Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

2 April 2020*

(Reference for a preliminary ruling — Competition — Agreements, decisions and concerted practices — Article 101(1) TFEU — Card payment systems — Interbank agreement fixing the level of interchange fees — Agreement restricting competition 'by object' and 'by effect' — Concept of restriction of competition 'by object')

In Case C-228/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kúria (Supreme Court, Hungary), made by decision of 6 March 2018, received at the Court on 3 April 2018, in the proceedings

Gazdasági Versenyhivatal

v

Budapest Bank Nyrt.,

ING Bank NV Magyarországi Fióktelepe,

OTP Bank Nyrt.,

Kereskedelmi és Hitelbank Zrt.,

Magyar Külkereskedelmi Bank Zrt.,

ERSTE Bank Hungary Zrt.,

Visa Europe Ltd,

MasterCard Europe SA,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, I. Jarukaitis, E. Juhász, M. Ilešič and C. Lycourgos, Judges,

Advocate General: M. Bobek,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 27 June 2019,

* Language of the case: Hungarian.

after considering the observations submitted on behalf of:

– Gazdasági Versenyhivatal, by A. Kőhalmi and M. Nacsa, acting as Agents,

– Budapest Bank Nyrt., initially by L. Wallacher, and subsequently by A. Kékuti, ügyvédek,

– ING Bank NV Magyarországi Fióktelepe, by A. Kőmíves, ügyvéd,

– OTP Bank Nyrt., by L. Réti and P. Mezei, ügyvédek,

– Kereskedelmi és Hitelbank Zrt., by Z. Hegymegi-Barakonyi, ügyvéd,

– Magyar Külkereskedelmi Bank Zrt., by S. Szendrő, ügyvéd,

– ERSTE Bank Hungary Zrt., by L. Wallacher, ügyvéd,

– Visa Europe Ltd, by Z. Marosi and G. Fejes, ügyvédek,

– MasterCard Europe SA, by E. Ritter, ügyvéd,

– the Hungarian Government, by M.Z. Fehér, G. Koós and G. Tornyai, acting as Agents,

– the European Commission, by F. Castilla Contreras, V. Bottka and I. Zaloguin, acting as Agents,

– the EFTA Surveillance Authority, by M. Sánchez Rydelski, C. Zatschler, C. Simpson and C. Howdle, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 September 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101(1) TFEU.

2 The request has been made in proceedings between the Gazdasági Versenyhivatal (Competition Authority, Hungary) and (i) six financial institutions, namely Budapest Bank Nyrt., the Hungarian subsidiary of ING Bank NV, OTP Bank Nyrt., Kereskedelmi és Hitelbank Zrt., Magyar Külkereskedelmi Bank Zrt. and ERSTE Bank Hungary Zrt., and (ii) two companies providing card payment services, namely Visa Europe Ltd ('Visa') and MasterCard Europe SA ('MasterCard'), concerning a decision of the Competition Authority by which it found that there was an anticompetitive agreement relating to interchange fees.

Hungarian law

3 Paragraph 11(1) of the tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvény (Law No LVII of 1996 on the prohibition of unfair and restrictive market practices; 'the Law on unfair market practices') provides:

'Agreements or concerted practices between undertakings and decisions by organisations of undertakings established pursuant to the freedom of association, or by public corporations, associations or other similar organisations formed by undertakings …, which have as their object or

potential or actual effect the prevention, restriction or distortion of competition, shall be prohibited. Agreements concluded between undertakings not independent of each other cannot be covered by this definition.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

4 It is apparent from the order for reference that, in the mid-1990s, Visa and MasterCard, or their respective legal predecessors, permitted, pursuant to their internal rules, financial institutions issuing their cards ('the issuing banks'), on the one hand, and financial institutions providing merchants with services enabling them to accept those cards as a method of payment ('the acquiring banks'), on the other hand, to determine jointly the amount of national 'interchange' fees between issuing and acquiring banks, that is to say, the amount paid by the latter to the former when a card payment transaction takes place.

5 In the course of 1995 and 1996, the banks operating in the card payment services sector introduced a multilateral cooperation procedure ('the Forum'), in which they discussed, on a case-by-case basis, various issues on which it was considered that cooperation was needed in that sector.

6 Within the Forum, seven banks — most of which had joined the card payment systems set up by Visa and MasterCard, and which represented a large part of the national market of issuing and acquiring banks — reached agreement on 24 April 1996, following several rounds of negotiations, on the text of an agreement relating to the determination, for each category of merchant, of the minimum level of the uniform merchant service charge ('MSC') payable by each category ('the MSC Agreement'). Subsequently, on 28 August 1996, they concluded an agreement, which entered into force on 1 October 1996, by which they introduced a uniform amount for interchange fees relating to payments made by means of cards issued by banks belonging to the card payment system offered by Visa or MasterCard ('the MIF Agreement'). Kereskedelmi és Hitelbank negotiated the MIF Agreement on behalf of Visa and MasterCard, and the latter both applied that agreement.

