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EU Competition Law Newsletter

Highlights

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— The Commission Tests 1997 Market Definition Notice's "Fit-for-Purpose"

— Mylan's Tie-Up With Pfizer's Upjohn Division Approved Subject To Remedies

Budapest Bank: Banking On The Importance Of The By-Effect Assessment

On April 2, 2020, the Court of Justice of the European Union (the "CJEU") ruled on a 2018 preliminary reference from Hungary's Supreme Court, vacating on appeal the decision of the Hungarian competition authority. The authority found that an agreement on multilateral interchange fees ("MIFs") constituted a by-object and by-effect infringement of Article 101 TFEU.[1] The judgment concerns two heavily discussed topics: the notion of restriction of competition by object vs effect,[2] and MIFs.[3]

The CJEU found that an anticompetitive conduct can concurrently be classified as a by-object and by-effect infringement and provided guidance for the by-object analysis in practice. The CJEU further concluded that the MIF Agreement in question unlikely represented a by-object restriction, unless it could be assumed from its content, objectives and context that it has a sufficiently serious effect on competition, which the CJEU left for the national court to decide.

Factual background

The *Budapest Bank* case is the latest development in a string of antitrust investigations into credit card payment schemes that led to the seminal judgments of the EU Courts in *Cartes Bancaires* and *MasterCard*, as well as the judgment of the UK High Court of Justice in the *MasterCard Damages* litigation.[4]

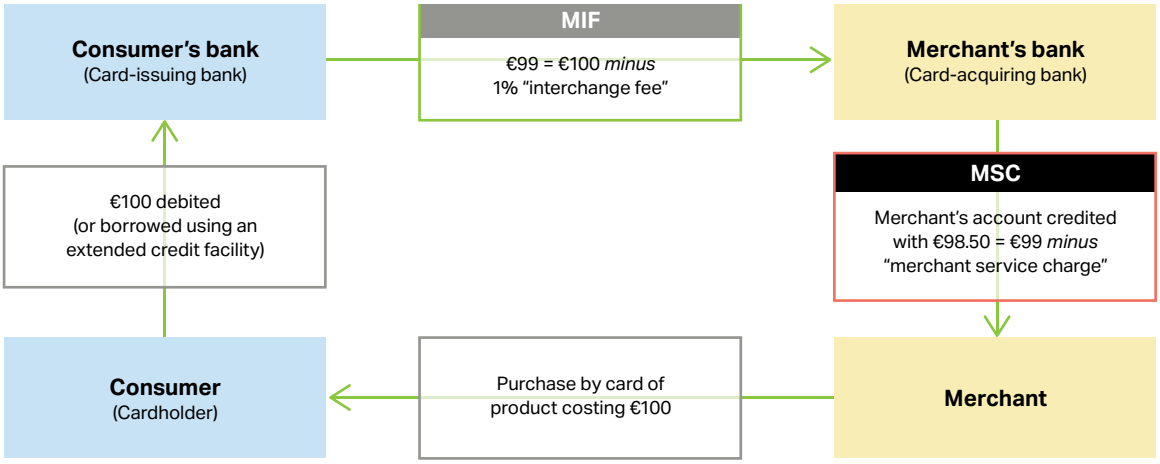
[1] *Gazdasági Versenyhivatal v Budapest Bank Nyrt and Others* (Case C-228/18) EU:C:2020:265 ("Budapest Bank").

[2] The issue of restriction by-object and by-effect was recently dealt by the ECJ in *Generics (UK) Ltd and Others* (Case C-307/18) EU:C:2020:52 ("Paroxetine") as discussed in our December 2019/January 2020 EU Competition Law Newsletter.

