data from the LSE and actually bringing private civil proceedings were indissociable. That is to say, whether a private right could be exercised at all was a function of the extent to which the relevant information was accessible. Indeed, any issuer in similar circumstances would have faced the same problem of exercise of the private right being directly contingent on accessing the relevant information. The logical result of this inseparability is that it was erroneous to dispose of the case on an interlocutory, common law basis – the proceedings were squarely within the orbit of EU law. That Baker J. ought to have been exercising judicial powers stemming principally from EU law meant that it was necessary to consider whether his application of *Norwich Pharmacal* relief *qua* national remedy complied with the principle of effectiveness (Case 45-76, *Comet BV v Produktschap voor Siergewassen* EU:C:1976:191, [1976] E.C.R. 2043; Case 14-83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* EU:C:1984:153, [1984] E.C.R. 1891), and, if potentially not, whether a preliminary reference to the CJEU on this point was also required (Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd. and others* EU:C:1990:257, [1990] E.C.R. I-2433).

According to section 3 of the European Union (Withdrawal) Act 2018, after 31 December 2020, the MAR will become retained EU law. However, preliminary references to the CJEU will no longer be possible. The decision in *Burford* may effectively put the law in this area at odds with the rest of Europe and place UK issuers (and potentially shareholders) in a less favourable position, as it is far from obvious what regulatory protection the FCA directly provides to issuers that incur the type of loss (allegedly) suffered by Burford.

J.S. Liptrap and Anna L. Christie

Addresses for Correspondence: Clare College, Cambridge, CB2 1TL, UK; Trinity College, Cambridge, CB2 1TQ, UK. Emails: jsl65@cam.ac.uk; alc200@cam.ac.uk

RESTRICTIONS BY OBJECT UNDER EU COMPETITION LAW

IN Case C-228/18, *Gazdasági Versenyhivatal v Budapest Bank* (ECLI:EU:C:2020:265), the Court of Justice has provided important guidance on the requirements for an agreement to be categorised as a “restriction by object” for the purposes of Article 101(1) TFEU. It is the latest in a line of cases emphasising that the concept of restriction of competition by object is to be interpreted restrictively.

The case arose from an agreement entered into in 1996 between Hungarian banks operating within the Visa and MasterCard card payment schemes, setting uniform multilateral interchange fees (MIFs) for

https://doi.org/10.1017/S0008197320000732 Published online by Cambridge University Press

transactions under both schemes (MIF Agreement). Interchange fees are charged by card issuers (banks that issue cards to consumers) to card acquirers (banks that provide services to retailers to enable them to accept cards as a means of settlement), and form part of the merchant service charge levied by acquirers on retailers. The setting of MIFs within the framework of payment card schemes has been a controversial issue over the last 20 years: the Commission has brought multiple challenges against the Visa and MasterCard MIFs as an infringement of Article 101(1) TFEU and there have recently been numerous damages actions against the card schemes for breach of Article 101(1). However, the central issue in *Budapest Bank* was not the existence of MIFs per se, but the fact that, under the MIF Agreement, the MIFs charged under both the Visa and MasterCard schemes were fixed at the same level. In 2009 the Hungarian competition authority (HCA) adopted an infringement decision under Article 101(1) TFEU and the equivalent domestic law, imposing fines on the member banks and the credit card companies, finding that the MIF Agreement constituted both a restriction by object and a restriction by effect. Its decision was appealed and reached the Hungarian Supreme Court, which referred a number of questions to the Court of Justice. Central among these were whether an agreement could infringe Article 101(1) both because of its anti-competitive object and effect (which the court had no difficulty answering in the affirmative), and whether the MIF Agreement was correctly categorised as a restriction by object (where both the court and A.G. Bobek entertained more doubts).