7 Ultimately, the MSC Agreement was not signed by the seven banks, but the interchange fees covered by the MIF Agreement, as a cost factor, had an indirect effect on determination of the amount of the MSC. In particular, the fees covered by the MIF Agreement operated as a lower limit in the reduction of the MSCs. Furthermore, the pursuit of the objectives set in the draft MSC Agreement played a part in the conclusion of the MIF Agreement and in the calculation of the uniform scales for Visa and MasterCard, even if those objectives were not subsequently achieved.

8 Over time, other banks interested in the card payment services sector signed the MIF Agreement and joined the activities of the Forum, so that the number of banks that were party to that agreement — and are concerned by the main proceedings — rose to 22 over the course of 2006.

9 The MIF Agreement was still in force on 31 January 2008 when the Competition Authority initiated a procedure relating to that agreement.

10 The MIF Agreement was terminated with effect from 30 July 2008.

11 In a decision of 24 September 2009 ('the Competition Authority's decision'), the Competition Authority found that, by (i) determining the level and structure of the interchange fee, which were uniformly applicable to Visa and MasterCard as well as to all the banks, (ii) establishing a framework for such an agreement in their internal rules and (iii) facilitating it, the 22 banks that were party to the MIF Agreement, and Visa and MasterCard, entered into an anticompetitive agreement that did not fall within any exemption. It stated that, by that conduct, from the time when they signed up to the MIF Agreement — the starting date of the anticompetitive conduct being that of the entry into force of the Law on unfair market practices on 1 January 1997 in respect of the banks that concluded

the MIF Agreement, while that date varied in respect of the banks that signed up to that agreement subsequently — until 30 July 2008 they infringed Paragraph 11(1) of that law and, after 1 May 2004, they infringed Article 101 TFEU. That conduct constituted not only a restriction of competition 'by object', in that the purpose of the MIF Agreement was anticompetitive conduct, but also a restriction 'by effect', in that that agreement had a restrictive effect on competition. The Competition Authority imposed fines in varying amounts on the seven banks that had initially concluded the MIF Agreement, and on Visa and MasterCard.

12 Visa, MasterCard and six of the banks ordered to pay fines brought proceedings against the Competition Authority's decision before the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary), which dismissed their application.

13 Ruling on the appeal brought by those parties, with the exception of MasterCard, the Fővárosi Törvényszék (Budapest High Court, Hungary) amended the Competition Authority's decision and, on procedural grounds, closed the procedure so far as concerns the Hungarian subsidiary of ING Bank. As regards the other parties, it annulled that decision and referred the case back to the Competition Authority in order for it to give a fresh decision.

14 The Competition Authority brought an appeal on a point of law before the referring court, the Kúria (Supreme Court, Hungary), against the judgment of the Fővárosi Törvényszék (Budapest High Court, Hungary).

15 The referring court is uncertain, in the first place, whether the same conduct can give rise to a finding of an infringement under Article 101(1) TFEU on account of both its anticompetitive object and its anticompetitive effects as independent grounds.

16 It states that, on the one hand, in particularly complex cases, the national competition authorities and the European Commission found their decisions on a dual basis in order to prevent a subsequent assessment, which diverges in part, in judicial review proceedings from affecting the decision against the infringer on the substance.

17 On the other hand, it might be inferred from the use of the conjunction 'or' in Article 101(1) TFEU that it is not possible to regard one and the same agreement as involving a restriction of competition both 'by object' and 'by effect' since a decision to that effect would be of an uncertain and contradictory nature.

18 Moreover, the exemption conditions and penalties necessarily call for a different assessment depending on whether the restriction concerned is classified as a restriction 'by object' or 'by effect', so that the classification of that restriction in any event affects the substance of the case. According to the referring court, even if, in the case of restriction of competition by object, the competition authority concerned is required, according to the factual context, to carry out an in-depth examination of the effects of the restriction in question in order to be able to decide on the appropriate level of penalties and assess the existence of exemption conditions, that does not mean, however, that a decision finding and penalising anticompetitive conduct can be founded on a dual basis.