[3] *See*, for example, *Groupement des cartes bancaires v European Commission* (Case C-67/13 P) EU:C:2014:2204 ("Cartes Bancaires"), as reported in our Q3 2014 EU Competition Law Newsletter and our Q2 2016 EU Competition Law Newsletter; *MasterCard I* (Case C-382/12 P) EU:C:2014:2201 ("MasterCard I"), as reported in our Q3 2014 EU Competition Law Newsletter; and *MasterCard II* (Case COMP/AT.4049), Commission decision of January 22, 2019 ("MasterCard II"), as reported in our January 2019 EU Competition Law Newsletter and our April 2019 EU Competition Law Newsletter.

[4] *Asda Stores Limited and Others v Mastercard Incorporated and Others*, (2017) High Court Of Justice, Queen's Bench Division, Commercial Court, EWHC 93 (Comm). The UK Mastercard saga was reported in our February 2019 UK Competition Law Newsletter. The follow-on damages actions by Dixon and Europcar against MasterCard's cross-border MIFs are pending at the Court of Appeal of England and Wales.

Credit card transactions take place within a multi-sided market with four stakeholders: (1) the cardholder; (2) the financial institution that issued the credit card (the "issuing bank"); (3) the merchant; and (4) the financial institution enabling the merchant to accept the card as a means of settling a transaction (the "acquiring bank"). MIFs are fees charged by the issuing bank to the acquiring bank for each credit card transaction. The issuing bank deducts the MIF from the amount it pays the acquiring bank handling the transaction for the merchant. The acquiring bank then remits to the merchant the amount of the transaction minus the MIF and minus an additional fee for the acquiring bank, called the merchant service charge (the "MSC"). Agreements on MIF may raise competitive concerns if they inflate the cost base of the MSCs, which may restrict price competition between the acquiring banks to the detriment of merchants.



The present case stemmed from a 1996 agreement concluded by several banks[5] introducing a uniform MIF for Visa and MasterCard credit card systems (the "MIF Agreement"). The MIF Agreement remained in force until 2018. Visa and MasterCard were not present at the meeting at which the MIF Agreement was concluded but subsequently received a copy.

In 2019, the Hungarian Competition Authority found that the MIF Agreement constituted both a restriction of competition by-object and by-effect, and imposed fines on seven banks and Visa and MasterCard, in the total amount of €5 million. The parties appealed up to the Hungarian Supreme Court, which asked the CJEU whether: (i) the same conduct can constitute both a restriction of competition by-object and by-effect; and (ii) under what conditions would the MIF Agreement at issue be deemed a restriction by-object.

Concurrent restriction of competition by-object and by-effect

The CJEU reiterated that an anticompetitive conduct can concurrently be classified as a by-object and a by-effect infringement. The use of the conjunction "or" in the wording of Article 101(1) TFEU indicates that it is first necessary to determine whether an agreement restricts competition by object and, if so, there is no need to examine the effects of that agreement.[6] But, if a competition authority wishes to carry out a by-object and by-effect analysis at the same time, it is free to do so.[7] The authority must however adduce the necessary evidence for both types of restrictions.[8]

[5] The MIF Agreement was initially concluded by 7 banks, and only later on by another 15 banks. The Hungarian Competition Authority only fined the seven original signatories and Visa and MasterCard.

[6] *See*, for example, *Toshiba Corporation v European Commission* (Case C-373/14 P) EU:C:2016:26, para. 25.

[7] *Budapest Bank*, para. 40.

[8] *Budapest Bank*, para. 43.

Analytical framework for *by-object* restrictions

In line with its judgments in *Cartes Bancaires*, *MasterCard*, *InnoLux*[9] and most recently *Paroxetine*, the CJEU explicitly reiterated that the by-object restriction concept must be interpreted restrictively and applied to practices only if they reveal a sufficient degree of harm to competition to consider that it is unnecessary to investigate its effects.[10] Notably, though, the CJEU proposed a two-step analytical framework, in line with the Opinion of Advocate General Bobek:[11]

— First, a competition authority must determine whether the agreement can be presumed anticompetitive by its very nature based on "sufficiently robust and reliable experience" following traditional economic analysis as previously confirmed by authorities and supported by case law.[12] Absent this type of experience, a by-effect assessment is warranted. The *Paroxetine* judgment clarifies that the by-object category is limited to agreements, for which the only plausible explanation is the restriction of competition.

