| Chapter 5 |

Central European Countries' Competition Law Practice Contribution to the Development of EU Competition Law

András TÓTH

ABSTRACT

The case law of the Central European EU Member States has made important contributions to the development of EU competition law through preliminary rulings. First, restriction of competition 'by object' is an open category since the European Court of Justice's judgment in the Hungarian insurance cartel: the competition authority or the court may also declare market conduct as anti-competitive by object if it is not yet characterized as having an anti-competitive object. Second, preliminary ruling questions referred from Central European countries have given the EU Court of Justice an opportunity to clarify the relationship between national and EU competition law.

KEYWORDS

EU competition law, restriction competition by object, *ne bis in idem*, parallel applicability of EU and national competition law.

1. Introduction

This chapter aims to demonstrate how the Central European countries (i.e., the Czech Republic, Hungary, Poland, Romania, and Slovakia) competition law practice contributed to development of the EU competition law. The methodology of the research is based on the preliminary ruling judgments of the European Court of Justice (EUCJ) referred from the above-mentioned countries in competition law cases since 2004.

Due to these methodological reasons, I do not describe in this study such competition law cases that can only be traced back to a single Member State's practice in the region. For example, the need for the regulation of cross-border enforcement of Member State competition law decisions imposing fines was highlighted by a Hungarian case.[1] Another example is the *Tibor–Trans* judgment of the EUCJ,[2] according to

1 Judgment of the CJEU (Second Chamber) of 28 July 2016, Hungarian Competition Authority (Gazdasági Versenyhivatal) v. Siemens Aktiengesellschaft Österreich, Case C-102/15, ECLI:EU:C:2016:607.
2 Judgment of the CJEU (Sixth Chamber) of 29 July 2019, Tibor-Trans Fuvarozó és Kereskedelmi Kft. v. DAF TRUCKS N.V., Case C-451/18, ECLI:EU:C:2019:635.

Tóth, A. (2022) 'Central European Countries' Competition Law Practice Contribution to the Development of EU Competition Law' in Osztovits, A., Bóka, J. (eds.) *The Policies of the European Union from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 103–118. https://doi.org/10.54171/2022.aojb.poeucep_5

which indirect buyers can bring damages action against any member of an EU-wide cartel in their own Member State.

Two major areas can be identified where the contribution of Central European countries' competition law practices have contributed to the development of European competition law. One is the restriction of competition 'by object' and the other is the relationship between national and European competition law.

2. Central European Competition Law Practices' Contribution to the Development of Art. 101 TFEU

2.1. Extension of the Category of Restriction 'By Object'

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. However, they have focused their investigations on practices in markets with more complex and sophisticated operations, which are not characterized 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.'[3] 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.

2.1.1. Hungarian Allianz Case: Beginning of a New Age?

In its decision of December 21, 2006, in Case No. Vj-51/2005, the Hungarian Competition Authority (Gazdasági Versenyhivatal, or GVH) established that Allianz and Generali had infringed Hungarian competition law[4] by linking hourly repair fees to the performance achieved (undertaken) in the sale of their insurance policies. According to the decision, this behavior was considered a restriction of competition by object. Although the original case 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

3 Judgment of the Court (First Chamber), 14 March 2013, Allianz Hungária Biztosító Zrt. and Others v. Hungarian Competition Authority (Gazdasági Versenyhivatal), Case C-32/11, ECLI:EU:C:2013:160 (hereinafter: CJEU Judgment No. C-32/11, Hungarian Competition Authority v. Allianz Hungária Biztosító and Others).

4 The GVH found that EU competition law was not applicable due to the limited cross-border trade in insurance products. Hungarian Competition Authority Decision No VJ/51-184/2005, para. 482.

provisions,[5] which concerned the assessment of vertical agreements as a restriction of competition by object. 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.[6]

The judgment 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.[7] 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 Art. 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."[8]

2.1.2. Consolidation after the Hungarian Allianz Case

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,[9] which 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

