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OSTENSIBLE DICHOTOMY?

By object and by effect restraints in EU competition law, with special regard to the *Budapest Bank case*

The purpose of our study is to examine the prohibition of anticompetitive agreements in EU competition law. Our analysis focuses on the frontier between by object and by effect restraints. After reviewing the development of the definitions of by object – by effect restrictions in EU case law, the paper shortly introduces the main definitions of anticompetitive agreement categories in the USA. The article provides a detailed analysis of the Opinion of Advocate General Bobek in the *Budapest Bank* case and the two-step test recommended in the Opinion. After a comparison of the aforementioned two-step test with US experience, our study summarizes our views about the ostensible nature of the dichotomy.

INTRODUCTION

EU competition law, similarly to its American counterpart, is a regime with a desire for constant or at least long-lasting regulation. The substantive legal rules that prohibit anticompetitive agreements[1] affecting trade between Member States, now a core element of EU competition policy, were already present in the 1957 Treaty of Rome, and they have been preserved, without major text changes, as Article 101 of the Treaty on the Functioning of the European Union (TFEU) since the Treaty of Lisbon (*Tóth* [2018] p. 60., *Szilágyi* [2007] pp. 146–147.). Article 101(1) TFEU is a general clause that prohibits those agreements and concerted practices that are anticompetitive by object or effect.

> • "The following shall be prohibited as incompatible with the internal market: 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 …" (Article 101(1) TFEU.)

By reading the text of the Article, one should almost immediately ponder on the meaning of and difference between anticompetitive object and effect. The general

[1] For the sake of clarity, in the present article we use the word 'agreement' as a single term for agreements and concerted practices.

clauses of TFEU have the ability of constant adaption, the downside being their reluctance to provide detailed answers by themselves. Article 267 a) TFEU stipulates that the Court of Justice of the European Union (CJEU) has exclusive jurisdiction in the interpretation of the terms of anticompetitive object and effect as they are derived from the text of the Treaties.

The CJEU was the first to hold[2] that the relationship between anticompetitive object and effect is not cumulative but alternative, from which it developed the consistent case law that did not require the establishment of anticompetitive effects if an agreement had already been found to be restrictive by object, because in such a case anticompetitive effects would be obvious, and the agreement would qualify as *prima facie* anticompetitive.[3] Consequently,

- "establishing the object of an agreement is an exercise that differs from the evaluation of its impact on competition" (*Ibáñez Colomo–Lamadrid* [2016] p. 16).

Nevertheless, the apparently straightforward dichotomy of object and effect and the relatively strict distinction between the two notions, confirmed by earlier decisions, have been fairly confounded by the CJEU'S case law of the last decade. The extent and depth of the examination of an agreement's economic background, as well as their actual or potential economic effects have been taken under consideration. The CJEU's latest case law has suggested a possible expansion of by object restrictions (*Whish–Bailey* [2018] p. 125), which ultimately gave rise to concerns that decisions made by the European Commission (Commission) or national competition authorities would consider more agreements as restrictive by object, whereas their factual circumstances would reasonably necessitate an effects test.

Intentions to resolve the above situation can be found in AG Michal Bobek's Opinion, submitted in the *Budapest Bank* case (Opinion).[4] The two-step test, presented by the Opinion, aims to synthetize the substantive legal requirements to distinguish by object restrictions, that is, the elements of a case that should fall under scrutiny and the order of investigation, executed by the competition authorities in the first place and the courts in the course of judicial review.

In the present article we argue that the object analysis established by the Opinion does not bring back the former strict dichotomy of object and effect, instead it moves toward an approach that designates the terms of anticompetitive object and effect as the extremes of a continuum. In this model, the area between the extremes

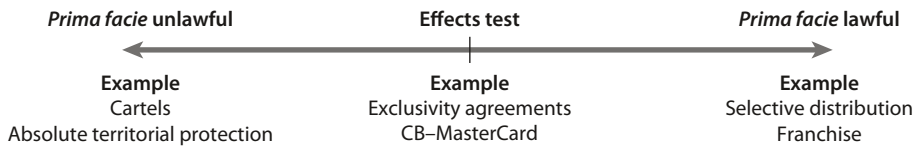
[2] Case C-56/65, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH,* EU:C:1966:38, para 249.

[3] See *Ibáñez Colomo* [2019] p. 3, which considers cartel infringements as *prima facie* breaches of competition law.

[4] Case C-228/18, *Budapest Bank and Others v Gazdasági Versenyhivatal,* Opinion of AG Bobek, ECLI:EU:C:2019:678. We note that since the original publication of the present article in Hungarian, the judgment of the CJEU has also been published (ECLI:EU:C:2020:265).

represents an intermediate category, where the extent of economic analysis will be dependent on the appreciation of competition authorities and courts.

This continuum can also be viewed in *figure* below.



Source: Ibáñez Colomo [2019] p. 3.

This extended discretion will not only require the respect for client guarantees during competition proceedings and judicial review more than before, but it also has a close resemblance to the case law and policy developed under the US antitrust regime.

Although antitrust law in the United States stands on the ground of single regulation from its beginnings, the notion of *per se* illegality and the *rule of reason* test might also give the first impression of a dichotomy. This first impression is also an ostensible one, however, on account of the so-called *quick look* test, widely recognized in American antitrust literature, which is distinguished from the *rule of reason* principle, and because the rule of reason test itself does not offer clear-cut requirements for the depth and strictness of legal and economic analysis (*Markham* [2012] p. 594).

Therefore, in our article, we argue for the existence of relevant similarities that can be identified between the two-step test of the Opinion and the regime developed by US antitrust case law, which might as well be the takeaways for future European competition enforcement.

THE EVOLUTION OF THE ASSESSMENT OF BY OBJECT RESTRICTIONS UNDER EU LAW

Albeit the wording of Article 101(1) TFEU has remained basically unchanged since its creation, the relationship between anticompetitive object and effect – due to the conjunction 'or' used in the text – prompted questions early in the days of European integration, and the CJEU held in 1966 – in the landmark case of *LTM*[5] – that the conjunction 'or' between object and effect means that these are not cumulative but alternative requirements.