— Second, the competition authority must then undertake a "a basic reality check" to ensure that "no specific circumstances may cast doubt on the presumed harmful nature of the agreement in question."[13] Although the relevant considerations may be similar,[14] no in-depth by-effect analysis is warranted at this stage.

Four observations on this analytical framework are noteworthy. First, the framework underscores the CJEU's ruling in *Cartes Bancaires*, that competition authorities cannot use the by-object classification as a shortcut to avoid embarking on a contextual assessment based on the peculiarities of each agreement.

Second, in line with the *Paroxetine* judgment,[15] if the agreement pursues multiple objectives, only the objectives that are effectively established can be taken into account (in contrast to objectives that are merely invoked).[16] Third, ambivalent or procompetitive effects are not only relevant under Article 101(3) TFEU but also in the context of a by-object assessment under Article 101(1) TFEU.

Fourth, the counterfactual underpinning a by-effect analysis is also relevant for analyzing by-object restrictions, albeit at a higher level. The difference between the two assessments is in the intensity of work required from a competition authority. For the by-object stage, the threshold of plausibility is sufficient *i.e.*, to rule out a by-object infringement, it must be plausible that the agreement pursues objectives other than harming competition. For the by-effect infringement, the analysis of competitive harm has to meet the threshold of likelihood *i.e.*, an agreement restricts competition by-effect if it is likely that it would produce negative effects on price, output, innovation or the variety or quality of goods and services on the relevant market.

Multilateral interchange fees

The CJEU indicated that the MIF Agreement at issue likely does not pass the first step of the by-object analytical framework, which was however left for the referring court to decide.[17] Notably, the judgment contains a concrete example of how the counterfactual may be determinative to rule out a by-object restriction at

[9] *InnoLux v European Commission* (Case C-231/14 P) EU:C:2015:451, para. 72.

[10] *Budapest Bank*, para. 54, see also *Cartes Bancaires,* paras. 53, 54, 70.

[11] *Gazdasági Versenyhivatal v Budapest Bank Nyrt and Others* (Case C-228/18) EU:C:2019:678, paras. 41–43 ("Budapest Bank AG Opinion").

[12] *Budapest Bank*, para. 76; and *Budapest Bank AG Opinion*, para. 42.

[13] *Budapest Bank AG Opinion*, paras. 48–49.

[14] Including the nature of the goods or services affected, conditions of the functioning and structure of the markets in question, and, if necessary, the intentions of the parties.

[15] *Paroxetine*, paras. 103–109.

[16] *Budapest Bank*, para. 69.

[17] The CJEU ruled that the evidence on the MIF Agreement does not allow for conclusion that it is by its very nature harmful to competition. On the contrary, the decision-making practice of the competition authorities and the CJEU indicates that, for MIF agreements, a detailed examination of the effects is necessary to determine whether it actually had the effect of introducing a floor for MSCs, restricting the price competition between acquiring banks.

the second step of the analysis: if there would have been an upward pressure on the MIFs even absent the MIF Agreement (which has to be established by the referring court), then the MIF Agreement could not be classified as restrictive by-object, and a by-effect assessment ought to be carried out.[18]

More generally, MIFs may escape a 101 TFEU prohibition even under a more comprehensive by-effect analysis. Indeed, in the *MasterCard Damages* judgment, the UK High Court found that Mastercard's MIF arrangement would not restrict competition if it could be established that its business would collapse without the MIFs.[19]

Implications

The *Budapest Bank* judgment puts flesh on the bones of the CJEU's earlier MIFs judgments and attempts to close the gaps in the by-object vs by-effect debate. In practical terms, regulators should not rely on the by-object shortcut in novel cases that cannot arguably benefit from an established consensus on the anticompetitive nature of a given practice. Instead, regulators should focus on contextual assessment based on economic and legal grounds.