5 In Case C-32/11 Allianz Hungária Biztosító Zrt. and Others v. Hungarian Competition Authority, the Curia ruled on the relationship between Art. 101 TFEU and Art. 11 of the Hungarian Competition Act as follows: "The Supreme Court notes, first of all, that the wording of Art. 11(1) of the Competition law is almost identical to that of Art. 101(1) TFEU and that the interpretation of Art. 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 Art. 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 Judgment of the CJEU (Fourth Chamber) of 21 July 2016, SIA 'VM Remonts' (formerly SIA' DIV un KO') and Others v. Konkurences padome, Case C-542/14, ECLI:EU:C:2016:578. According to the settled case law of the Court, "it is clearly in the interest of the European Union that, 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, para. 18; Judgment of the CJEU (First Chamber), 4 December 2014, FNV. Kunsten Informatie en Media v. Staat der Nederlanden, Case C 413/13, EU:C:2014:2411, para. 18; Judgment of the CJEU (Fourth Chamber) of 26 November 2015, SIA "Maxima Latvija" v. Konkurences padome, Case C 345/14, EU:C:2015:784, p. 12).

6 For more details see Nagy, 2021, p. 157.

7 See Dömötörfy, Kiss and Firniksz, 2019, p. 32.

8 Opinion of Advocate General Bobek delivered on 5 September 2019, Hungarian Competition Authority (Gazdasági Versenyhivatal) v. Budapest Bank Nyrt., Case C-228/18, ECLI:EU:C:2019:678, para. 46 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CC0228&from=EN.

9 Judgment of the CJEU (Third Chamber), 11 September 2014, Groupement des cartes bancaires (CB) v. European Commission, Case C-67/13 P, ECLI:EU:C:2014:2204.

of competition by object must be interpreted restrictively.[10] 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,[11] circumstances to be assessed[12] 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*[13] and *MIF* cases.[14]) 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)[15] 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.[16] 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* (emphasis mine)—are sufficiently harmful that they amount to a 'restriction of competition by object.'[17] 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 in this way reveals a sufficient degree of harm.[18] In this context, the European Court of Justice emphasizes 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

10 Ibid. para. 58.
11 Ibid. para. 53. "According to the case law of the Court, 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' in the meaning of Art. 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."
12 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.
13 Judgment of the CJEU (Fourth Chamber) of 30 January 2020, Generics (UK) Ltd and Others v. Competition and Markets Authority, Case C-307/18, ECLI:EU:C:2020:52, para. 104.
14 Judgment of the CJEU (Fifth Chamber) of 2 April 2020, Hungarian Competition Authority (Gazdasági Versenyhivatal) v. Budapest Bank Nyrt. and Others,Case C-228/18, ECLI:EU:C:2020:265, para. 76.
15 CJEU Judgment No. C-32/11 Hungarian Competition Authority v. Allianz Hungária Biztosító and Others, para. 34.
16 Judgment of the CJEU (Third Chamber), 11 September 2014, Groupement des cartes bancaires (CB) v. European Commission, Case C-67/13 P, ECLI:EU:C:2014:2204.
17 CJEU Judgment No. C-32/11 Hungarian Competition Authority v. Allianz Hungária Biztosító and Others, para. 46.
18 Judgment of the CJEU (Third Chamber), 11 September 2014, Groupement des cartes bancaires (CB) v. European Commission, Case C-67/13 P, ECLI:EU:C:2014:2204, para. 51.

conduct constitutes a restriction by object, since it may also take place on a related market other than the relevant market.[19] 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 that 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.[20]

Based on the CB case (one year later), the European Court of Justice also pointed out in the Romanian *ING Pensii* case the importance of placing the restriction of competition into appropriate market context to determine if the restriction is can be regarded as 'by object':

> "The purpose of the bilateral agreements to share duplications was to affiliate the persons concerned to a limited group of operators, contrary to the statutory rules applicable, and thus to the detriment of other companies operating in the economic sector concerned in the main proceedings."[21]

The Court concluded in this case that due to the fact that the agreement concerned constitute agreements with an anti-competitive object, the number of clients affected by such an agreement is irrelevant for the purpose of assessing the requirement regarding the restriction of competition in the internal market.[22]

2.1.3. Hungarian MIF *Case: The New Age Does Exist*

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.

After such antecedents, the other Hungarian case was ruled upon by the European Court of Justice on April 2, 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[23] and that the conduct in question must be placed in

19 Ibid. paras. 77–78.

20 Judgment of the CJEU (Fourth Chamber) of 30 January 2020, Generics (UK) Ltd and Others v. Competition and Markets Authority, Case C-307/18 , ECLI:EU:C:2020:52, para. 104.

