

CPI EU News Presents:

Are Payment Card Systems' Multilateral Interchange Fees Anticompetitive by Object under EU Competition Law?

Csongor István Nagy¹
(University of Szeged)

Edited by Thibault Schrepel, Sam Sadden & Jan Roth (CPI)



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1. Background

Hungarian banks fixed the interchange fee to be used in the two major payment card systems (MasterCard and Visa) on a multilateral basis. This fee is used in inter-bank clearing and is paid by the acquiring bank (which operates the bankcard terminal installed at the merchant) to the issuing bank (which issued the bankcard used for the payment). When the customer pays by card, the acquiring bank charges a fee to the merchant. Afterwards, the acquiring bank passes a portion of the merchant fee on to the issuing bank. In this system, the issuing bank has two sources of income: the cardholder may pay a fee for the issuance of the payment card, and the acquiring bank shares a part of the merchant fee. This makes the payment card industry a two-sided market.

These fees were normally not fixed on a bilateral basis but by means of a single uniform multilateral interchange fee ("MIF"). This practice gave rise to various competition investigations in Europe,² where competition authorities approached the MIF in various ways: some considered it to be an agreement to be assessed by its effects, some pronounced this arrangement anticompetitive by object. In the end, the controversies about the MIF resulted in a European legislative intervention in the form of a regulatory cap.³

While the MIF may have the appearance of price fixing, as the fee paid in consideration of the services provided by the issuing bank is fixed uniformly by competitors, this conclusion is overshadowed by the fact that the agreement embraces both sides of the market (sellers and buyers), and the MIF may be regarded as ancillary to the effective operation of the payment card system and as a means to encourage use of this payment method.

In Case Vj-18/2008 *MIF*, the Hungarian Competition Office ("HCO") used a combination of the two approaches: it condemned Hungarian banks for fixing the domestic MIF and for treating the two payment card companies alike as anticompetitive both by object and effect. The decision was appealed, and the Hungarian Supreme Court ("Kúria") submitted four preliminary questions. The Court of Justice of the European Union ("CJEU") answered the first two questions, but deemed the remainder to be inadmissible. The first question raised no difficult issues of interpretation. The Court confirmed that anticompetitive object and anticompetitive effect may be used as parallel legal bases by competition authorities and private plaintiffs: it is not against the law to pronounce the same agreement to be anticompetitive both by object and effect. The second question proved to be more difficult: the Hungarian Supreme Court requested the CJEU's guidance as to whether Hungarian banks' fixing of the interchange fee on a multilateral basis and uniformly in respect of the two payment card systems (MasterCard and Visa) was anticompetitive by object.

2. Outcome

The CJEU found that the MIF is presumed not to be anticompetitive by object. While concluding that this is a fact-intensive issue, and hence the final decision is up to the national court,⁴ the CJEU also established a presumption against automatic condemnation.

The wording of the preliminary decision makes this clear: it provides that the MIF is not anticompetitive by object, *unless* the national court finds that the arrangement's purpose and background suggests the opposite conclusion.⁵ It seems that the CJEU found that the preliminary question fell within the scope of the ruling in *Cartes bancaires*,⁶ where the Court took the same position with respect to another two-sided payment card system.⁷

The Court stressed that anticompetitive object is the exception and not the rule and, hence, competition authorities and courts should make use of this only when there is sufficiently solid and reliable experience ("une expérience suffisamment solide et fiable") that bears out this conclusion.⁸ It may be assumed that such experience may derive from earlier case-law or empirical analysis. The Court concluded that experience of the MIF does not live up to this expectation.⁹

According to the CJEU, the following raised doubts as to the anticompetitive nature of the MIF. First, while acknowledging that indirect price-fixing is also price-fixing,¹⁰ the Court pointed out that banks did not fix the price but merely a cost element.¹¹ Second, it also underlined that complex two-sided markets are normally not amenable to the automatic condemnation inherent to a finding that an agreement is anticompetitive by object.¹² Third, the MIF appears to have been serving the purpose of creating balance in the system, which may be a legitimate consideration and may make the multilateral cooperation ancillary, and call for an effects-analysis.¹³ Fourth, the MIF was determined not by the sellers (issuing banks) unilaterally, but was based on a bipartite agreement between sellers and buyers (issuing and acquiring banks). Although the bipartite nature of the agreement does not rule out the existence of an anticompetitive object, it does raise doubts in this regard.¹⁴