The Commission Tests 1997 Market Definition Notice's "Fit-for-Purpose"

On April 3, 2020, the Commission launched a public consultation to review the adequacy of the 1997 Market Definition Notice (the "Notice"), which sets out the Commission's formal guidance on the definition of relevant product and geographic market.[20] This kicks off a six-week process to solicit opinions from anyone interested.

In the aftermath of the *Siemens/Alstom* prohibition decision,[21] a number of EU Member States openly called for broad reforms of EU competition law, including to better reflect the reality of "global" markets.[22] Similarly, the Commission's increased scrutiny of digital markets has brought about novel market definition challenges with multi-sided platforms.[23]

While acknowledging the increasing impact of globalization and digitalization on competition in Europe, Commissioner Vestager reiterated that any revision of the Market Definition Notice would focus on preparing an updated "clear and consistent approach" manual for measuring the boundaries of a market, rather than a "choice about what [the Commission] think[s] the market ought to be."[24]

The Commission aims to conclude the revision process by mid-2021. Any revision to the Notice is unlikely to radically change the Commission's approach to defining markets, which is well-founded in economics. Similarly, any substantive change to defining digital product markets might be premature in the absence of a broader economic and legal consensus.

[18] *Budapest Bank*, para. 82.

[19] Accordingly, the UK High Court found that Mastercard's MIF arrangements did not restrict competition by-effect as Mastercard's schemes would otherwise not have survived in the UK. On appeal, the UK Court of Appeal upheld the UK High Court's test, but disagreed with the outcome as it found that Mastercard's schemes were able to survive in other countries outside of the UK without MIFs. Mastercard's appeal is currently pending before the UK Supreme Court.

[20] Commission Notice on the definition of relevant market for the purposes of Community competition law, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31997Y1209%2801%29. *See also*, the Commission's Roadmap, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-Evaluation-of-the-Commission-Notice-on-market-definition-in-EU-competition-law.

[21] *Siemens/Alstom* (Case COMP/M.8677), Commission decision of February 6, 2019.

[22] The calls for reform of EU merger control rules after *Siemens/Alstom* were reported in our February 2019 EU Competition Law Newsletter.

[23] *See* The EU's Competition Policy for the Digital Era, Final Report 2019, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[24] *See,* for instance, https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en.

Mylan's Tie-Up With Pfizer's Upjohn Division Approved Subject To Remedies

On April 22, 2020, the Commission conditionally approved the joint venture between Mylan and Upjohn, Pfizer's off-patent branded and generic medicines division, following a Phase I review.[25] The transaction follows a recent stream of large pharma and healthcare transactions approved by the Commission, including the unconditional clearance of Bristol-Myers Squibb's acquisition of Celgene,[26] and conditional clearances of AbbVie's acquisition of Allergan,[27] and GSK's acquisition of Pfizer's Consumer Health Business.[28]

Mylan is a leading generic pharmaceutical supplier in the EEA. Upjohn focuses on the sale of off-patent branded originator pharmaceuticals, including well-known brands such as Viagra, Xanax, and Lipitor, as well as generics. The Commission's investigation focused on national markets for genericized medicines based on the same chemical molecule indicated for a specific therapeutic use. On this basis, the Commission identified concerns in 12 molecules[29] in several EEA countries (resulting in 36 molecule-country combinations) related to cardiovascular, genito-urinary, musculoskeletal, nervous system and sensory organ treatments areas. In each of these segments, the parties competed closely, had high market shares, and faced insufficient constraint from the remaining competitors.