21 Judgment of the CJEU (Second Chamber) of 16 July 2015, ING Pensii, Societate de Administrare a unui Fond de Pensii Administrat Privat SA v. Consiliul Concurenței, Case C-172/14, ECLI:EU:C:2015:484, para. 37.

22 Ibid. para. 56.

23 Judgment of the CJEU (Fifth Chamber) of 2 April 2020, Hungarian Competition Authority v. Budapest Bank Nyrt. and Others, Case C-228/18, ECLI:EU:C:2020:265, para. 54.

a market context in which it must be able to demonstrate that there was a restriction of competition with a sufficient degree of harm.[24] 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:

> "It is likewise apparent from the wording of Art. 101(1)(a) TFEU and, more specifically, from the words 'in particular' that, as has been stated in para. 54 of the present judgment, the types of agreements mentioned in Art. 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 paras. 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 neutralized one aspect of competition between two card payment systems."[25]

Thus, in the MIF case, the Court of Justice made it clear that a practice either succeeds in falling in the restriction by object category[26] 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 behavior is restriction by object because it reaches the experiential degree of harm of the classical type.[27] It is therefore no coincidence that the extension of the restriction by object category and the assessment of behaviors 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.[28] 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.[29] 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

24 Ibid. paras. 35, 51, 52, 54 and 80.
25 Ibid. para. 63.
26 Ibid. para. 62: 'MIF Agreement may be regarded as falling in the scope of indirect price fixing in that it indirectly determined the service charges.'
27 Ibid. para. 63: 'In addition, it is likewise apparent from the wording of Art. 101(1)(a) TFEU and, more specifically, from the words 'in particular' that, as has been stated in para. 54 of the present judgment, the types of agreements mentioned in Art. 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 paras. 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.'
28 Ibid. paras. 51, 52 and 59.
29 Ibid. para. 76.

of competition.[30] Based on the above, there is therefore sufficient experience with the categories already known as restriction by object.[31] With non-existent types of market behavior, this experience must be gained from an examination of whether the conduct in question is, by its nature, sufficiently harmful to the proper functioning of competition.[32]

2.2. Clarification of Further Aspects of Cartel Infringements

In a Slovak case, the Court had the opportunity to clarify several aspects of cartel infringements.[33] The EUCJ confirmed that it is for public authorities and not private undertakings to ensure compliance with statutory requirements.[34] Therefore, there is no relevance to the question of whether the agreement constitutes an 'by object' infringement if it is apparent that the agreement entered into by the specific banks concerned had as its object the restriction of competition, and that none of the banks had challenged the legality of their competitor's business before they were investigated in the case.[35] The EUCJ clarified that the application of Art. 101 TFEU does not require to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who is authorized to act on behalf of the undertaking is sufficient.[36]

The EUCJ also confirmed that the application of Art. 101(3) TFEU requires that the four conditions decided in that provision must all be satisfied and proved.[37] In this regard, the EUCJ stated that the agreement at issue does not appear to meet the third condition (indispensability), since the proportional reaction would have been to lodge a complaint with the competent authorities and not to take it upon themselves to eliminate the competing undertaking from the market.[38]

3. Relationship between National and EU Competition Law

Since 2004, Romanian, Hungarian, Czech, Polish, and Slovak cases have given the EU Court of Justice the opportunity in several preliminary ruling procedures to clarify in detail the relationship between Member States and EU competition law.

30 Ibid.
31 Ibid. para. 36.
32 Ibid. para. 79.
33 Judgment of the CJEU (Tenth Chamber) 7 February 2013, Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a.s, Case C-68/12, ECLI:EU:C:2013:71.
34 Ibid. para. 20.
35 Ibid. paras. 19 and 21.
36 Ibid. para. 25.
37 Ibid. para. 31.
38 Ibid. para. 35.

3.1. Parallel Application of National and European Competition Law

The European Court of Justice in the Czech *Toshiba*[39] and Slovak *Telekom*[40] cases examined in detail the issue of the parallel application of European competition law by the European Commission and the Member States competition authorities. In this regard, Art. 11 of Regulation 1/2003 states, in the first sentence of para. 6, the following rule: 'The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Arts. 81 [EC] and 82 [EC].'