EU case law has been considerably expanded over the decades on the issue of distinction between object and effect. Relevant judgments can be divided into three categories, taking into account the generality or singularity of their statements. In

[5] Case C-56/65, supra note 2, p. 249.

the first category are elements of the case law that concentrate on defining the notion of 'anticompetitive object' as the object of judicial assessment. In the second category one can place relevant judgments that concern the extent and depth of scrutiny, the methodology of qualifying agreements as restrictive by their object. In the third category are the agreements that are considered to be restrictive by object in the courts' view, given their factual circumstances. It might also be possible to describe the above categories as elements of the case law that attempt to answer the following questions:
1st category: What is the definition of anticompetitive object?
2nd category: What must be examined in order to establish a by object restriction?
3rd category: Which agreements can safely be considered as restrictive by object?

Naturally, the contents of the above categories are interrelated and they cannot be distinguished in each case as it is obvious that a judgment that falls into the 3rd category might also be the source of general remarks from the CJEU on the nature of anticompetitive object and the methodology of investigation. Furthermore, upon close scrutiny one might have the impression that the 1st and 3rd categories are dependent on the extent and depth of investigation, more specifically, the 2nd category of the case law.

The case law of the CJEU and the General Court of the European Union (GC) leaves only a narrow margin of appreciation on the definition of anticompetitive effect. According to the CJEU,

- "certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition."[6]

It is the very nature of the agreement that must be proven by the competition authority as being injurious and restrictive to competition. It is also clear that the intention of the parties cannot serve as an indication to the nature of the agreement (although it can also be taken into account), because the nature of the agreement is an objective element that must be examined in context.[7]

Within the 3rd category are the anticompetitive agreements that are part of the 'object box' established by *Whish–Bailey* [2018] (p. 132). Accordingly, it is established that

[6] Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd. and Barry Brothers (Carrigmore) Meats Ltd.,* ECLI:EU:C:2008:643, para. 17; Case C-8/08, *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-04529, para. 29; Case C-226/11, *Expedia Inc. v Autorité de la concurrence and Others,* EU:C:2012:795, para. 36; Case C-67/13, *Groupement des Cartes Bancaires v Commission,* EU:C:2014:2204, para. 50.

[7] Case C-32/11, *Allianz Hungária and Others v Gazdasági Versenyhivatal,* ECLI:EU:C:2013:160, paras. 36–37; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission,* EU:C:2009:610, para. 58.

- "certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered by their nature as likely to have negative effects, in particular on the price, quantity or quality of the goods and services, so that it may be considered redundant, for the purposes of applying Article 101(1) TFEU, to prove that they have actual effects on the market."[8]

Pursuant to the case law, the following are considered to be restrictive by object:
– horizontal price fixing,[9]
– market sharing,[10]
– export bans,[11]
– agreements to reduce output and production capacity,[12]
– exchange of information between competitors[13] or
– vertical price fixing.[14]

Nevertheless, Bailey and Whish acknowledge themselves that the contents of the 'object box' cannot be defined in a clear-cut way, and that infringement types caught because of their anticompetitive object may increase as the markets change and new forms of anticompetitive practices are recognized.[15] In certain cases, where the anticompetitive behaviour of undertakings can be considered as restrictive, factual background may ultimately alter qualification. Therefore, the economic background of agreements must always be examined (*Whish–Bailey* [2015] pp. 131–132).

The 1st and 3rd categories are undoubtedly connected to the uncertainty concerning the methodology of the object test, with regards to the object, process and depth of this test. The solution to this problem would try to distinguish the object test from the effects test. In the often-cited *LTM* case, the CJEU held that the object of the agreement should be examined in the first place, in the economic context in which it is to be applied.[16] If

- "does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition

[8] Case C-345/14, *SIA Maxima Latvija v Konkurences Padome,* ECLI:EU:C:2015:784, para. 19.
[9] Case C-345/14, para. 22; Case C-67/13, para. 51; Case T-374/94, *European Night Services and Others v Commission* [1998] ECR II-03141, para. 136.
[10] Case T-374/94, supra note 9, para. 136.
[11] Ibid.
[12] Case C-209/07, supra note 6.
[13] Case C-8/08, supra note 6.
[14] Case C-243/83, *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 02015.
[15] It is interesting to note that *Whish* [2010] argues for the continuously refined and narrowed object box in the sixth edition of the cited book, pointing to the *Visa International, Erauw-Jacquery, Javico* and *GlaxoSmithKline* cases (*Whish* [2010] p. 120.)
[16] Case C-56/65, supra note 2, p. 249; see also Joined Cases C-96-102/82, C-104/82, C-105/82, C-108/82 and C-110/82, *IAZ International Belgium and Others v Commission* [1983] ECR 03369, para. 35.

> it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent."[17]

In the *BIDS* case, the CJEU applied the above to find the agreement made between the members of *Beef Industry Development Society* (BIDS) reducing beef production capacity by 25 percent and applying incentives that encourage competitors to exit from the market to be restrictive by object.[18] According to the CJEU, the infringement committed by BIDS is prohibited even if the undertakings entered into the agreement without the subjective intention of limiting competition, in order to remedy the negative effects of the economic crisis suffered by the Irish beef industry. The CJEU also denied to accept BIDS's argumentation that called for a narrow interpretation of by object infringements,[19] which might be regarded as a foreshadowing of its future case law.

In the *T-Mobile Netherlands* case, the CJEU took a step towards expanding the definition of anticompetitive object. The background of the case is that the Dutch mobile service operators had started negotiations on the reduction of standard dealer remunerations for postpaid subscriptions. The CJEU, after a summary of the developments in *BIDS* and former case law, held that in the case of a concerted practice such as the exchanges of information, it is not necessary to carry out an effects test. In order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. According to the CJEU, the concerted practice at hand, with regard to its specific legal and economic circumstances, was capable of resulting in the prevention, restriction or distortion of competition.[20]

A few years later, in the Hungarian *Allianz* case, the CJEU had to decide whether the vertical agreements between the Hungarian the national association of authorised car dealers (GÉMOSZ) and certain insurance companies were anticompetitive by object. Similarly to the *BIDS* and *T-Mobile Netherlands* cases, the CJEU accepted an expanded interpretation. While repeating the doctrines already stated in *LTM*, the CJEU amended it by holding that in the economic and legal context of the agreement,

- "it is also appropriate 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."[21]

[17] Case C-56/65, supra note 2, p. 249; Case C-209/07, supra note 6, para. 15.
[18] Case C-209/07, supra note 6, para. 40.
[19] Ibid. paras. 21–23.
[20] Case C-8/08, supra note 6, para. 31.
[21] Case C-32/11, supra note 7, para. 36.