To address the Commission's concerns, Mylan offered to divest a generics portfolio reflecting the 36 molecule-country combinations at issue, removing the entire overlap between the parties in the national markets in question. The divestment package included marketing authorizations, contracts and brands, and transitional manufacturing and supply arrangements, consistent with the Commission's pharma remedy practice.[30]

The Commission's assessment of the overlaps between the parties at the molecule level is consistent with its previous practice in transactions involving generic medicines such as *Teva/Allergan*,[31] *Mylan/Abbott EPD-DM*,[32] and *Mylan/Meda*,[33] as is the requirement to divest the affected molecules in the relevant countries in question, rather than at the EEA level. Despite the Commission's clearance, the COVID-19 outbreak and associated delays in the regulatory review process have pushed back closing of the deal to the second half of 2020.

[25] *Mylan/Upjohn* (Case COMP/M.9517), Commission decision of April 22, 2020, not yet published.

[26] *BMS/Celgene* (Case COMP/M.9294), Commission decision of July 29, 2019, as reported in our October 2019 EU Competition Law Newsletter.

[27] *AbbVie/Allergan* (Case COMP/M.9461), Commission decision of January 1, 2020.

[28] *GlaxoSmithKline/Pfizer Consumer Healthcare Business* (Case COMP/M.9274), Commission decision of July 7, 2019, as reported in our July 2019 EU Competition Law Newsletter.

[29] Alprazolam, atorvastatin, doxazosin, eletriptan, eplerenone, gabapentin, latanoprost, tatanoprost/timolol, pregabalin, sildenafil (for pulmonary arterial hypertension), venlafaxine, and ziprasidone.

[30] *See e.g., Mylan/Abbott EPD-DM* (Case COMP/M.7379), Commission decision of January 28, 2015; and *Mylan/Meda* (Case COMP/M.7975), Commission decision of July 20, 2016.

[31] *Teva/Allergan Generics* (Case COMP/M.7746), Commission decision of December 20, 2017.

[32] *Mylan/Abbott EPD-DM* (Case COMP/M.7379), Commission decision of January 28, 2015. *See* our Q 2 2015 EU Competition Quarterly Report.

[33] *Mylan/Meda* (Case COMP/M.7975), Commission decision of July 20, 2016.

News

Commission Updates

The Commission Doubles Down On Digital Markets

On April 24, 2020, the Commission announced that it is seeking to design and implement specific *ex ante*[34] and remedy tools[35] for digital markets. This follows earlier efforts related to the creation of a single data market and the proposed European approach towards artificial intelligence unveiled in February 2020.[36]

In the Commission's view, current competition tools are insufficient to avoid the structural problem of *tipping*, described as the "tendency of one system to pull away from its rivals in popularity once it has gained an initial edge."[37] This enables powerful (but not necessarily dominant) digital firms to profit from indirect network effects and maintain and/or increase their market position. Two initiatives are noteworthy.

First, the Commission aims at developing *ex ante* rules for companies that can control competitor access to a specific platform, known as "digital gatekeepers" (*e.g.*, Amazon, Facebook, *etc.*). These rules shall include clear-cut prohibitions and obligations to remedy or prevent imbalances caused by the market structures. Second, the Commission would like to conduct market investigations and impose commitments to address a "tipping" market trend in a particular digital market, without the need to prove actual negative effects. The palette of intervening measures under consideration notably includes the breaking up of a company, albeit as a measure of "last resort."

Ongoing investigations in digital markets
In addition, the Commission continues to actively scrutinize digital platforms, despite the challenges stemming from the COVID-19 pandemic. Three recent developments are noteworthy.

Facebook. As previously reported, the Commission has been investigating complaints that Facebook may have distorted the online classified advertising market by promoting its free Marketplace service to the 2 billion users of its social network.[38] On April 6, 2020, the Commission sent a third request for information ("RFI") to third parties dealing with Facebook, to better understand Facebook's business model and the importance of data for the success of the social media platform.[39]

Apple. The Commission has further progressed its probe into Apple's alleged anticompetitive App Store policies, which allegedly favor Apple's own music-streaming services to the detriment of its rival Spotify.[40] The Commission has recently sent out additional RFIs to various music streaming stakeholders that frequently distribute their services through the App Store.[41]

Amazon. The Commission also continues the Amazon probe, assessing whether Amazon's dual role as retailer and provider of a market place, and related use by Amazon of sensitive data from independent retailers, violates EU antitrust rules.[42] The Commission has recently reiterated that the COVID-19 pandemic "doesn't change

[34] *See* https://globalcompetitionreview.com/article/1226098/vestager-eu-may-introduce-competition-rules-for-%E2%80%9Cdigital-gatekeepers%E2%80%9D.