19 In the second place, the referring court is unsure whether the MIF Agreement was capable of being regarded as a restriction of competition 'by object'. In that connection, it notes that, in its decision-making practice, the Commission has never adopted a decisive position as to whether similar agreements may be regarded as constituting such restrictions. Nor is the answer to this question clear from the case-law of the Court of Justice. Furthermore, the case in the main proceedings displays differences from those examined to date by the Commission and the Court. One of those differences lies in the fact that, in the earlier cases, it was not ascertained whether the interchange fees were actually set at the same level.

20 In the latter regard, the referring court observes that the MIF Agreement was not a purely horizontal price-fixing cartel since the parties to that agreement included both issuing and acquiring banks without distinction. Furthermore, even assuming that Visa and MasterCard were directly involved in the MIF Agreement, that agreement did not set selling and purchase prices but rather the transaction conditions relating to their respective services. The referring court also points out that the MIF Agreement concerned an atypical and imperfect competitive market, the effects of which would be impossible to remedy without imposing rules. Lastly, the referring court highlights the fact that, in the past, the market was, for the most part, characterised by uniform prices. It observes, more specifically, that it is only if the other conditions of competition between Visa and MasterCard were different that to require differing interchange fees would not be anticompetitive, but there are no indications to that effect here.

21 Conversely, the referring court acknowledges that there are arguments supporting the conclusion that the MIF Agreement resulted in a restriction of competition by object. In particular, one of the reasons stated for the uniform pricing adopted by that agreement is that it was a necessary requirement under the MSC Agreement. However, since that objective immediately disappeared as the MSC Agreement did not in fact come into being, no effect whatsoever can be attributed to the MIF Agreement. The referring court adds that, although such a subjective intention to restrict competition might have existed, if not amongst the banks which were parties to that agreement, at least on the part of Visa and MasterCard, subjective intentions cannot, on their own, form the basis for taking the view, in objective terms, that the MIF Agreement pursued an object that restricted competition.

22 The referring court takes the view that the need to take into account, in addition to the actual content of the agreement which allegedly restricts competition, the economic and legal context of that agreement makes it particularly unclear where examination of the agreement from the perspective of its object ends and where examination of the agreement from the perspective of its effects begins.

23 Finally, in so far as the Competition Authority took the view that the MIF Agreement also constituted a restriction of competition 'by object' on the ground that it involved an indirect determination of prices relating to the level of service charges paid by merchants, the referring court considers that there is no question of indirect price fixing.

24 In the third and final place, the referring court has doubts regarding Visa's involvement in the MIF Agreement and, in particular, whether that undertaking may be regarded as having been party to that agreement, when it was not directly involved in defining the content of the agreement, but did enable its conclusion and also accepted and implemented it, or whether it should rather be concluded that there was a concerted practice between it and the banks that concluded the agreement. The referring court is also unsure whether such a distinction needs to be drawn, whilst observing that the way in which Visa's involvement is classified could have consequences vis-à-vis liability and any penalties applied.

25 In those circumstances, the Kúria (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(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?

(3) Can [Article 101(1) TFEU] be interpreted as meaning that [Visa and MasterCard] can also be considered to be parties to [the MIF Agreement although those companies] were not directly involved in defining the content of the agreement but facilitated its adoption and accepted and implemented it; or are these companies to be considered to have acted in concert with the banks that entered into the agreement?

(4) Can [Article 101(1) TFEU] be interpreted as meaning that, in view of the subject matter of the proceedings, for the purpose of finding an infringement of competition law, it is not necessary to differentiate between participation in the [MIF Agreement] and acting in concert with the banks that participated in the agreement?'

Consideration of the questions referred

The first question

26 By its first question, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as precluding the same anticompetitive conduct from being regarded as having as both its object and its effect the restriction of competition, within the meaning of that provision.

Admissibility

27 Budapest Bank, ERSTE Bank Hungary and MasterCard contend that the first question is inadmissible. In particular, those two banks state that the debate in the main proceedings related only to the criteria for the concept of a restriction 'by object'. Furthermore, the Hungarian courts have themselves held that the classification of conduct as restrictive by object or by effect requires that different circumstances be examined, so that the question of the possibility of a dual classification on the basis of identical facts does not arise. In MasterCard's view, the first question is hypothetical since, first, it has no bearing on the outcome of the dispute in the main proceedings and, second, it follows from the Court's settled case-law that the referring court may classify the same conduct as a restriction by object or by effect, but that there is no obligation to classify that conduct on a dual basis.

28 Furthermore, without formally pleading that the first question is inadmissible, OTP Bank takes the view that this question must be reformulated since, as currently worded, it is not clear how it would be relevant in the light of the dispute in the main proceedings, whilst Magyar Külkereskedelmi Bank and the Hungarian Government argue that the question cannot be regarded as relevant for the purposes of resolving that dispute since, according to that bank, the MIF Agreement has neither the object nor the effect of restricting competition and, according to the Hungarian Government, simultaneous assessment of the object and the effect of the same conduct is problematic only if that assessment would infringe the '*ne bis in idem*' principle, which is not the case here.