3.1.1. Overlap Shall Relate to the Same Alleged Infringements

According to the EUCJ the national competition authorities are relieved of their competence to apply Arts. 101 and 102 TFEU when the Commission initiates proceedings for the purposes of adopting a decision finding an infringement of those provisions insofar as that formal act relates to the same alleged infringements of Arts. 101 and 102 TFEU, committed by the same undertaking on the same product market and the same geographical market or during the same period as those concerned by the proceeding previously brought by those authorities.[41]

3.1.2. Loss of Competence Does Not Extend to Reviewing the National Court

The EUCJ emphasized in its judgment in the Slovak *Telekom* case that

> "The 'loss of competence' provided for in Art. 11(6) of Regulation 1/2003 does not extend to courts of the Member States insofar as they act as review courts in respect of those decisions. By contrast, it applies in situations where, pursuant to the applicable national law, an authority brings an action before a judicial authority that is separate from the prosecuting authority. In such a situation and where the conditions of Art. 11(6) of Regulation 1/2003 are met, that authority must withdraw its claim before the judicial authority and bring the national proceedings to an end."[42]

3.1.3. National Competition Law No Longer Applies after the Commission Initiates Proceedings

The EUCJ added that the national competition authorities can no longer apply EU competition law alone, but must also apply part of their domestic competition law once the commission initiates proceedings for the adoption of a decision under Chapter

39 Judgment of the CJEU (Grand Chamber) 14 February 2012, Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže, Case C-17/10, ECLI:EU:C:2012:72.
40 Judgment of the CJEU (Eighth Chamber) of 25 February 2021, Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky, Case C 857/19, ECLI:EU:C:2021:139.
41 Ibid. para. 38.
42 Ibid. para. 24.

III of Regulation 1/2003.[43] The reason is that Art. 11(6) of Regulation 1/2003 is closely connected in terms of its content with Art. 3(1)[44] of the same regulation.[45] According to EUCJ the parts of national competition law which remain applicable are mentioned in Art. 3(2) of Regulation 1/2003 which states that the national competition authorities may implement stricter national laws which prohibit or sanction 'unilateral conduct engaged in by undertakings.'[46] However, the national competition authority is not authorized to apply Art. 101 TFEU or corresponding national law, where the commission has opened a proceeding for the adoption of a decision in application of Chapter III of that regulation.[47]

Although the Czech competition authority opened proceedings in the specific case after the commission had informed it about the initiation of its own proceedings, the commission did not investigate the cartel's activities in the Czech Republic because it had been operating mostly before May 1, 2004 (when the Czech Republic acceded to the EU). In this case, therefore, the prohibition of the parallel application of national law—in the absence of overlap over time—has not arisen. In addition, Regulation 1/2003 prohibiting parallel proceedings was not applicable for the period before its entry into force (the date of accession of the Czech Republic to the EU).[48]

3.1.4. Commission's Procedures Do Not Permanently Remove the National Competition Authorities' Power

The EUCJ stated that commission's procedures do not permanently and definitively remove the national competition authorities' power to apply national legislation on competition matters.[49] According to the EUCJ, the power of the national competition authorities is restored once the proceeding initiated by the commission is concluded.[50] Of course, by virtue of Art. 16(2) of Regulation 1/2003, where the competition authorities of the Member States' rule on agreements, decisions, or practices falling

43 Judgment of the CJEU (Grand Chamber) 14 February 2012, Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže, Case C-17/10, ECLI:EU:C:2012:72, para. 74.
44 'Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices in the meaning of Art. 81(1) [EC] which may affect trade between Member States in the meaning of that provision, they shall also apply Art. 81 [EC] to such agreements, decisions or concerted practices.' See: Art. 3(1) of Regulation No. 1/2003.
45 Judgment of the CJEU (Grand Chamber) 14 February 2012, Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže, Case C-17/10, ECLI:EU:C:2012:72, para. 74.
46 Ibid. para. 76.
47 Ibid. para. 78; see in this regard Art. 3(1) of Regulation 1/2003: 'The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition in the meaning of Art. 81(1) [EC], or which fulfil the conditions of Art. 81(3) [EC] which are covered by a Regulation for the application of Art. 81(3) [EC]. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.'
48 Ibid. para. 67.
49 Ibid. para. 79.
50 Ibid. para. 80.

in Art. 101 TFEU or 102 TFEU, which already form the subject matter of a commission decision, they cannot take decisions which would contradict the decision adopted by the commission. The EUCJ emphasized that the same rules must apply *a fortiori* where the national competition authorities intend to apply national competition law.[51]