3. Analysis

The CJEU's ruling in *GVH v. Budapest Bank and others* lines up in a sequence of cases (starting with *Allianz*,¹⁵ and followed by *Cartes bancaires*, *MasterCard*,¹⁶ *Maxima Latvija*¹⁷ and *Hoffmann-La Roche & Novartis*¹⁸) that have remolded the concept of anticompetitive object. Although addressing a specific aspect (uniform treatment of the two payment card systems), the ruling in *GVH v. Budapest Bank and others* centers around the general question of whether the MIF can be regarded as anticompetitive by object after a quick look into the totality of circumstances, and provides another example of the CJEU trying to put the genie invoked by *Allianz* back into the bottle. For a long time, anticompetitive object had been viewed as a category-building doctrine, generating an amplifiable but relatively exhaustive list of hard-core restraints, and reminiscent of US antitrust law's concept of *per se* agreements. With its ruling in *Allianz*,¹⁹ the CJEU turned this concept upside down and called on competition authorities and courts to analyze agreements on a case-by-case basis. If, after carrying out an abridged effects-analysis, the agreement is found to be anticompetitive by object, it is, as such, automatically prohibited (the *Allianz* doctrine).²⁰

It is noteworthy that since *Allianz* the CJEU, with the exception of *Hoffmann-La Roche & Novartis*, has consistently overturned all infringement decisions relying on the *Allianz*

doctrine (that is, not based on one of the traditional categories of anticompetitive object) and stressed that this doctrine should be used exceptionally, as in EU competition law it is the exception and not the rule.²¹

In the post-*Allianz* era, traditional hardcore agreements (price-fixing, market-division, etc.) remain to be treated as anticompetitive by object and, in addition to this, any unlisted agreement may get this label, if the competition authority or the court, after a quick look into the market, finds that it deserves automatic prohibition. *Allianz* was followed by a good number of cases where the CJEU was expected to review the case-by-case characterization of national courts. In these cases, the CJEU stressed that although anticompetitive object became an elusive concept, it still applies only exceptionally, and courts should not be quick to make use of it to avoid an effects-analysis. The ruling in *GVH v. Budapest Bank and others* reconfirms this.

¹ LL.M., Ph.D., S.J.D, Dr. Juris, Professor of Law and Head of the Department of Private International Law at the University of Szeged, recurrent visiting professor at the Central European University (Budapest/New York) and the Sapientia University of Transylvania (Romania). Admitted to the Budapest Bar, arbitrator at the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry and member of the Panel of Conciliators and Arbitrators, International Centre for Settlement of Investment Disputes (ICSID).

² See e.g. Case C-382/12 *MasterCard Inc. and Others v. European Commission*, ECLI:EU:C:2014:2201; *Sainsbury's v. MasterCard*, [2016] CAT 11; Michele Giannino, The Italian Competition Authority finds an anti-competitive agreement in the banking sector but does not impose any fine (ABI / SEDA), April 28, 2017, e-Competitions April 2017, Art. N° 84366; Commission Decision of April 29, 2019 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39398 – Visa MIF).

³ Regulation 2015/751 of the European Parliament and of the Council of April 29, 2015 on interchange fees for card-based payment transactions. OJ L 123, 19.5.2015, p. 1-15.

⁴ Case C-228/18, *Gazdasági Versenyhivatal v. Budapest Bank Nyrt. and Others*, ECLI:EU:C:2020:265, April 2, 2020, para 59.

⁵ Para 86.

⁶ Case C-67/13 *Groupement des cartes bancaires (CB) v. European Commission*, ECLI:EU:C:2014:2204.

⁷ Para 66.

⁸ Para 76.

⁹ Paras 65, 77 & 79.

¹⁰ Para 62.

¹¹ Para 61.

¹² Para 68.

¹³ Paras 71 & 73.

¹⁴ Paras 84-85.

¹⁵ Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v. Gazdasági Versenyhivatal*, ECLI:EU:C:2013:160. See Csongor István Nagy, The Distinction between Anti-Competitive Object and Effect after *Allianz*: The End of Coherence in Competition Analysis? 36(4) *World Competition: Law and Economics Review* 541 (2013), available at <https://ssrn.com/abstract=2447630>.

¹⁶ Case C-382/12 *MasterCard Inc. and Others v. European Commission*, ECLI:EU:C:2014:2201.

¹⁷ Case C-345/14 *SIA „Maxima Latvija” v. Konkurences padome*, ECLI:EU:C:2015:784.

¹⁸ Case C-179/16 *Hoffmann-La Roche Ltd, Roche SpA, Novartis AG, Novartis Farma SpA v. Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2018:25.

¹⁹ Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v. Gazdasági Versenyhivatal*, ECLI:EU:C:2013:160.

²⁰ Csongor István Nagy, The New Concept of Anti-Competitive Object: A Loose Cannon in EU Competition Law, 36(4) *European Competition Law Review* 154 (2015), available at <https://ssrn.com/abstract=2740692>.

²¹ Csongor István Nagy, Anticompetitive Object/Effect: An Overview of EU and National Case Law, e-Competitions Bulletin Anticompetitive object/effect, Art. N° 91905 (2019), available at <https://ssrn.com/abstract=3470689>.