29 It should be recalled that, in accordance with its settled case-law, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 27 and the case-law cited).

30 In the present instance, it is undisputed that the Competition Authority's decision, which — as is clear from paragraphs 11 to 14 of the present judgment — is at the origin of the appeal on a point of law brought before the referring court, classifies the MIF Agreement as restrictive both by its object and by its effects. That being so, the view cannot be taken that the first question, by which the referring

court seeks specifically to ascertain whether such a dual classification is compatible with Article 101(1) TFEU, bears no relation to the actual facts of the dispute in the main proceedings or its purpose or that it is hypothetical.

31 Moreover, none of the specific circumstances mentioned by the parties which submitted observations is capable of calling that finding into question. In particular, the fact that one or other of the two classifications adopted in respect of the MIF Agreement may possibly be unfounded, the fact that there may be no obligation on the referring court to classify the same conduct on a dual basis or indeed the fact that the dual classification at issue in the main proceedings may not infringe the '*ne bis in idem*' principle concerns not the admissibility of the first question but the merits of the Competition Authority's decision.

32 The first question is therefore admissible.

Substance

33 It should be noted at the outset that, in order to be caught by the prohibition laid down in Article 101(1) TFEU, an agreement must have as its 'object or effect' the prevention, restriction or distortion of competition within the internal market. According to the settled case-law of the Court since the judgment of 30 June 1966, *LTM* (56/65, EU:C:1966:38), the alternative nature of that requirement, as shown by the conjunction 'or', leads, first of all, to the need to consider the precise object of the agreement (judgments of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 16, and of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 24).

34 Thus, where the anticompetitive object of an agreement is established, it is not necessary to examine its effects on competition (judgments of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 17, and of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 25).

35 Indeed, it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition to be regarded as being restrictions by object, so that there is no need to examine their effects. That case-law arises from the fact that certain forms of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of competition (judgments of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraphs 184 and 185, and of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 26).

36 Thus, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, 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 it has 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 (judgments of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51, and of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 19).

37 In the light of the case-law of the Court recalled in paragraphs 35 and 36 of the present judgment, the essential legal criterion for ascertaining whether an agreement involves a restriction of competition 'by object' is therefore the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not necessary to assess its effects (judgment of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 20 and the case-law cited).

38 Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 52 and the case-law cited).

39 Although it thus follows from the case-law of the Court referred to in paragraphs 33 to 38 of the present judgment that, where an agreement is classified as a restriction of competition 'by object' under Article 101(1) TFEU, there is no need to demonstrate, in addition, the effects of that agreement for the purposes of finding that it is prohibited pursuant to that provision, the Court has, on the other hand, already held, with regard to the same conduct, that that conduct had both the object and the effect of restricting competition (see to that effect, inter alia, judgments of 1 October 1987, *van Vlaamse Reisbureaus*, 311/85, EU:C:1987:418, paragraph 17; of 19 April 1988, *Erauw-Jacquery*, 27/87, EU:C:1988:183, paragraphs 14 and 15; of 27 September 1988, *Ahlström Osakeyhtiö and Others* v *Commission*, 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, paragraph 13; and of 9 July 2015, *InnoLux* v *Commission*, C-231/14 P, EU:C:2015:451, paragraph 72).

40 It follows that the fact that a finding of a restriction of competition 'by object' relieves the competent authority or court having jurisdiction of the need to examine the effects of that restriction in no way means that that authority or court cannot undertake such an examination where it considers it to be appropriate.

41 The considerations set out in the previous paragraph are by no means called into question by those mentioned by the referring court, namely that, first, in the case of a restriction of competition 'by object' it is more difficult to justify an exemption under Article 101(3) TFEU than in the case of a restriction 'by effect' and, second, a restriction 'by object' is more severely punished than a restriction 'by effect'.

42 In that regard, it should be observed that the fact that, as the case may be, the considerations underlying the classification of conduct as a restriction of competition 'by object' are likewise relevant when examining whether that restriction may be exempted pursuant to Article 101(3) TFEU or when considering the penalty that should be imposed in connection with the restriction has no bearing on the ability of the competent competition authority to classify an undertaking's conduct as restricting competition under Article 101(1) TFEU on account both of its object and of its effects.

43 Lastly, it should be added that, as the Advocate General has observed in points 29 and 30 of his Opinion, the option available to the competent authority or the court having jurisdiction of classifying the same anticompetitive conduct as a restriction both 'by object' and 'by effect' in no way detracts from the obligation incumbent on that authority or court, first, to support its findings for that purpose with the necessary evidence and, second, to specify to what extent that evidence relates to each type of restriction thus found to exist.