The CJEU also elaborated that it is necessary to take into account the fact that an agreement such as the one in the hand case at hand is likely to affect not only one, but two markets, in this case those of car insurance and car repair services, and that its object must be determined with respect to the two markets concerned.[22]

The judgment in *Allianz* acknowledged the admissibility of new factors in the object analysis (*Nagy* [2016] p. 177). Parts of this analysis mentioned by the judgment had only occurred before in cases that were related to the implementation of the effects test.[23] This might have made the impression that the object and effect analyses were obfuscated (Ibid. p. 186), which made future competition enforcement uncertain.

Assuredly, by object restrictions had facilitated compliance for undertakings by defining the absolutely and unequivocally prohibited competition infringements in a kind of 'blacklist.' Contrary to the above practice, the CJEU in *Allianz* considered a vertical agreement to be anticompetitive by object that, according to general case law, would have qualified more favourably, while, on the other hand, it automatically considered this agreement to be a more serious infringement because it had violated national regulations of the insurance (!) sector (*Komossa* [2013] pp. 418–419). In light of the preliminary judgment, the Kúria (the Hungarian Supreme Court) held that the agreement between GÉMOSZ and the insurance companies was anticompetitive by object.[24] Apparently, the contents of the 'object box' had been expanded by an ambivalent example.

The CJEU applied the precedent in *Allianz* to adjudicate the *Cartes Bancaires* case. The Commission had found that the agreements between French banking institutions that operated bank card payment systems, having as their goal to balance the financial burdens of card acquirers and card issuers, as well as to regulate acquiring and issuing activities and to combat 'free-riding' in the above system, constituted an infringement of competition by object. The GC upheld the decision, accepting the Commission's analysis.[25] According to the first-instance judicial assessment, the practice of the undertakings in question was similar to the members' of BIDS, because the agreements were essentially limiting capacity and impeding the natural development of the relevant market.[26]

The CJEU, however, set aside the GC's judgment and referred the case back to first instance for a revised procedure. It elaborated that by object infringements (contrary to the case in *Allianz*) were to be assessed in a narrow sense, and such

[22] Case C-32/11, supra note 7. para. 42.

[23] See, e.g., Case C-238/05, *Asnef-Equifax and Others v Asociación de Usuarios de Servicios Bancarios (Ausbanc),* EU:C:2006:734, para. 49. Although in the Allianz case the CJEU makes a reference to the judgment in *Expedia* (Case C-226/11, supra note 6, para. 21) as precedent, the cited paragraph is more about the examination of the appreciable effects of *de minimis* cartels than about the methodology of the object test.

[24] Judgment no. Kfv.II.37.268/2013/8. of the Kúria.

[25] Case T-491/07, *Groupement des Cartes Bancaires v Commission,* EU:T:2012:633.

[26] Ibid. paras. 197–198.

an interpretation can only be accepted in cases where an agreement reveals a sufficient degree of harm to competition that does not make it necessary to find that competition has in fact been prevented, restricted or distorted to an appreciable extent by that agreement.[27] According to the CJEU, during the object analysis, the GC did not take account of all relevant aspects of the economic or legal context in which the actual agreements had taken place. The GC should have examined, in particular, the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets.[28] Moreover, in a similar vein to the *Allianz* case, the GC should have had regard to all interactions between the relevant market and a different related market.[29] The CJEU did not find *Cartes Bancaires* to be comparable to *BIDS* because while the members of BIDS intended to facilitate the exit of competitors from the market, the GC could not lawfully demonstrate, in its assessment, similar goals of the agreements in *Cartes Bancaires* or any other type of sufficiently deleterious harm.[30]

Although the CJEU acknowledged in *Cartes Bancaires* that the object analysis required the evaluation of interactions between two-sided or multilateral markets, in light of later decisions it still remains uncertain on how deep the examination of an agreement's legal and economic context should be.

A remarkable example to the above is the *Maxima Latvija* case. Maxima Latvija is a Latvian supermarket chain that leases areas from shopping malls. In the course of a preliminary ruling procedure, the CJEU had to answer whether lease agreements that reserve to Maxima Latvija as the tenant the right to agree to the lessor letting to third parties commercial premises not let to Maxima Latvija, can qualify as a by object infringement of competition. Following the appreciation of available documents and the economic context of the case, the CJEU concluded that the lease agreements containing the above clause do not show a degree of harm with regard to competition sufficient for them to be considered to constitute a restriction of competition by object, not even if these agreements could potentially have the effect of restricting the access of Maxima Latvija's competitors to some shopping centres.[31]

Nevertheless, in the *Toshiba* case, which was related to the power transformers market, the CJEU was apparently satisfied with less extensive object analysis. In its appeal, Toshiba asserted that the GC erred in law in characterising the 'gentlemen's agreement' between market-sharing European and Japanese cartel members as a by object infringement because it did not examine if an entry to the EEA market represented an economically viable strategy for Japanese producers. Toshiba argued that the GC did not take into account the insurmountable barriers to entry to the

[27] Case C-67/13, supra note 6, para. 52.
[28] Ibid. para. 78.
[29] Ibid. para. 79.
[30] Ibid. paras. 83–86.
[31] Case C-345/14, supra note 8, paras. 15–24.