3.1.5. The Ne bis in idem Principle

It is apparent from the Court's settled case law that the principle *ne bis in idem* must be observed in proceedings that may lead to the imposition of fines under competition law.[52] The EUCJ held that the *ne bis in idem* principle precludes an undertaking being found liable or proceedings being brought against it afresh on the grounds of anti-competitive conduct for which it has been penalized or declared not liable by an earlier decision that can no longer be challenged.[53] It follows that the application of the principle *ne bis in idem* in proceedings under competition law is subject to a twofold condition: first, that there is a prior definitive decision (the *'bis'* condition) and, second, that the prior decision and the subsequent proceedings or decisions concern the same anticompetitive conduct (the *'idem'* condition).[54] According to EUCJ, the facts, the offender and the legal interest protected must be the same in the two cases.[55] In the Czech *Toshiba* case, one of the conditions thus decided—identity of the fact—was lacking because the anti-competitive effects of the cartel occurred in the Czech Republic prior to its accession to the European Union, which were not penalized by the Commission.[56] In the Slovak *Telekom* case, the principle *ne bis in idem* was not applicable since the sub-condition that the facts must be the same was not met and the '*idem*' condition was consequently not satisfied.[57]

In 2019, a Polish case raised the issue of whether the principle of *ne bis in idem* enshrined in Art. 50 of the Charter must be interpreted as precluding a national competition authority from finding an undertaking in a single decision for an infringement of national competition law and of Art. 102 TFEU. According to the EUCJ the rationale behind the principle of *ne bis in idem* that, as a corollary to the

51 Ibid. para. 86.

52 Judgment of the CJEU (Eighth Chamber) of 25 February 2021, Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky, Case C 857/19, ECLI:EU:C:2021:139, para. 41.

53 Judgment of the CJEU (Fourth Chamber) of 3 April 2019, Powszechny Zakład Ubezpieczeń na Życie S.A. v. Prezes Urzędu Ochrony Konkurencji i Konsumentów, Case C-617/17, ECLI:EU:C:2019:283, para. 28.

54 Judgment of the CJEU (Eighth Chamber) of 25 February 2021, Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky, Case C 857/19, ECLI:EU:C:2021:139, para. 42.

55 Judgment of the CJEU (Fifth Chamber) of 7 January 2004, Aalborg Portland A/S (C-204/00 P), Irish Cement Ltd (C-205/00 P), Ciments français SA (C-211/00 P), Italcementi—Fabbriche Riunite Cemento SpA (C-213/00 P), Buzzi Unicem SpA (C-217/00 P) and Cementir—Cementerie del Tirreno SpA (C-219/00 P) v. Commission of the European Communities, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P. ECLI:EU:C:2004:6, para. 338.

56 Judgment of the CJEU (Grand Chamber), 14 February 2012, Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže, Case C-17/10, ECLI:EU:C:2012:72, para. 103.

57 Judgment of the CJEU (Eighth Chamber) of 25 February 2021, Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky, Case C 857/19, ECLI:EU:C:2021:139, para. 45.

principle of *res judicata*, that principle aims to ensure legal certainty and fairness; in ensuring that once the person concerned has been tried and, as the case may be, punished, that person has the certainty that he or she will not be tried again for the same offence.[58] The EUCJ stated that *ne bis in idem* aims to prevent the repetition of prosecution leading to a criminal sentence unrelated to a situation in which national and EU competition law are applied in parallel in a single decision (due to the lack of the '*bis*' condition).[59] However, where the national competition authority imposes two fines in a single decision, the national competition authority must ensure that, taken together, the fines are proportionate to the nature of the infringement.[60]

3.2. Commission's Primary Roles in the Consistent Application of EU Competition Law

Following a Polish preliminary ruling, the Court had the opportunity to clarify the importance of the Commission's primary role for the proper functioning of the EU competition law regime.