44 In the light of the foregoing, the answer to the first question is that Article 101(1) TFEU must be interpreted as not precluding the same anticompetitive conduct from being regarded as having as both its object and its effect the restriction of competition, within the meaning of that provision.

The second question

45 By its second question, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that an interbank agreement which fixes at the same amount the interchange fee payable, where a payment transaction by card takes place, to the banks issuing such cards offered

by card payment services companies operating on the national market concerned may be classified as an agreement which has 'as [its] object' the prevention, restriction or distortion of competition, within the meaning of that provision.

Admissibility

46 The Competition Authority, Magyar Külkereskedelmi Bank, MasterCard and the Hungarian Government contend that the second question is inadmissible, on the ground that it is not for the Court to rule on the specific application of Article 101(1) TFEU to the facts of the main proceedings.

47 In that regard, it should be recalled that, in the context of the procedure referred to in Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court, the role of the latter is limited to interpreting the provisions of EU law about which it is asked (judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 29).

48 However, the Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (judgment of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 48 and the case-law cited). Although the Court has no jurisdiction under Article 267 TFEU to apply EU law to specific cases, it can nevertheless provide the national court with the interpretative criteria needed to enable it to decide the case before it (see, inter alia, judgments of 26 January 1977, *Gesellschaft für Überseehandel*, 49/76, EU:C:1977:9, paragraph 4, and of 8 July 1992, *Knoch*, C-102/91, EU:C:1992:303, paragraph 18).

49 In the present instance, it is apparent from the grounds of the order for reference that the referring court is essentially asking the Court to give a ruling not on the specific application of Article 101(1) TFEU to the facts of the main proceedings but on the question whether an interbank agreement which fixes at the same amount the interchange fee payable, where a payment transaction by card takes place, to the banks issuing such bank cards may, in the light of that provision, be classified as an agreement which has as its object the prevention, restriction or distortion of competition.

50 The second question is therefore admissible.

Substance

51 In addition to the considerations set out in paragraphs 33 to 40 of the present judgment, the Court has already held that, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition to be considered a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53 and the case-law cited).

52 As regards the account taken of the objectives pursued by a measure being assessed under Article 101(1) TFEU, the Court has already held that the fact that a measure is regarded as pursuing a legitimate objective does not preclude that measure from being regarded — in the light of the existence of another objective which is pursued by the measure and which, for its part, must be regarded as illegitimate, account being taken in addition of the content of that measure's provisions and of the context of which it forms a part — as having an object restrictive of competition (see, to that effect, judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 70).

53 Furthermore, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account (judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 54 and the case-law cited).

54 Moreover, the concept of restriction of competition 'by object' must be interpreted restrictively. The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition for it to be found that there is no need to examine their effects, as otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of competition. The fact that the types of agreements envisaged in Article 101(1) TFEU do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant (see, to that effect, judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 58 and the case-law cited).

55 Where the agreement concerned cannot be regarded as having an anticompetitive object, a determination should then be made as to whether that agreement may be considered to be prohibited by reason of the distortion of competition which is its effect. To that end, as the Court has repeatedly held, it is necessary to assess competition within the actual context in which it would occur if that agreement had not existed in order to assess the impact of that agreement on the parameters of competition, such as the price, quantity and quality of the goods or services (see, to that effect, judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraphs 161 and 164 and the case-law cited).

56 In the present instance, it is apparent from the documents before the Court that three distinct markets in the field of open bank card systems can be identified, namely, first, the 'inter-systems market', on which the various cards systems compete with one another, next, the 'issuing market', on which the issuing banks compete to attract card holders as customers, and, finally, the 'acquiring market', on which the acquiring banks compete to attract merchants as customers.

57 According to the information provided by the referring court, in its decision the Competition Authority took the view that the MIF Agreement was restrictive of competition by its object, in particular because, first, it neutralised the most significant element of price competition on the inter-systems market in Hungary, second, the banks themselves gave it the role of restricting competition on the acquiring market in that Member State and, third, it necessarily affected competition on the latter market.

58 Before the Court, the Competition Authority, the Hungarian Government and the Commission argued, in that same vein, that the MIF Agreement was a restriction of competition 'by object' in that it entailed indirect determination of the service charges, which serve as prices on the acquiring market in Hungary. On the other hand, the six banks at issue in the main proceedings, as well as Visa and MasterCard, dispute that that was the case.

