>76</sup> Where the classification of a conduct as restriction by object is not clear or is explicitly aimed at recognising an as yet unknown type of restriction by object conduct, it must be shown to be sufficiently harmful to competition on the basis of the case law of the Court of Justice. Both the non *prima facie* consideration and the category ex-

tension need the same assessment. This does not require an effect-based analysis, but the ability to demonstrate the market and economic context in which the conduct concerned fits, capturing a substantive dimension of competition whose sufficient harm can be shown by experience to be comparable to *prima facie* restrictions of competition by object. Case law to date has not provided any examples of an extension of the category of classic (known so far) restrictions of competition by object. The case law to date has either covered the assessment of by object restrictions that are difficult to identify (see pay-for-delay agreements in patent disputes) or has covered conduct whose harm was not apparent once it was placed in the appropriate economic and market context (see Hungarian cases). It is highly questionable whether there are further cases of the category of restrictions of competition by object, as confirmed in principle by the European Court of Justice in Hungarian cases.

## Notes

- 1 Bailey, D. (2012) Restrictions of competition by object under Article 101 TFEU, *Common Market Law Review*, 49(2), p. 559-599.
- 2 For more details see: Tóth, A. (2014) Hungarian experiences on the role of the competition policy in a transitional economy, *Korea Economic Law Journal*, 13(3), p. 123-138.
- 3 For more details see: Tóth, A. (2019) Vélelmek a versenytörvényben [Presumptions in competition law], *Magyar Jog [Hungarian Law]* 66(3), 125-131; and Koivusalo, J. (2021) The pursuit of an anti-competitive outcome – restrictions of competition by object after GUK and Budapest Bank, *ECLR*, 42(6), 316.; Nagy, Cs. I. (2019) Anticompetitive object/effect: An overview of EU and national case law, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3470689](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3470689) (October 31, 2019).
- 4 Monti, G. (2020) EU Competition Law and the Rule of Reason Revisited [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3686619](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3686619) (September 4, 2020).
- 5 CJEU judgment no. C-58/64 (1965), p. 342.  
<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=87319&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 6 Experience shows that such behaviour leads to a reduction in production and an increase in prices, and leads to an unfavourable allocation of resources, in particular to the detriment of consumers. (Judgment of 11 September 2014, CB v Commission, C-67/13 P, EU:C:2014:2204, paragraph 51; Judgment of 26 November 2015, Maxima Latvija, C-345/14, EU:C:2015:784, p. 19.)
- 7 CJEU judgment no. C-172/14 (2015), p. 32.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=165909&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 8 CJEU judgment no. C-286/13 P (2015), p. 115.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=163028&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 9 CJEU judgment no. C-591/16 P (2021), p. 148.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=239291&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2727268>

- 10 CJEU judgment no. C-32/11 (2013),  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=135021&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 11 CJEU judgment no. C-228/18 (2020),  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2726605>
- 12 CJEU judgment no. C-67/13 P (2014),  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=157516&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 13 CJEU judgment no. C-67/13 P (2014),  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=157516&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>; CJEU judgement no. C-307/18 (2020),  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=222887&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 14 CJEU judgment no. C-345/14 (2015),  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=172145&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 15 See e.g. the Allianz case, where the judge only asked about restriction by object while the conduct was effect-based, or the Italian Hoffmann La-Roche case, which the Italian competition authority initially identified as market sharing, but the questions asked by the Italian judge did not suggest this at all.
- 16 “The question is therefore raised whether an agreement such as the MIF Agreement may be regarded as falling within the scope of indirect price fixing, for the purposes of that provision, in that it indirectly determined the service charges.” CJEU judgment no. C-228/18 (2020), p. 62.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2726605>
- 17 The GVH found that EU competition law was not applicable due to the limited cross-border trade in insurance products. Gazdasági Versenyhivatal [Hungarian Competition Authority] decision no VJ/51-184/2005. p. 482.
- 18 In Case C-32/11 Allianz Hungária Biztosító Zrt. and Others v GVH, the Curia ruled on the relationship between Article 101 TFEU and Article 11 of the Hungarian Competition Act as follows: “*The Supreme Court notes, first of all, that the wording of Article 11(1) of the Competition law is almost identical to that of Article 101(1) TFEU and that the interpretation of Article 11 of the Competition law, which will ultimately be adopted with respect to the agreements at issue, will in the future also have an impact on the interpretation of Article 101 TFEU in this Member State. This Court points out that there is a clear interest in having a uniform interpretation of the provisions and concepts of European Union law.*” Or see also Case C-542/14 SIA “VM Remonts and Others v Latvian Competition Council 17. According to the settled case-law of the Court, “*it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see in particular the judgment of 14 March 2013 in Allianz Hungária Biztosító and Others, C 32/11, EU:C:2013:160, 20. paragraph 18; judgment of 4 December 2014 FNV Kunsten Informatie en Media, C 413/13, EU:C:2014:2411, paragraph 18; judgment of 26 November 2015 Maxima Latvija, C 345/14, EU:C:2015:784, p. 12).*”
- 19 See Vj-51/2005. point 335, without revealing the horizontal link between insurers, cf. judgment of 14 March 2013 in Case C 32/11 Allianz and Others v Gazdasági Versenyhivatal ECLI:EU:C:2013:160, p. 45.: “*It is for the referring court to check the accuracy of those claims and, to the extent that it is enabled under domestic law, to determine whether there is enough evidence to establish the existence of an agreement or concerted practice between Allianz and Generali.*”
- 20 For more details Nagy, Cs. I. (2021) *A kartelljog dogmatikai szerkezete [The dogmatic system of cartel law]*, (HVG-Orac) 157.
- 21 CJEU judgment no. C-345/14 (2015),  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=172145&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 22 see Nagy, Cs. I. (2019) Anticompetitive object/effect: An overview of EU and national case law, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3470689](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3470689) (October 31, 2019).