European markets, which ruled out any potential competition between Japanese and European producers.[32]

The CJEU was again reluctant to provide detailed requirements on the acceptable extent of economic analysis. It only stated that

- "[i]n respect of such agreements, the analysis of the economic and legal context of which the practice forms part may thus be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object."[33]

The CJEU thus found the existence of the gentlemen's agreement to be sufficient to provide a strong indication that competition existed between the European and the Japanese producers.[34]

The *Hoffmann-La Roche and Novartis* case[35] represented another expansion of the object box based on the evaluation of the relevant economic context. Each of the two undertakings, active in the medicinal products market, was selling two products, Lucentis and Avastin in the Italian market, both developed by the same manufacturer. Both of the products had the same active substances, but they were applied for different therapeutic purposes, oncology and ophthalmology. As both products were considered equally suitable for the treatment of certain eye diseases, the undertakings entered into a market-sharing agreement that had the purpose of producing and disseminating opinions and rumours that could give rise to public concern regarding the allegedly negative effects of Avastin, an ophthalmology product used 'off-label' for oncology purposes as well. As this was contrary to scientific opinions and data, the CJEU held that the agreement was a by object infringement as

- "in such a case, given the characteristics of the medicinal products market, it is likely that the dissemination of such information will encourage doctors to refrain from prescribing that product, thus resulting in the expected reduction in demand for that type of use. The provision of misleading information to the […] healthcare professionals and the general public, […] also constitutes an infringement of the EU rules governing pharmaceutical matters giving rise to penalties. […] In those circumstances, an arrangement that pursues the objectives described […] must be regarded as being sufficiently harmful to competition to render an examination of its effects superfluous."[36]

The judgment in *Hoffmann-La Roche and Novartis* can be regarded as an ambivalent decision because of several aspects. A main criticism of the judgment is that while

[32] Case C-373/14 P, *Toshiba Corporation v Commission,* EU:C:2016:26, paras. 30-31.
[33] Ibid. para. 29.
[34] Ibid. para. 33.
[35] Case C-179/16, *F. Hoffmann-La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato,* EU:C:2018:25, para. 93.
[36] Ibid. para. 94.

it automatically holds any agreement between competitors that have the purpose of disseminating false information as a competition infringement by its object, it fails to observe the agreement's actual effects. On the other hand, the judgment deems various aspects of the case as relevant from the view of competition law despite the fact that they are regulated by other fields of law, such as consumer protection (see, to that effect, *Nagy* [2019] pp. 6–8, for a detailed discussion).

The analysis of an agreement's object also forms a part of competition law discussions on pay-for-delay agreements. After the *Cartes Bancaires* judgment, both practitioners and theorists raised the problem of qualifying pay-for-delay agreements under the by object - by effect dichotomy (*Gallasch* [2015]), *Dömötörfy* [2015]). Pay-for-delay agreements in the pharmaceutical industry[37] signify an understanding between an innovative manufacturer (a patent owner) and a generic manufacturer who actually or potentially infringes the innovative manufacturer's patent by entering a market or disputes its validity. For a specified consideration in return, the generic manufacturer undertakes to postpone its entry into the market for a certain period of time.[38]

Concerning the assessment of pay-for-delay agreement from the viewpoint of competition law, US jurisprudence has provided some additional comments to the already fierce debates. In the *Actavis* case, the US Supreme Court held that pay-for-delay agreements are not illegal *per se*, and therefore they would be subject to the rule of reason test.[39] At the same, however, the GC decided in the *Lundbeck* and the *Servier* cases that pay-for-delay agreements constitute an infringement of competition by object.[40] In these cases, the GC compared pay-for-delay agreements to market-sharing or output-limiting agreements, which are among the most severe types of competition infringements.[41] The GC's assessment was based on potential competition between the innovative and the generic manufacturer.[42] If there is potential competition, these agreements are considered to reveal, by their legal and economic context, a harm that is sufficiently deleterious to competition, which does not necessitate a more detailed examination.[43]

[37] Pay-for-delay agreements typically occur in the pharmaceutical industry (Hovenkamp [2014] p. 14, *Hemphill* [2010]). Despite alternative interpretations which were presented in the dissenting opinions of the judges in Actavis (Roberts, C. J., dissenting 570 U. S. (2013) FTC v. Actavis, Inc. Supreme Court of the United States No. 12-416 Chief Justice Roberts–Justice Scalia–Justice Thomas), the present article accepts the above as the widely accepted approach.

[38] What constitutes a consideration or a value transfer remains a hotly debated topic in practice and competition law literature alike, but it is not discussed in the present article.

[39] FTC v. Actavis, Inc., 133 S. Ct. 2223, 2229 (2013).

[40] Case T-472/13, *H. Lundbeck A/S and Lundbeck Ltd v Commission,* ECLI:EU:T:2016:449; Case T-691/14, *Servier SAS and Others v Commission.* ECLI:EU:T:2018:922.

[41] Case T-472/13, supra note 40, para. 1948.

[42] Ibid. paras. 171 and 191.

[43] The GC's judgment also created controversy in terms of assessing potential competition in the case of existing patents, although this is not discussed in the present article (see, e.g., *Ibáñez Colomo* [2016] for a detailed discussion).

Apparently, EU jurisprudence generally requires the examination of legal and economic context during the object analysis. The CJEU specified this early in the *LTM* case and has stuck to it ever since. Nevertheless, the approved depth and extent of the analysis, as well as whether the results of the analysis should be taken into account, varies from case to case. According to the CJEU, in certain cases like *BIDS* and *Toshiba*, the existence of a by object restriction should be derived from the agreement itself or the intention of the parties, without the economic context being actually capable of modifying the outcome. At the same time, in other cases such as *Allianz* and *Maxima Latvija* the CJEU made it clear that object analysis can only be carried out on the ground of economic examination, the absence of which may culminate in an unlawful decision.

Obviously, the case law detailed in this chapter cannot serve as a guide to determine the conditions for choosing either approach. However, as discussed below, the Opinion appears to be rather helpful in this aspect.

THE OPINION IN THE *BUDAPEST BANK* CASE

Similarly to *Allianz*, the Opinion was also issued in a Hungarian case. Starting from the middle of the '90s, Hungarian banks accepted unified rates for the multilateral interchange fees (MIF) applied by the bank card companies Visa and Mastercard. In its decision, the Hungarian Competition Authority (GVH) considered this agreement to have an anticompetitive object, although it also carried out a so-called effects test in the decision. The GVH's decision was annulled by the Metropolitan Court at the second instance, and the case was referred back to the GVH for a new procedure. The Metropolitan Court held that the agreement between the banks and the card companies was not restrictive by object, that the GVH did not thoroughly investigate the case and it could not appropriately establish by the effects test that the agreement had an anticompetitive effect.