59 As to whether, having regard to the relevant factors characterising the situation in the main proceedings and to the economic and legal context in which that situation falls, an agreement such as the MIF Agreement may be classified as a restriction 'by object', it should be observed that, as is clear from paragraph 47 of the present judgment, it is ultimately for the referring court to determine whether that agreement had as its object the restriction of competition. In any event, the Court does not have at its disposal all the information which might prove relevant in that regard.

60 So far as concerns the information actually submitted to the Court, it should be observed, as regards, first, the content of the MIF Agreement, that it is not in dispute that that agreement established a uniform amount for the interchange fees that the acquiring banks paid to the issuing banks when a payment transaction was made using a card issued by a bank which was a member of the card payment system offered by Visa or MasterCard.

61 In that connection, it should be observed that, as the Advocate General has stated, in essence, in point 53 of his Opinion, whether it be from the perspective of competition between the two card payment systems or from that of competition between the acquiring banks concerning the service charges, an agreement such as the MIF Agreement does not directly set sale or purchase prices, but standardises an aspect of the cost met by the acquiring banks to the benefit of the issuing banks in return for the services triggered by the use of the cards issued by the latter banks as a means of payment.

62 That consideration notwithstanding, it is clear from the very wording of Article 101(1)(a) TFEU that an agreement which 'indirectly fix[es] purchase or selling prices' may also be regarded as having as its object the prevention, restriction or distortion of competition within the internal market. The question is therefore raised whether an agreement such as the MIF Agreement may be regarded as falling within the scope of indirect price fixing, for the purposes of that provision, in that it indirectly determined the service charges.

63 In addition, it is likewise apparent from the wording of Article 101(1)(a) TFEU and, more specifically, from the words 'in particular' that, as has been stated in paragraph 54 of the present judgment, the types of agreements mentioned in Article 101(1) TFEU do not form an exhaustive list of prohibited collusion, since other types of agreements may also be classified as restrictions 'by object' where such a classification is made in accordance with the requirements stemming from the case-law of the Court recalled in paragraphs 33 to 39, 47 and 51 to 55 of the present judgment. Accordingly, nor can it be ruled out from the outset that an agreement such as the MIF Agreement may be classified as a restriction 'by object' in that it neutralised one aspect of competition between two card payment systems.

64 In that regard, it is apparent from the order for reference that uniform levels of interchange fees were fixed in the MIF Agreement for various payment transactions made using the cards offered by Visa and MasterCard. Furthermore, some of the earlier uniform fees increased, but other such fees were kept at the same level as before. Over the period during which the MIF Agreement was in force, that is to say, from 1 October 1996 to 30 July 2008, the levels of the interchange fees decreased on several occasions.

65 Although it is clear from the documents before the Court that specific percentages and amounts were used in the MIF Agreement for the purposes of fixing the interchange fees, the content of that agreement does not, however, necessarily point to a restriction 'by object', in the absence of proven harmfulness of the provisions of that agreement to competition.

66 Next, as regards the objectives pursued by the MIF Agreement, the Court has already held that, in the case of two-sided card payment systems such as those offered by Visa and MasterCard, it falls to the competent authority or to the court having jurisdiction to analyse the requirements of balance between issuing and acquisition activities within the payment system concerned in order to ascertain whether the content of an agreement or a decision by an association of undertakings reveals the existence of a restriction of competition 'by object' within the meaning of Article 101(1) TFEU (see, to that effect, judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 76 and 77).

67 In order to assess whether coordination between undertakings is by nature harmful to the proper functioning of competition, it is necessary to take into consideration all relevant aspects — having regard, in particular, to the nature of the services at issue, as well as the real conditions of the

functioning and structure of the markets — of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market (judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 78).

68 That must be the case, in particular, when that aspect is the taking into account of interactions between the relevant market and a different related market and, all the more so, when there are interactions between the two facets of a two-sided system (judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 79).

69 In the present instance, although the information contained in the documents before the Court suggests that the MIF Agreement pursued several objectives, it is for the referring court to determine which objective or objectives are actually established.

70 In that regard, the referring court states that the pursuit of the objectives stipulated in the MSC Agreement, even though that agreement did not enter into force, played a role in the conclusion of the MIF Agreement and in the calculation of the uniform scales provided for therein. The specific purpose of the MSC Agreement was to determine, per category of merchants, the minimum level of the uniform service charge to be paid by those merchants.

71 That said, certain information contained in the documents before the Court tends to indicate that one objective of the MIF Agreement was to ensure a degree of balance between the issuing and acquisition activities within the card payment system at issue in the main proceedings.