23 CJEU judgment no. C-32/11 (2013), p. 45.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=135021&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2727791>

24 CJEU judgment no. C-32/11 (2013), p. 49-50.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=135021&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2727791>

25 Gál, G. (2020) Card trick: The Judgment of the Court of Justice of the European Union in the Budapest Bank case (C-228/18), European Mirror, 23(3), 46.

26 See Dömötörfy, B., Kiss, B. S., Firniksz, J. (2020) Látszólagos dichotómia? Versenykorlátozó cél és hatás vizsgálata az uniós versenyjogban, különös tekintettel a budapest Bank ügyre, Verseny és szabályozás [An apparent dichotomy? Examining by object and by effect restrictions in EU competition law, with particular reference to the Budapest Bank case, Competition and Regulation], In: Valentiny, P., Nagy, Cs. I., Berezhvai, Z. (eds.) *Verseny és szabályozás 2019. [Competition and regulation 2019.]* (Budapest: MTA KRTK Közgazdaság-tudományi Intézet), 32.

27 Opinion of Advocate General Michal Bobek in Case C-228/18 (2019), p. 46. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CC0228&from=EN>

28 CJEU judgment no. C-67/13 P (2014),

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=157516&pageIndex=0&doclang=HU&mode=lst&dir=&occ=-first&part=1&cid=2728503>

29 CJEU judgment no. C-67/13 P (2014), p. 58.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=157516&pageIndex=0&doclang=HU&mode=lst&dir=&occ=-first&part=1&cid=2728503>

30 "According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 81(1) EC, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question" CJEU judgment no. C-67/13 P (2014), p. 53.

31 Regard must be had to the content of its provisions, its objectives, and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.

32 CJEU judgment no. C-307/18 (2020), p. 104.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=222887&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

33 CJEU judgment no. C-228/18 (2020), p. 76.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

34 CJEU judgment no. C-32/11 (2013), p. 34.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=135021&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632> p. 58.

35 see CJEU judgment no. C-67/13 P (2014).

36 CJEU judgment no. C-32/11 (2013), p. 46.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=135021&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

37 CJEU judgment no. C-67/13 P (2014), p. 51.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=157516&pageIndex=0&doclang=HU&mode=lst&dir=&occ=-first&part=1&cid=2728503>

38 CJEU judgment no. C-67/13 P (2014), p. 77-78.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=157516&pageIndex=0&doclang=HU&mode=lst&dir=&occ=-first&part=1&cid=2728503>