The GVH brought an appeal before the Kúria, whereby the presiding chamber referred the case to the CJEU in a preliminary ruling procedure. The Kúria referred four questions to the CJEU, two of which is relevant to the current topic:

- "1. Can Article 101(1) TFEU be interpreted as meaning that the same conduct can infringe this provision both because the object of the conduct is anticompetitive and also because its effect is anticompetitive, with the two cases being treated as separate grounds in law?
  2. Can Article 101(1) TFEU be interpreted as meaning that the MIF Agreement, which establishes, in respect of MasterCard and Visa, a unitary amount for the interchange fee payable to the issuing banks for the use of the cards of those two companies, constitutes a restriction of competition by object?"[44]

[44] Case C-228/18, supra note 4.

The first question essentially seeks an answer to whether the same practice can be considered as a restriction by object and by effect at the same time. After a detailed argumentation, AG Bobek deems it efficient from an enforcement perspective that the infringements caught are assessed by their object as well as their effect by the competition authority.[45] Albeit this seems to be a relatively straightforward answer, we will discuss this later in the article.

The second question – enjoying our undivided attention – ultimately asks from the CJEU to decide whether an agreement similar to the agreement between the Hungarian banks and card companies would qualify as a by object or by effect restriction. Therefore, the Opinion concentrates on providing an abstract approach to by object restrictions, as well as analyzing the factual circumstances of the case.

In the first, general part, AG Bobek makes an attempt to give a unified interpretation of EU case law on the object analysis. Object analysis is therefore divided into two steps:

1. Analysis of the content of the provisions of the agreement and its objectives;
2. Analysis of the economic and legal context of the agreement.

The first step is an examination of the agreement and its contents, its aim being

- "to ascertain whether the agreement in question falls within a category of agreements whose harmful nature is, in the light of experience, commonly accepted and easily identifiable." [46]

The Opinion – referring to former case law, especially the opinion presented by AG Wahl in *Cartes Bancaires*[47] – emphasizes the role of experience in this step, which is defined as what can traditionally be seen to follow from economic analysis, as confirmed by the competition authorities and supported by case law.[48] The first step therefore has the purpose of examining whether the agreement's anticompetitive object stems obviously from the agreement itself.

In the course of step two,

- "the authority is required to verify that the presumed anticompetitive nature of the agreement, determined on the basis of a merely formal assessment of it, is not called into question by considerations relating to the legal and economic context in which the agreement was implemented. To that end, it is necessary to take into account the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the markets in question. In addition, although the parties' intention is

[45] Opinion, supra note 4, paras. 18–36.
[46] Ibid. para. 42.
[47] Opinion of AG Wahl in *Cartes Bancaires,* EU:C:2014:1958.
[48] Opinion, para. 42.

not a necessary factor in determining whether an agreement between undertakings is restrictive, that factor may be taken into account where relevant."[49]

The Opinion acknowledges that the extent and depth of the second step is unclear, as it does not answer where the object analysis ends and the effects test begins. At the same time, however, AG Bobek affirms that the second step is inevitable and mandatory for competition authorities, which serves as a legal and economic justification for prohibiting an anticompetitive agreement. EU competition enforcement cannot be carried out in the abstract; it should always reflect the economic and legal realities of actual circumstances.[50]

In the *Toshiba* judgment, the CJEU limited the examination of economic and legal context to the absolutely necessary elements of the case. The Opinion interprets this as follows:

- "it means that the competition authority […] must […] check that there are no specific circumstances that may cast doubt on the presumed harmful nature of the agreement in question. If experience tells us that the agreement under consideration belongs to a category of agreements that, most of the time, is detrimental to competition, a detailed analysis of the impact of that agreement on the markets concerned appears unnecessary. It is sufficient for the authority to verify that the relevant market(s) and the agreement in question do not have any special features which might indicate that the case at hand could constitute an exception to the experience-based rule."[51]

AG Bobek makes the more detailed examination of effects to the condition if the competition authority can identify particular circumstances that cast a doubt on establishing an obvious anticompetitive object. The second step is essentially a 'basic reality check',[52] which does not have any defined type or extent. AG Bobek admits that it is impossible to draw a clear line between the object analysis and the effects test, and divide the two methodologies. The distinction between the two tests is 'more one of degree than of kind.'[53]

In order to demonstrate the above, AG Bobek chooses to use the following – albeit admittedly extreme – metaphor:

- "if it looks like a fish and it smells like a fish, one can assume that it is fish. Unless, at the first sight, there is something rather odd about this particular fish, such as that it has no fins, it floats in the air, or it smells like a lily, no detailed dissection of that fish

[49] Ibid. para. 43.
[50] Ibid. paras. 44–45.
[51] Ibid. para. 48.
[52] Ibid. para. 49.
[53] Ibid. paras. 49–50.

> is necessary in order to qualify it as such. If, however, there is something out of the ordinary about the fish in question, it may still be classified as a fish, but only after a detailed examination of the creature in question."[54]

Next, the Opinion applies the above methodology to the agreement between the Hungarian banks and card companies. First, it determines that the agreement itself does not reveal a harm that would be sufficiently deleterious to competition, which makes a more detailed assessment necessary.[55] By the second step, AG Bobek concludes that the information available in the documents of the case is not sufficient to decide the second question and it is for the Kúria to adjudicate the appeal on this issue. The Opinion adds that the effects test must always be applied if the effects of the agreement to competition are ambivalent or unclear at first sight. In the course of an effects test, not only the negative but also the positive effects (generally examined under the individual exemption rule of Article 101(3) TFEU) must be taken into account.[56]

In summary, the Opinion does not try to re-interpret existing case law, instead it attempts to put the pieces (*i.e.*, the cases already adjudicated by the CJEU) in their right, coherent place, just like a puzzle. It does not state anything new, although it does not resolve the blurred lines between object analysis and effects test. It draws up a structure of existing practice that has the potential to terminate the strict, dualistic approach to object and effect in EU competition law. At the center of the new approach is the examination of factual circumstances, which may help competition authorities to determine whether to decide on a by object or by effect restriction.

We are of the view that the new approach outlined by the Opinion can be set in contrast to antitrust enforcement in the US. For the sake of comparison, we will discuss only the most relevant aspects of US case law.