72 In particular, first, the interchange fees were set at a uniform level using not minimum or maximum limits but fixed amounts. If the sole objective of the MIF Agreement had been to ensure that merchants pay service charges that reach a certain level, it would have been possible for the parties to that agreement to provide merely for minimum limits for the interchange fees. Second, whilst the interchange fee is paid to the issuing banks in return for the services triggered by the use of a payment card, it is clear from the documents before the Court that, during 2006 and 2007, the banks were informed by MasterCard and Visa that cost studies conducted by each of them revealed that the levels of the costs fixed in the MIF Agreement were not sufficient to cover all the costs borne by the issuing banks.

73 It cannot be ruled out that such information points to the fact that the MIF Agreement was pursuing an objective consisting not in guaranteeing a minimum threshold for service charges but in establishing a degree of balance between the 'issuing' and 'acquisition' activities within each of the card payment systems at issue in the main proceedings in order to ensure that certain costs resulting from the use of cards in payment transactions are covered, whilst protecting those systems from the undesirable effects that would arise from an excessively high level of interchange fees and thus, as the case may be, of service charges.

74 The referring court also states that, by neutralising competition between the two card payment systems at issue in the main proceedings as regards the aspect of the cost represented by the interchange fees, the MIF Agreement could have had the result of intensifying competition between those systems in other respects. In particular, the referring court observes that both the Competition Authority's decision and the appeal on a point of law brought before the referring court are based on the premiss that the features of the products offered by Visa and MasterCard are substantially the same. The referring court points out that those features may have varied over the period in which the anticompetitive conduct complained of in the present instance would have occurred. According to that court, setting the interchange fees at a uniform level may have triggered competition in relation to the other features, transaction conditions and pricing of those products.

75 If that was actually the case, which is for the referring court to ascertain, a restriction of competition on the payment systems market in Hungary, contrary to Article 101(1) TFEU, can be found only after an assessment of the competition which would have existed on that market if the MIF Agreement had not existed, an assessment which — as is clear from paragraph 55 of the present judgment — falls within the scope of an examination of the effects of that agreement.

76 Indeed, as the Advocate General has stated in points 54 and 63 to 73 of his Opinion, in order to justify an agreement being classified as a restriction of competition 'by object', without an analysis of its effects being required, there must be sufficiently reliable and robust experience for the view to be taken that that agreement is, by its very nature, harmful to the proper functioning of competition.

77 However, in the present instance, as regards, first, competition between the two card payment systems, it is not possible on the basis of the information available to the Court to determine whether removing competition between Visa and MasterCard as to the aspect of the cost represented by the interchange fees reveals, in itself, a sufficient degree of harm to competition for the view to be taken that its effects do not need to be examined. In that regard, in addition to the considerations set out in paragraphs 74 and 75 of the present judgment, it must be observed that the arguments raised before the Court intended to demonstrate the existence, in the present instance, of a restriction 'by object' consist, in the main, in asserting that the existence of the same level of interchange fee between those two systems bolstered the anticompetitive effects resulting from the standardisation of those fees within each of those systems.

78 Second, as regards the acquiring market in Hungary, even assuming that the MIF Agreement had inter alia as its objective the fixing of a minimum threshold applicable to the service charges, the Court has not been provided with sufficient information to establish that that agreement posed a sufficient degree of harm to competition on that market for a restriction of competition 'by object' to be found to exist. It is, however, for the referring court to carry out the necessary verifications in that respect.

79 In particular, in the present instance, subject to those verifications, it is not possible to conclude on the basis of the information produced for this purpose that sufficiently general and consistent experience exists for the view to be taken that the harmfulness of an agreement such as that at issue in the main proceedings to competition justifies dispensing with any examination of the specific effects of that agreement on competition. The information relied on by the Competition Authority, the Hungarian Government and the Commission in that connection, that is to say, primarily, that authority's decision-making practice and the case-law of the Courts of the European Union, specifically demonstrates, as things currently stand, the need to conduct an in-depth examination of the effects of such an agreement in order to ascertain whether it actually had the effect of introducing a minimum threshold applicable to the service charges and whether, having regard to the situation which would have prevailed if that agreement had not existed, the agreement was restrictive of competition by virtue of its effects.

80 Finally, with regard to the context of which the MIF Agreement formed a part, in the first place, it is true that, as the Commission maintains, the complexity of the card payment systems of the type at issue in the main proceedings, the bilateral nature of those systems in itself and the existence of vertical relationships between the different types of economic operators concerned are not, in themselves, capable of precluding classification of the MIF Agreement as a restriction 'by object' (see, by analogy, judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 43 and the case-law cited). That said, the fact remains that such an anticompetitive object must be established.