- 39 CJEU judgment no. C-307/18 (2020), p. 104.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=222887&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 40 CJEU judgment no. C-67/13 P (2014), p. 85.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=157516&pageIndex=0&doclang=HU&mode=lst&dir=&occ=-first&part=1&cid=2728503>
- 41 CJEU judgment no. C-67/13 P (2014), p. 81.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=157516&pageIndex=0&doclang=HU&mode=lst&dir=&occ=-first&part=1&cid=2728503>
- 42 General Court judgment no. T-491/07 RENV (2016),  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=181045&pageIndex=0&doclang=FR&mode=lst&dir=&occ=-first&part=1&cid=2724836>
- 43 Ronzano, A. (2016) Restriction by effect: The General Court of the European Union confirms the tariff measures by the French interbank network effectively restricted competition after the ECJ ruled that they had no restrictive object (Groupement des cartes bancaires), *Concurrences*, 2016/3, [www.concurrences.com](http://www.concurrences.com)
- 44 Nagy, Cs. I. (2019) Anticompetitive object/effect: An overview of EU and national case law, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3470689](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3470689) (October 31, 2019.).
- 45 CJEU judgment no. C-179/16 (2018), p. 78.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=198644&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2724836>
- 46 Nagy, Cs. I. (2021) *A kartelljog dogmatikai szerkezete [The dogmatic system of cartel law]* (Budapest: HVG-Orac), 161.
- 47 CJEU judgment no. C-179/16 (2018), p. 94.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=198644&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2724836>
- 48 CJEU judgment no. C-307/18 (2020), p. 77.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=222887&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 49 CJEU judgment no. C-307/18 (2020), p. 103.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=222887&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 50 CJEU judgment no. C-307/18 (2020), p. 103.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=222887&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 51 CJEU judgment no. C-307/18 (2020), p. 106.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=222887&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 52 See from previous case law: CB, points 54 and 70, from subsequent case law: MIF, points 51 and 52, and the Lundbeck judgment summarising the harm test: "Only the specific characteristics of an agreement are relevant for the classification of a given agreement as a "restriction by object" (see in this sense: 2020. Generics (UK) and Others, judgment of 30 January 2010, C 307/18, EU:C:2020:52, p. 84 and 85), on the basis of which it is necessary to infer the specific harm that may exist from the point of view of competition, if necessary, after a detailed analysis of the agreement, its objectives and the economic and legal context in which it forms a part." p. 131.
- 53 CJEU judgment no. C-228/18 (2020), p. 54.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>
- 54 see CJEU judgment no. C-228/18 (2020), p. 35, 51-52, 54 and 80.  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

55 CJEU judgment no. C-228/18 (2020), p. 63.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

56 CJEU judgment no. C-228/18 (2020),

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632> p. 62.: MIF Agreement may be regarded as falling within the scope of indirect price fixing “in that it indirectly determined the service charges.”

57 CJEU judgment no. C-228/18 (2020), p. 63.

“In addition, it is likewise apparent from the wording of Article 101(1)(a) TFEU and, more specifically, from the words ‘in particular’ that, as has been stated in paragraph 54 of the present judgment, the types of agreements mentioned in Article 101(1) TFEU do not form an exhaustive list of prohibited collusion, since other types of agreements may also be classified as restrictions ‘by object’ where such a classification is made in accordance with the requirements stemming from the case-law of the Court recalled in paragraphs 33 to 39, 47 and 51 to 55 of the present judgment. Accordingly, nor can it be ruled out from the outset that an agreement such as the MIF Agreement may be classified as a restriction ‘by object’ in that it neutralised one aspect of competition between two card payment systems.”

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

58 CJEU judgment no. C-228/18 (2020), p. 51, 52 and 59.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

59 CJEU judgment no. C-228/18 (2020), p. 76.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

60 CJEU judgment no. C-228/18 (2020), p.76.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

61 CJEU judgment no. C-228/18 (2020), p. 36.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

62 CJEU judgment no. C-228/18 (2020), p. 79.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

63 CJEU judgment no. C-228/18 (2020), p. 56t.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

64 European Commission decision in Case COMP/34.579 <https://ec.europa.eu/mwg-internal/de5fs23hu73ds/progress?id=2KvUMj-pEKzVd1bvtlcEypVw-ZLOUGlW6c5IOD3zYoKs>

65 CJEU judgment no. C-228/18 (2020), p. 43.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

66 Koivusalo, J. (2021) The pursuit of an anti-competitive outcome – restrictions of competition by object after GUK and Budapest Bank, *European Competition Law Review*, 42(6).

67 CJEU judgment no. C-228/18 (2020), p. 82.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

68 CJEU judgment no. C-228/18 (2020), p. 52.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=-first&part=1&cid=2459632>

69 CJEU judgment no. C-228/18 (2020), p. 78.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=224884&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2459632>

70 CJEU judgment no. C-382/12 P (2014),

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=147066&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2727388>

71 CJEU judgment no. C-591/16 P (2021), p. 130t.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=239291&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2727268>

72 CJEU judgment no. C-591/16 P (2021), p. 131.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=239291&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2727268>

73 CJEU judgment no. C-591/16 P (2021), p. 140.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=239291&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2727268>

74 CJEU judgment no. C-32/11 (2013), p. 58.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=135021&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2459632>

75 Ibáñez Colomo, P. (2019) Legal Tests in EU Competition Law, Taxonomy and Operation, *Journal of European Competition Law & Practice*, 10(7).

76 Opinion of Advocate General Michal Bobek in Case C 228/18 (2019), p. 54 and 63-73, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CC0228&from=EN>