Article 101(1) TFEU refers to agreements which have as their "object or effect" the prevention, restriction or distortion of competition and it is well established that "object" and "effect" are alternative bases for proving an infringement (Case 56/65, *LTM* [1966] E.C.R. 236, 249). The object/ effect distinction assumes critical importance because once an agreement has been shown to have an anti-competitive object, it is unnecessary to prove that it also has anti-competitive effects (Case C-345/14, *Maxima Latvija*, EU:C:2015:784, at [17]). For a competition authority there are obvious advantages in pursuing a case as a restriction by object, as there is no need to embark on a detailed economic analysis of its effects. On the other hand, as the court in *Budapest Bank* made clear, a finding of a restriction by object in no way precludes a finding that the same agreement has the effect of restricting competition (at [40], [44]).

But where should the limits of the restriction by object concept be drawn? *Cartes Bancaires* (*CB*) (Case C-67/13 P, EU:C:2014:2204) confirms that the concept is to be interpreted restrictively and that it applies only to certain types of coordination "which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects" (at [58]); otherwise there is a risk of condemning agreements

https://doi.org/10.1017/S0008197320000732 Published online by Cambridge University Press

which may turn out on closer analysis not to be anti-competitive. As A.G. Wahl noted in his Opinion in that case (at [56]):

> Only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition.

As to how the assessment should be carried out, the answer provided by the court in *CB* is to consider "the content of its provisions, its objectives and the economic and legal context of which it forms a part" (at [53]). For these purposes, "context" includes the nature of the products affected and the markets involved (ibid.).

Classic examples of restrictions by object include (horizontal) price-fixing, output limitation, market-sharing and (vertical) resale price maintenance. But the application of the restriction by object concept to other forms of coordination has proved more controversial. In *Generics (UK) Ltd.* (Case C-307/18, EU:C:2020:52), the Court of Justice recently gave a nuanced response to the question of whether pharmaceutical pay-for-delay agreements could be characterised as a restriction by object, noting that the mere fact that they involve a transfer of value by an originator to a generic is not enough (at [84]–[86]), unless it is clear that this can only be explained by the parties' commercial interest "not to engage in competition on the merits" (at [87]). For A.G. Bobek in *Budapest Bank* the identification of a restriction by object required a two-step analysis. The first was to consider the content of the agreement and its objectives, to ascertain whether the agreement fell within a category whose harmful nature was, "in the light of experience, commonly accepted and easily identifiable" (at [42]). For these purposes, "experience" referred to "what can traditionally be seen to follow from economic analysis, as confirmed by the competition authorities and supported, if necessary by case-law" (ibid.). The second was to ensure that this purely formal assessment was "not called into question by considerations relating to the legal and economic context in which the agreement was implemented" including the nature of the products affected and the markets involved; in addition, the parties' subjective intentions could be taken into account where relevant (at [43]). While this approach is pragmatic, it necessarily entails some consideration of the economic effects of an agreement and therefore risks blurring the object/effect distinction, a point acknowledged by A.G. Bobek, who admitted that he was unable to draw a bright line between this second step and a full effects analysis (at [49]); but in his view this was justified as a "basic reality check" to ensure there were no legal or factual circumstances pointing in the opposite direction (at [49]–[50]).

https://doi.org/10.1017/S0008197320000732 Published online by Cambridge University Press

Applying this logic, both the A.G. and the court had doubts about whether the MIF Agreement could properly be categorised as a restriction by object. One issue for A.G. Bobek was that the MIF Agreement did not obviously entail horizontal price-fixing or vertical resale price maintenance; it merely standardised one aspect of the cost structure under both card schemes (at [53]), added to which was a lack of clarity in the competitive harm alleged by the HCA (at [56]–[60]). The court seemed less convinced, noting that it would have been sufficient that the MIF Agreement could be viewed as a form of indirect price-fixing, indirectly determining the merchant service charges (at [62]); this meant the MIF Agreement could not be ruled out a priori from being a restriction by object (at [63]). But nor could the court exclude that the real objective of the MIF Agreement was to ensure a balance between the interests of card issuers and acquirers by allowing for recovery of some costs but preventing interchange fees and merchant service charges rising to excessively high levels (at [73]). There were also suggestions from the Hungarian Supreme Court that by removing price competition between the two card schemes the MIF Agreement could have enhanced competition on parameters other than price (at [74]). Although the court noted that this was a matter for the referring court, it added that if that were the case, an infringement of Article 101 (1) could only be established on the basis of a full effects analysis, by considering the counterfactual; in other words, how competition would have developed in the absence of the MIF Agreement (at [75]).