PER SE, RULE OF REASON AND *QUICK LOOK* TESTS IN US ANTITRUST LAW

Contrary to the EU experience, in the antitrust enforcement regime of the USA there is no dichotomy. Section 1 of the Sherman Act unequivocally prohibits all agreements that restrict competition.[57] Another difference between EU competition law and US antitrust law is that US law does not recognize an individual exemption rule such as Article 101(3) TFEU once it was established that the agreement violates competition law.

[54] Ibid. para. 51.
[55] Ibid. paras. 63–73.
[56] Ibid. paras. 77–82.
[57] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

After 1890, American jurisprudence faced a problem caused by the enforcement of the Sherman Act. Courts realized that a strict application of the law would lead to the prohibition of certain agreements that would potentially have advantageous effects. In order to scrutinize the reasonability of these agreements, the rule of reason test was born, which is a weighing-up exercise of procompetitive and anticompetitive effects. If the rule of reason test is applied, the court seeks to take account of the relevant economic activities, the nature of the restriction, its history and effects, with the goal of distinguishing the restraints that are detrimental to competition and consumers from the restraints that stimulate competition and are beneficial to consumers.[58] US antitrust law acknowledges two categories of restraints, based on their examination method:

a) *per se* illegal are the 'naked restraints', which are agreements that have the obvious nature of distorting competition, for example, horizontal price fixing (in these cases, *Hovenkamp* [2018] states that the main question is the existence of the agreement because keeping the agreement a secret is the undertakings' major concern), while
b) the *rule of reason* test is applied to other restrictions where advantageous restraints are mixed with anticompetitive elements (in this case, Hovenkamp argues that the existence of the agreement is obvious, and the key issue is to decide whether the agreement is anticompetitive given the actual circumstances. Naturally, the rule of reason test requires a genuinely more extensive and costly analysis (*Hovenkamp* [2018] p. 93).

While many of the European commentators compare *per se* and *rule of reason* infringements to by object and by effect restraints, the *per se* – rule of reason dichotomy is an ostensible one. The rule of reason test is not a unified concept, as it is not always applied in the same form. Generally, if the plaintiff is able to prove that a restriction is 'inherently suspect' because it belongs to a group of agreements that are always (or almost always) detrimental to competition, the so-called 'quick look' test or 'truncated' rule of reason test absolves the plaintiff of the burden of proof regarding these detrimental effects. It will be the defendant's duty to prove possible procompetitive effects, which, if successful, will require a 'full' rule of reason test (*Oliver* [2010]).

One may consider the quick look rule of reason to be an intermediate 'category'; when anticompetitive restrictions of an agreement are less obvious than *per se* illegal infringements, a quick look analysis might be sufficient to exclude the necessity of a full rule of reason test.

In this case, the analysis is made up of several steps. First, the authority examines the nature, not the market effects, of the infringement, and decides whether

[58] http://wikis.fu-berlin.de/pages/viewpage.action?pageId=410157604.

it is inherently suspect of being detrimental to consumers. If the result is negative, a full rule of reason test must be conducted.

If the restriction qualifies as being inherently suspect, the second step involves the defendant attempting to demonstrate the plausibility of possible efficiencies in order to evade the application of the quick look test (e.g., the decrease in production costs, the creation of new products, etc.).

It the plaintiff is able to successfully demonstrate plausible efficiencies, it will be the authority's obligation to prove that the restraint distorts, or is capable of distorting competition, having regard to the factual circumstances of the case (*Jones* [2006] p. 712). In the *Actavis* judgment, the US Supreme Court preferred the application of the quick look test to the full rule of reason test (*Hovenkamp* [2014] pp. 3–30, pp. 23–27). The judgment itself makes a reference to professor Areeda's opinion in describing the examination of reasonableness as a 'scale', reflecting to the requirement that the quality of proof required should vary from case to case.[59]

Similarly to the above, Spencer Weber Waller remarks that the regime under US case law resembles to a scale, where there is no clear-cut border between *per se* illegal restrictions and restrictions that are subject to the rule of reason test: on the one hand, sometimes even the application of the *per se* rule might require a thorough analysis of the market in order to presume the agreement's anticompetitive nature, while on the other hand, even the rule of reason test may be carried out 'in the twinkling of an eye' if detrimental effects are obvious (*Waller* [2009] pp. 693–724, pp. 705–706). The rule of reason test itself is best described as a colour scale with different shades of a colour, which resembles more to a continuum than to a dichotomy (*American Needle…* [2010] p. 407; see also *Areeda* [1989] p. 408, *Hovenkamp* [2018] p. 149). *Hovenkamp–Areeda* [2017] (p. 1501.) explicitly calls it a 'sliding scale' (see also *Hovenkamp* [2018] p. 123).

We must note, however, that the existence of this continuum is disputed in the United States as well. From a practical point of view, the application of the quick look test may be a 'death sentence' for certain infringements as plaintiffs have limited options to rebut the presumption of detrimental effects. Consequently, instead of an attempt to categorize several shades of grey in business practices, in the antitrust doctrine the quick look rule of reason enables courts to prohibit complicated infringements without the need to expand the *per se* concept (*American Needle…* [2010] p. 407).

[59] "As a leading antitrust scholar has pointed out, '[t]here is always something of a sliding scale in appraising reasonableness,' and as such 'the quality of proof required should vary with the circumstances.' […] As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences. […] We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation." (FTC v. Actavis, Inc., p. 21.)

Hovenkamp warns that other interpretations place the quick look test between the *per se* and rule of reason categories. Court have given different definitions to the quick look test in cases that were basically amalgamations of *per se* infringements with a complicated economic background that necessitated a closer look. Occasionally, the complicating factor would be the novelty or uniqueness of the infringement, and the lack of judicial experience requires further assessment – which in turn would not automatically be a full rule of reason test. Hovenkamp uses the above trichotomic approach to explain that the dispute is essentially about the allocation of the burden of proof and the assessment of evidence (*Hovenkamp* [2018] pp. 123–124).