According to the Art. 5 of the 1/2003 Regulation, the power of the national competition authority is limited to the adoption of a decision stating that that are no grounds for action. According to Art. 10 of the 1/2003 Regulation, the Commission may decide that Arts. 101 TFEU and 102 TFEU are not applicable. Recital 14 in to the 1/2003 Regulation states that the Commission may adopt such a decision of a declaratory nature 'in exceptional cases.' The purpose of such action, according to that recital, is 'to [clarify] the law and ensur[e] its consistent application throughout the [Union], in particular with regard to new types of agreements or practices that have not been settled in the existing case law and administrative practice.'[61] The EUCJ emphasized that "empowerment of national competition authorities to take decisions stating that there has been no breach of Art. 102 TFEU would call into question the system of cooperation established by the regulation and would undermine the power of the Commission."[62] According to EUCJ,

> "Such a 'negative' decision on the merits would risk undermining the uniform application of Arts. 101 TFEU and 102 TFEU, which is one of the objectives of the regulation, since such a decision might prevent the Commission from finding subsequently that the practice in question amounts to a breach of those provisions of European Union law."[63]

58 Judgment of the CJEU (Fourth Chamber) of 3 April 2019, Powszechny Zakład Ubezpieczeń na Życie S.A. v. Prezes Urzędu Ochrony Konkurencji i Konsumentów, Case C-617/17, ECLI:EU:C:2019:283, para. 33.
59 Ibid. para. 34.
60 Ibid. paras. 38–39.
61 Recital 14. of Regulation No. 1/2003.
62 Case C-375/09 Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o, devenue Netia SA. ECLI:EU:C:2011:270, para. 27.
63 Ibid. para. 28.

Art. 12 para. (1) of Directive 1/2019/EU also confirmed that national competition authorities' decision to make commitments offered by undertakings or associations of undertakings binding, shall conclude that there are no longer grounds for action by the national competition authority concerned.

3.3. Application of European Competition Rules in National Competition Law Procedures

In the Hungarian *Allianz* case, the EU Court of Justice confirmed that it has jurisdiction to give preliminary rulings on questions concerning European Union law in situations where the facts of the cases being considered by the national courts were outside the direct scope of European Union law, but where those provisions had been rendered applicable by domestic law, which adopted, for internal situations, the same approach as that provided for under European Union law.[64] The reason behind that it is clearly in the interest of the European Union that, to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.

The Court has already pointed out that a Commission notice, such as the *de minimis* notice, is not binding on the Member States.[65] The EUCJ in a Romanian case stated that determination of the limitation rules for the imposition of penalties by national competition authorities is a matter for Member States, subject to compliance with the principles of equivalence and effectiveness.[66]

3.4. Effective Application of EU Competition Law in the Member States

According to Art. 4(3) TEU, Member States are obliged not to detract, by means of national legislation, from the full and uniform application of EU law; nor may they introduce or maintain in force measures that may render ineffective the competition rules applicable to undertakings.[67] However, according to the EUCJ it is compatible with EU law to lay down reasonable time limits for the imposition of penalties by national competition authorities in the interests of legal certainty, which protects both the undertakings concerned and those authorities.[68] EUCJ stated in the Romanian *Whiteland* case that national rules laying down limitation periods must also ensure the effective and efficient application of Arts. 101 and 102 TFEU, to safeguard the public interest in preventing the operation of the internal

64 CJEU judgment no. C-32/11 Hungarian Competition Authority v. Allianz Hungária Biztosító and Others, para. 20.

65 Judgment of the CJEU (Second Chamber) 13 December 2012, Expedia Inc. v. Autorité de la concurrence and Others, Case C-226/11, ECLI:EU:C:2012:795, para. 29.

66 Judgment of the CJEU (Second Chamber) of 21 January 2021, Consiliul Concurenței and Whiteland Import Export SRL, Case C-308/19, ECLI:EU:C:2021:47, para. 37.

67 Judgment of the CJEU (Second Chamber) of 19 March 1992, Criminal proceedings against José António Batista Morais, Case C-60/91, EU:C:1992:140, para. 11.

68 Judgment of the CJEU (First Chamber) of 17 November 2016, Stadt Wiener Neustadt v. Niederösterreichische Landesregierung, Case C-348/15, EU:C:2016:882, para. 41.

market being distorted by agreements or practices harmful to competition.[69] To determine whether national rules on limitation strike such a balance between legal certainty and effective and efficient application of Arts. 101 and 102 TFEU, all elements of those rules must be taken into consideration which may include, *inter alia*: the date from which the limitation period begins to run, the duration of that period, and the rules for suspending or interrupting it, or specific features of competition law cases and of the fact that those cases require, in principle, a complex factual and economic analysis.[70]