[35] *See* https://globalcompetitionreview.com/article/1226094/dg-comp-official-eu-is-considering-%E2%80%9Crestorative-or-prescriptive%E2%80%9D-antitrust-remedies.

[36] As reported in our February 2019 EU Competition Law Newsletter. *See also* Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, Article 19(2).

[37] *See* Michael Katz & Carl Shapiro, "Systems Competition and Network Effects," 8 J. Econ. Persp. 93 (1994), p. 106.

[38] *See* https://www.silicon.co.uk/e-marketing/advertising/facebook-marketplace-european-commission-301613. *See* also, https://www.ft.com/content/ec0a3e7-c648-4ddc-9eef-64b2cf384073.

[39] *See* https://www.reuters.com/article/us-eu-facebook-antitrust/eu-antitrust-regulators-raise-more-questions-about-facebooks-online-marketplace-idUSKBN21P22J.

[40] As reported in our February 2019 EU Competition Law Newsletter.

[41] *See* https://app.parr-global.com/intelligence/view/1956233.

[42] *See* https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291.

[its] enforcement priorities" and confirmed it is accordingly progressing the Amazon case.[43]

DG COMP Responds To The COVID-19 Outbreak

The COVID-19 pandemic has caused significant economic disruption, including supply shortages, cost increases, and liquidity constraints resulting from a prolonged shutdown. As EU Member States and businesses respond to these challenges, their actions continue to raise potential issues under EU competition law.

In response, the Commission has undertaken several initial steps, as reported in our March 2020 EU Competition Law Newsletter. In April 2020, the following additional steps are noteworthy:

— **Antitrust.** The Commission has affirmed it will not actively pursue necessary and temporary measures taken by companies to avoid a shortage of supply during the COVID-19 pandemic. It has published guidance on how it will analyze such business cooperation and has offered to provide informal guidance for specific situations if businesses so request. An overview of this guidance, and key takeaways for companies, is available here.

— **State aid.** The Commission issued a Communication amending the Temporary Framework that both clarified and relaxed its earlier guidelines. An update on this development is available here. By the end of April, the Commission had cleared more than 109 measures under these rules, for every Member State except Cyprus. The Commission is also consulting Member States on a draft proposal to extend these measures to recapitalizations.

These initiatives mirror actions by national competition agencies and other enforcers globally. These developments are monitored in our COVID-19 Resource Center. The table below provides an overview of measures published since our March 2020 EU Competition Law Newsletter.

Antitrust	
International Competition Network joint statement on competition during and after the COVID-19 pandemic (April 8, 2020)	Link
Commission Communication on the Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (April 8, 2020)	Press Release, Communication
DG Competition page on antitrust rules and coronavirus	Link
State aid	
Commission Communication on amendments to the Temporary Framework to enable Member States to accelerate production of COVID-19 relevant products and protect jobs in the current COVID-19 outbreak (April 3, 2020)	Press Release, Communication
Commission Statement on consulting Member States on proposal to further expand State aid Temporary Framework to recapitalisation measures (April 9, 2020)	Statement
DG Competition page on State aid rules and coronavirus	Link
List of Member State measures approved under Article 107(2)(b) TFEU and the Temporary Framework	Link
European Courts	
CJEU press release on continuation of judicial activities (April 3, 2020)	Link
CJEU press release on the continuity of European public administration, and resumption of oral hearings after May 25, 2020 (April 27, 2020)	Link

[43] *See* https://app.parr-global.com/intelligence/view/prime-3024956.

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