Naturally, for a thorough analysis of the full extent of the rule of reason test one would also need to take account of the historical development of the test (*Gavil* [2012]), which is not discussed extensively here due to its length. We wish to briefly note, however, that the necessity of a reasonability test was emphasized early in the first decade of the enforcement of the Sherman Act, in the 1897 *Trans-Missouri Freight* judgment.[60] The landmark decision was nonetheless issued fourteen years later: the rule of reason test was born with the 1911 *Standard Oil* judgment.[61] Over the course of a hundred years' career, the test has gone through several phases of development (*Markham* [2012] pp. 601–613). One of the most important events in the development was the appearance of the quick look test (Ibid. p. 607). By the end of the 1970s it became clear that the *per se* – rule of reason dichotomy is not able to provide satisfactory answers in every case. In the *Broadcasting Music* case[62], the court had to adjudicate an agreement that had the object of price fixing with regard to an entry of a new product into the market (Ibid. p. 608). Although the infringement ostensibly fell into the *per se* illegal category, the court insisted on applying the rule of reason test. In the *National Society of Professional Engineers* case,[63] also an example of price fixing, the court disregarded the *per se* rule, and, ultimately, the full rule of reason test (Ibid. p. 600). The quick look test was conceived in the *NCAA* case[64] as an explicit third category (Ibid. p. 601). The *California Dental* judgment later stated that there was no clear-cut border between the concepts.[65] The case literally refers[66] to the concept of a 'quicker' look than the full rule of reason test. *Hovenkamp* [2018] places the *Actavis* judgment in the 'quicker look' category (p. 33).

In the period after *California Dental* antitrust enforcement developed the tendency to expand the rule of reason test while pushing back the application of the *per*

[60] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
[61] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911).
[62] Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 8-9 (1979).
[63] National Society of Prof. Engineers v. United States, 435 U.S. 679 (1978).
[64] NCAA v. Bd. of Regents, 468 U.S. 85 (1984); *Markham* [2012] 608-609.
[65] Cal. Dental Association v. FTC, 526 U.S. 756 (1999). Markham, Jesse W.: Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law. Fordham Journal of Corporate & Financial Law, 2012. Vol. 17. No. 2. 591-664. p. 610.
[66] Cal. Dental, 526 U.S. at 780–81 (1999)

se rule (*Markham* [2012] pp. 610-613; see also *Sokol* [2015] note 49). This increase in the application can be observed to be more or less present since the 1970s – due to the rise of the economic approach and the development of analytic methods –, which left only the hardcore cartels in the *per se* illegal category (*Valentiny* [2019] p. 148). One of the most important results of this tendency was that in 2007 resale price maintenance cases were decided to fall outside the scope of *per se* illegal infringements.[67] One can wonder what effect the economic progress of the fourth industrial revolution may have on the evolution of the case law (*Economist* [2018], *Ezrachi–Stucke* [2017]).

The US Antitrust Guidelines for Collaborations among Competitors[68] declares *per se* illegal the agreements that always or almost always lead to the increase of prices or the limitation of production output. In the case of the rule of reason test, the analysis commences with the examination of the agreement's nature. The authority assesses the object of the agreement and, if it is an already existing agreement, the actual anticompetitive damage caused by it. In certain cases, the nature of the agreement and the lack of market power may indicate the lack of anticompetitive effects. On the other hand, when the nature of the agreement itself makes detrimental effects plausible, or actual damages were incurred, in the absence of procompetitive effects the authority carries out a detailed evaluation.[69]

It is also interesting to note that a short paragraph of the abovementioned Guidelines demonstrates a degree of similarity to the CJEU's judgement in *Cartes Bancaires*: if the likelihood of anticompetitive effects is evident from the nature of the agreement, in the absence of any overriding benefits that could offset the anticompetitive harm, US authorities will challenge the agreement without a detailed market analysis.[70]

In light of the foregoing, it seems evident to approach the rule of reason test from the view of the burden of proof. The full rule of reason test as the first category places that burden solely on the plaintiff (*Jones* [2006] pp. 702–705). The quick look rule of reason test presumes the unreasonableness of the agreement, which can be rebutted by the defendant via the demonstration of possible advantages (*Waller* [2009] p. 701). Consequently, in order to decide between the types of the rule of reason test, US courts will always take account of the factual circumstances and economic context of the case.

[67] *Leegin Creative Leather Products, Inc. versus PSKS, Inc.,* 551 U.S. 877 (2007), *Valentiny* [2019] p. 148, Nagy [2013a] pp. 3–4.

[68] Federal Trade Commission and the U. S. Department of Justice: Antitrust Guidelines for Collaborations among Competitors. https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[69] Ibid.

[70] Ibid.

CONCLUSIONS

As we have mentioned before, the new approach outlined by the Opinion is not an inherently new paradigm in the analysis of anticompetitive agreements, albeit it is an excellent summary of EU case law development since *LTM* – with the intention to create order. The two-step test by AG Bobek indeed possesses some peculiar similarities to the *per se* – rule of reason approach of American antitrust literature.

We must emphasize that the below comparison is more of a functional distinction than one based on content. We do not dispute the fact that the two regimes are genuinely different. Enforcement rules under US law, as well as the *per se* – rule of reason approach cannot be easily identified with EU enforcement and the by object – by effect 'duality', respectively. *Per se* infringements under US law are not automatically placed into the object box under EU law, to the very least because of the opportunity of individual exemption under Article 101(3) TFEU.

Furthermore, tendencies in the USA today forecast an even rarer application of the *per se* rule (*Waller* [2009], *Carrier* [2009], *Jones* [2006] p. 806). According to certain remarks, by object restrictions can mostly be compared to infringements caught under the quick look test (*Killick* [2016] p. 16). It can also be argued that by object restrictions encompass a broader category than the concepts of US antitrust law: it is hardly believable, for example, that vertical agreements would be as strictly prohibited in the USA as in the EU (*Jones* [2006] p. 299.). These differences could best be elaborated within their historical and economic background; however, such a detailed comparison is not the object of the present article. Our only goal is to demonstrate parallel approaches between the two regimes on the methodology of economic analysis.