Therefore, according to EUCJ the national legislation, totally prohibiting the limitation period from being interrupted by action taken subsequently during the investigation, appears likely to compromise the effective application of the rules of EU competition law by national competition authorities, in that interpretation could present a systemic risk that acts constituting infringements of that law may go unpunished.[71] The EUCJ stated that EU competition law cases require, in principle, a complex factual and economic analysis. Thus, in a significant number of cases involving a high degree of complexity, such subsequent action, which necessarily extends the duration of the proceedings, might prove necessary.[72]

In this context, it should be noted that the Hungarian Supreme Court in 2018 in its judgment[73] in the concrete cartel case, took the view that the GVH could not involve a cartelist into ongoing proceedings if in the time of its involvement the five years passed since the end of the infringement, even if the proceedings discovered the cartel had already been initiated in the five years from the end of the infringement. In my view, this interpretation of limitation is also too strict and does not consider the complex factual and economic analysis of competition law cases, because, given the secret nature of cartels, it is highly likely that other members of the cartel discovered after the initiation of the preceding during the subsequent inquiry. This strict interpretation according to which, the initiation of proceedings would not interrupt the limitation period related to cartels who are not yet involved in the proceeding in the time of its initiation, could present a systemic risk that acts constituting infringements of that law may go unpunished.

69 Judgment of the CJEU (Second Chamber) of 21 January 2021, Consiliul Concurenței and Whiteland Import Export SRL, Case C-308/19, ECLI:EU:C:2021:47, para. 49.
70 Judgment of the CJEU (Second Chamber) of 28 March 2019, Cogeco Communications Inc v. Sport TV. Portugal SA and Others, Case C-637/17, EU:C:2019:263, para. 46.
71 Judgment of the CJEU (Second Chamber) of 21 January 2021, Consiliul Concurenței and Whiteland Import Export SRL, Case C-308/19, ECLI:EU:C:2021:47, para. 56.
72 Ibid.
73 Decision of the Supreme Court of Hungary, No. Kfv.II.37.364/2017/26, 28 February 2018.

4. Summary

The case law of the Central European EU Member States has made important contributions to the development of EU competition law through preliminary rulings in two fields.

First, the most important development is the clarification of the category of 'by object' restriction of competition, which contributed to the EU competition law in one of the most important competition law issues at the EU level due to the Hungarian cases.

Second, preliminary ruling questions referred from Central European countries have provided an opportunity for the EU Court of Justice to clarify the relationship between national and EU competition law. In this context, it should be emphasized, inter alia, that according to EUCJ, the national competition authorities can no longer apply not only EU competition law but also their domestic competition law once the Commission initiates proceedings. The EUCJ also stated that Commissions' procedures do not permanently and definitively remove the national competition authorities' power to apply national legislation on competition matters. According to the EUCJ the power of the national competition authorities is restored once the proceeding initiated by the Commission is concluded. The EUCJ stated that *ne bis in idem* bears no relation to the situation in which national and EU competition law are applied in parallel in a single decision (due to the lack of the *'bis'* condition). EUCJ emphasized in the Romanian *Whiteland* case that national rules laying down limitation periods must also ensure the effective and efficient application of Arts. 101 and 102 TFEU, to safeguard the public interest in preventing the operation of the internal market being distorted by agreements or practices harmful to competition.

Bibliography

Dömötörfy, B., Kiss, B.S., Firniksz, J. (2019) 'Látszólagos dichotómia? Versenykorlátozó cél és hatás vizsgálata az uniós versenyjogban, különös tekintettel a Budapest Bank ügyre' [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., Berezvai Zombor (eds.) *Verseny és Szabályozás.* 12th edn. Budapest: MTA KRTK Közgazdaságtudományi Intézet, pp. 26–49. [Online]. Available at: https://kti.krtk.hu/wp-content/uploads/2020/03/02_DomotorfyBT-KissBS-FirnikszJ.pdf (Accessed: 28 October 2021).

Nagy, Cs. I. (2021) *The dogmatic system of cartel law.* Budapest: HVG-ORAC.

Legal Sources

Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition decided in Arts. 81 and 82 of the Treaty. OJ L 1, 4.1.2003.

Decision of the Supreme Court of Hungary, No. Kfv.II.37.364/2017/26., 28 February 2018.

Hungarian Competition Authority Decision No. VJ/51-184/2005.

Judgment of the CJEU (Second Chamber) of 19 March 1992, Criminal proceedings against José António Batista Morais., Case C 60/91, EU:C:1992:140.