Perhaps the most powerful reason given by A.G. Bobek and the court for doubting whether the MIF Agreement could be viewed as a restriction by object stemmed from the lack of a "reliable and robust wealth of experience" showing that such agreements are commonly accepted as anti-competitive (Opinion, at [63]). The problem as articulated by A.G. Bobek (at [66]–[68]) was that the practice on which the HCA had said it was relying (essentially a series of Commission interventions against MIFs) appeared inconclusive and pointed in different directions. These included *Visa International* (COMP/29.373, OJ 2002 L 318 p.17) where the Visa MIF was expressly considered *not* to amount to a restriction by object, and was exempted; *MasterCard*, *EuroCommerce* and *Commercial Cards* (COMP/34.579, 36.518 and 38.580, OJ 2009 C 264 p.8) finding "fallback" (default) MIFs to be a restriction by effect, but without any conclusion on whether they amounted to a restriction by object; and *Visa MIF* (AT.39398, OJ 2019 C 299 p.8) accepting commitments (which necessarily entail no finding of infringement) to cap the level of various MIFs. Only in *MasterCard II* (AT.40049, OJ 2019 C 300 p.6) had the Commission found a restriction by object. Nor could it be said that the case law of the EU courts or of national courts assisted the debate (at [70]–71]), and, as A.G. Bobek observed, there was seemingly no consensus among economists supporting the argument in favour of a restriction by object (at

https://doi.org/10.1017/S0008197320000732 Published online by Cambridge University Press

[72]). Significantly, the court (at [76]) appears to endorse A.G. Bobek's reasoning on this point, noting the requirement for "sufficiently reliable and robust experience" to justify a finding of a restriction by object, adding (at [79]) that the information relied on by the HCA, the Hungarian Government and the Commission, primarily the HCA's decisional practice and EU case law, demonstrated "as things currently stand" the need to conduct a detailed effects analysis, including consideration of the counterfactual. This aspect of the case is likely to have ramifications well beyond the card payment sector, where competition authorities are using novel theories of harm to challenge types of agreement that have not previously been accepted as inherently anti-competitive. Absent evidence of a clear economic consensus, a consistent line of competition authority practice or case law precedent, *Budapest Bank* means that it is likely to be difficult to characterise such agreements as a restriction by object.

MARK FRIEND

Address for Correspondence: Allen & Overy LLP, One Bishops Square, London, E1 6AD, UK. Email: mark.friend@allenovery.com. All views expressed are personal. Allen & Overy LLP's Budapest office acted for ING Bank in this case.

JURISDICTION IN INSURANCE MATTERS AND THE "WEAKER PARTY"

IN *Aspen Underwriting Ltd. v Credit Europe Bank NV* [2020] UKSC 11, [2020] 2 W.L.R. 919, the Supreme Court had a rare opportunity to consider the insurance provisions of the Brussels I Regulation Recast ("BIR Recast"). The court's comments will be of significant interest to conflicts, insurance and EU lawyers, as well as those dealing with other provisions of the BIR Recast designed to protect the weaker party, namely the consumer and employment provisions.

The facts concerned a large and audacious attempted insurance fraud. Aspen Underwriting Limited ("the Insurer") was the insurer of a vessel called the *Atlantik Confidence*. Credit Europe Bank NV ("the Bank") was a mortgagee of the vessel and assignee of the insurance policy, which contained an exclusive English jurisdiction clause. The *Atlantik Confidence* sank in the Gulf of Aden. The Insurer entered into a settlement agreement with the owners and managers of the vessel and paid the brokers (at the Bank's direction) under the policy. The Admiralty Court subsequently held that the owner's alter ego had procured scuttling of the vessel: [2016] EWHC 2412, [2016] 2 Lloyd's Rep 525. The Insurer commenced proceedings against the owners, managers and the Bank to recover sums paid under the settlement agreement. The Bank, domiciled in the Netherlands, challenged the English court's jurisdiction.

https://doi.org/10.1017/S0008197320000732 Published online by Cambridge University Press