In US antitrust case law, there is clear precedent on the importance of judicial experience, and AG Bobek also emphasizes its relevance. EU courts have declared before that

- "it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels or consisting in the exclusion of some competitors from the market, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 101(1) TFEU, to prove that they have actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers."[71]

AG Bobek refers back to AG Wahl's opinion in *Cartes Bancaires* as a proof to the importance of experience. According to Wahl, experience is a relevant point of reference in presuming potential anticompetitive effects, because experience

[71] Case T470/13, *Merck KGaA v Commission,* EU:T:2016:452, para. 188; Case C-67/13, supra note 6, para. 51.

- "must be understood to mean what can traditionally be seen to follow from economic analysis, as confirmed by the competition authorities and supported, if necessary, by case-law."[72]

The Opinion in *Budapest Bank* is a continuation of object analysis based (also) on experience, which strengthens the precedent value of judicial case law in a similar vein to the US regime. Apparently, experience plays an important part in the existing case law that the Opinion intends to synthetize.

The second step of the object analysis and the quick look rule of reason test also have a number factors in common. Both tests have blurred borders, but it is safe to say that the quick look test is not a full rule of reason test, just as the second step of the object analysis proposed by AG Bobek is not a full effects test. Commentators of EU law further support this statement: according to *Ibáñez Colomo* [2019], the analysis of the economic and legal context is a kind of a 'standard effects test', which is to be distinguished from a 'enhanced effects test', meaning the actual effects analysis (p. 14). The examination of economic context is therefore important in both regimes, regardless of the establishment of a *per se* or by object restriction. According to both EU and US law, this evaluation should take place in the reasonable extent and depth.

In US antitrust law, the quick look test is between the *per se* and rule of reason tests. However, the categorization of infringements is not dichotomic or trichotomic, but – if one accepts the approach proposed by the US Supreme Court (*Hovenkamp* [2018] pp. 123–124) – resembles a scale where different infringements require a different approach. *Jones* [2006] affirms that US courts moved from a dichotomic or trichotomic approach to a direction that is more flexible and capable to account of the factual circumstances and logic of the given case (p. 739). According to *Hovenkamp* [2018], this is especially relevant if the agreement in question is not made among competitors but between the associations and alliances of competitors or other similar professional networks. The operation of these groups, as well as their self-regulation rules are generally lawful, however, in some instances there is no legitimate reason behind some of their agreements that are not objectively necessary for the achievement of their statutory goals, and these agreement may ultimately be considered as *per se* illegal. The quick look test might be an appropriate tool for a more extensive examination of these groups of undertakings (p. 129).

The above bear relevant similarities to EU jurisprudence and the Opinion.[73] The judgments in *Allianz* and *Cartes Bancaires* were related to associations of undertakings, and the relevant markets (car repairs and mandatory liability insurance,

[72] Opinion of AG Wahl in *Cartes Bancaires,* supra note 47, paras. 78–79.

[73] We must note that our comparison only concerns the confoundedness of the categories, that is, their description as a continuum or a sliding scale with blurred lines. We do not wish to argue whether the application of a given category of this scale is appropriate or not. See, as an example, the international criticism expressed after the *Allianz* judgment (*Nagy* [2013*b*], [2015]).

bank card payments) were two-sided or multilateral. The factual circumstances of the *Budapest Bank* case are also quite complicated, and the Opinion points out their relevance when it implies that the main goal of the second step in the object analysis is the identification of 'special features'.

By object/*per se*/quick look restrictions and by effect/rule of reason restrictions do not represent a dichotomy but a continuum, where – as AG Bobek states – the difference between the types of economic analysis is more of degree than of kind. *Hovenkamp* [2018] highlights the difference in the burden of proof: in the case of simpler factual circumstances, the burden of proof should be greater for the defendant undertakings, while in a more complicated case the authority should bear a greater obligation. Both systems might be interpreted in a way that places emphasis on the depth of demonstration and the allocation of the burden of proof, and from this viewpoint both the EU and the US regime appears to be more like a multicolored scale than a structure of clear-cut categories. European competition law commentators have previously raised the continuum-like approach of legal tests (see *Ibáñez Colomo* [2019] pp. 3–4), and the Opinion, in our view, appears to point toward the same direction.

It nonetheless remains to be seen whether the 'new' approach of the Opinion will be enforced in EU competition law, and if yes, how. One of the most important differences between US and EU competition law is the primacy of European public enforcement, which means that it is the duty of competition authorities, not courts, to carry out proceedings. The role of the CJEU, the GC and national courts is to do a review of legality. This review is limited: courts cannot intervene in the jurisdiction of competition authorities, and in the case of a procedure initiated by the Commission, the CJEU and the GC only have a limited jurisdiction towards the adjudication of complex economic assessments made by the Commission, which can only extend, in terms of its content, to the evaluation of whether the Commission's assessment is vitiated by a manifest error of assessment.[74] Therefore, in complex cases it is primarily the authority's duty to investigate the economic context of an agreement.

Under these circumstances, we are of the view that the protection of procedural rights might be even more relevant in competition proceedings than before, which places an important weapon to the hands of the reviewing courts. As AG Bobek declares in his answer to the first question referred before the CJEU in *Budapest Bank*,

> ◆ "as a conceptual possibility, that an agreement might amount to both types of restriction certainly does not liberate the appropriate competition authority from the requirement to, first, adduce the necessary evidence for both types of restriction and, second, evaluate and clearly subsume that evidence under the appropriate legal categories. […] I think it is important to underline that aspect rather clearly, not because of the text of the present request for a preliminary ruling, but rather its subtext. It would hardly be

[74] See, e.g. Case C-42/84, *Remia v Commission,* EU:C:1985:327, para. 34.

> sufficient, including for the purpose of subsequent judicial review of a decision, if, in its decision, a competition authority limited itself to assembling factual evidence and, without stating what inferences in terms of legal evaluation it drew from that evidence, merely suggested that certain behaviour might be this and/or that, leaving it for the reviewing court to connect the factual dots and come to a conclusion. Put simply, the existence of alternative legal boxes is no licence for vagueness, in particular when imposing heavy administrative sanctions."[75]

The right to a clear, reasonable, logical and unambiguous authority decision is one of the most important guarantees of the undertakings in a competition case. Consequently, if the object analysis as drawn out by the Opinion receives a wider reception, these requirements will perhaps be even more emphasized than before in EU competition cases.

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[75] Opinion, paras. 29–30.

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