Judgment of the CJEU (Fifth Chamber) of 7 January 2004, Aalborg Portland A/S (C-204/00 P), Irish Cement Ltd (C-205/00 P), Ciments français SA (C-211/00 P), Italcementi–Fabbriche Riunite Cemento SpA (C-213/00 P), Buzzi Unicem SpA (C-217/00 P) and Cementir–Cementerie del Tirreno SpA (C-219/00 P) v. Commission of the European Communities, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P. ECLI:EU:C:2004:6.

Judgment of the CJEU (Grand Chamber) 14 February 2012, Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže, Case C-17/10, ECLI:EU:C:2012:72.

Judgment of the CJEU (Second Chamber), 13 December 2012, Expedia Inc. v Autorité de la concurrence and Others, Case C-226/11, ECLI:EU:C:2012:795.

Judgment of the CJEU (Tenth Chamber) 7 February 2013, Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a.s., Case C-68/12, ECLI:EU:C:2013:71.

Judgment of the Court (First Chamber), 14 March 2013, Allianz Hungária Biztosító Zrt. and Others v. Hungarian Competition Authority (Gazdasági Versenyhivatal), Case C-32/11, ECLI:EU:C:2013:160.

Judgment of the CJEU (Third Chamber), 11 September 2014, Groupement des cartes bancaires (CB) v. European Commission, Case C-67/13 P., ECLI:EU:C:2014:2204.

Judgment of the CJEU (First Chamber) 4 December 2014, FNV Kunsten Informatie en Media v Staat der Nederlanden, Case C 413/13, EU:C:2014:2411.

Judgment of the CJEU (Second Chamber) of 16 July 2015, ING Pensii, Societate de Administrare a unui Fond de Pensii Administrat Privat SA v. Consiliul Concurenței, Case C-172/14, ECLI:EU:C:2015:484.
Judgment of the CJEU (Fourth Chamber) of 26 November 2015, SIA "Maxima Latvija" v. Konkurences padome, Case C 345/14, EU:C:2015:784.
Judgment of the Court (Fourth Chamber) of 21 July 2016, SIA 'VM Remonts' (formerly SIA 'DIV un KO') and Others v. Konkurences padome, Case C-542/14, ECLI:EU:C:2016:578.
Judgment of the CJEU (Second Chamber) of 28 July 2016, Hungarian Competition Authority (Gazdasági Versenyhivatal) v. Siemens Aktiengesellschaft Österreich, Case C-102/15, ECLI:EU:C:2016:607.
Judgment of the CJEU (First Chamber) of 17 November 2016, Stadt Wiener Neustadt v. Niederösterreichische Landesregierung, Case C 348/15, EU:C:2016:882.
Judgment of the CJEU (Second Chamber) of 28 March 2019, Cogeco Communications Inc v. Sport TV Portugal SA and Others, Case C 637/17, EU:C:2019:263.
Judgment of the CJEU (Fourth Chamber) of 3 April 2019, Powszechny Zakład Ubezpieczeń na Życie S.A. v. Prezes Urzędu Ochrony Konkurencji i Konsumentów, Case C-617/17, ECLI:EU:C:2019:283.
Judgment of the CJEU (Sixth Chamber) of 29 July 2019, Tibor-Trans Fuvarozó és Kereskedelmi Kft. v. DAF TRUCKS N.V., Case C-451/18, ECLI:EU:C:2019:635.
Judgment of the CJEU (Fourth Chamber) of 30 January 2020, Generics (UK) Ltd and Others v. Competition and Markets Authority, Case C-307/18, ECLI:EU:C:2020:52.
Judgment of the CJEU (Fifth Chamber) of 2 April 2020, Hungarian Competition Authority v. Budapest Bank Nyrt. and Others, Case C-228/18, ECLI:EU:C:2020:265.
Judgment of the CJEU (Second Chamber) of 21 January 2021, Consiliul Concurenței and Whiteland Import Export SRL, Case C-308/19, ECLI:EU:C:2021:47.
Judgment of the CJEU (Eighth Chamber) of 25 February 2021, Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky, Case C 857/19, ECLI:EU:C:2021:139.
Opinion of Advocate General Bobek delivered on 5 September 2019, Hungarian Competition Authority (Gazdasági Versenyhivatal) v. Budapest Bank Nyrt., Case C-228/18, ECLI:EU:C:2019:678.