81 In the second place, it was argued before the Court that competition between the card payment systems in Hungary triggered not a fall but an increase in the interchange fees, contrary to the disciplinary effect on prices which competition normally exerts in a market economy. According to

those arguments, this is due, inter alia, to the fact that merchants can exert only limited pressure on the determination of the interchange fees, whereas it is in the issuing banks' interest to derive revenue from higher fees.

82 In the event that the referring court were also to find there to be, a priori, strong indications capable of demonstrating that the MIF Agreement triggered such upwards pressure or, at the very least, contradictory or ambivalent evidence in that regard, such indications or evidence cannot be ignored by that court in its examination of whether, in the present instance, there is a restriction 'by object'. Contrary to what it appears may be inferred from the Commission's written observations in this connection, the fact that, if there had been no MIF Agreement, the level of interchange fees resulting from competition would have been higher is relevant for the purposes of examining whether there is a restriction resulting from that agreement, since such a factor specifically concerns the alleged anticompetitive object of that agreement as regards the acquiring market in Hungary, namely that that agreement limited the reduction of the interchange fees and, consequently, the downwards pressure that merchants could have exerted on the acquiring banks in order to secure a reduction in the service charges.

83 In addition, if there were to be strong indications that, if the MIF Agreement had not been concluded, upwards pressure on interchange fees would have ensued, so that it cannot be argued that that agreement constituted a restriction 'by object' of competition on the acquiring market in Hungary, an in-depth examination of the effects of that agreement should be carried out, as part of which, in accordance with the case-law recalled in paragraph 55 of the present judgment, it would be necessary to examine competition had that agreement not existed in order to assess the impact of the agreement on the parameters of competition and thereby to determine whether it actually entailed restrictive effects on competition.

84 In the third and final place, it should be noted that the fact, pointed out by the referring court, that the banks which were parties to the MIF Agreement included, without distinction, the operators directly concerned by the interchange fees, namely both issuing banks and acquiring banks, which, moreover, often engage in both issuing and acquiring activities, is also relevant in examining whether that agreement may be classified as a restriction 'by object'.

85 In particular, although such a fact by no means precludes, in itself, a finding of a restriction of competition 'by object' in respect of an agreement such as that at issue in the main proceedings, it may be of some relevance in assessing whether the MIF Agreement had the objective of ensuring a degree of balance within each of the card payment systems concerned in the present instance. Not only were the issuing and acquiring banks able to seek, by means of that agreement, a way of reconciling their potentially divergent interests, but the banks that were present on both the issuing and the acquiring market perhaps also intended to attain a level of interchange fees that enabled their activities on those two markets to be best protected.

86 In the light of all the foregoing considerations, the answer to the second question is that Article 101(1) TFEU must be interpreted as meaning that an interbank agreement which fixes at the same amount the interchange fee payable, where a payment transaction by card takes place, to the banks issuing such cards offered by card payment services companies operating on the national market concerned cannot be classified as an agreement which has 'as [its] object' the prevention, restriction or distortion of competition, within the meaning of that provision, unless that agreement, in the light of its wording, its objectives and its context, can be regarded as posing a sufficient degree of harm to competition to be classified thus, a matter which is for the referring court to determine.

The third and fourth questions

87 By its third and fourth questions, which should be examined together, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that it is necessary to specify the nature of the involvement of companies providing card payment services which did not directly participate in defining the content of an interbank agreement considered to be anticompetitive under that provision, but which enabled that agreement to be concluded and also accepted and implemented it, and, if so, whether such companies must be regarded as parties to that agreement or as parties to a concerted practice with the banks that concluded that agreement, pursuant to the abovementioned provision.

88 It is apparent from the order for reference that the third and fourth questions are submitted for the situation where the referring court is called upon, in relation to subsequent proceedings, to provide guidance consistent with EU law. In particular, the referring court points out that, in the judgment forming the subject of the appeal on a point of law brought before it, the Fővárosi Törvényszék (Budapest High Court) did not address the question of Visa's involvement in the MIF Agreement in the light of EU law and Visa did not lodge a cross-appeal with the referring court on that matter.

89 In addition, at the hearing before the Court, MasterCard stated that the dispute in the main proceedings has no bearing on its legal situation since, as is likewise clear from the order for reference, it did not bring an appeal before the Fővárosi Törvényszék (Budapest High Court) against the judgment delivered at first instance by the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court).

90 It follows that, as the referring court expressly acknowledges, the interpretation of EU law that it seeks to obtain by its third and fourth questions is not necessary to enable it to settle the dispute currently before it, but could be useful in any future national proceedings.

91 Accordingly, in the light of the case-law recalled in paragraph 29 of the present judgment, the third and fourth questions must be regarded as inadmissible on account of their hypothetical nature.

Costs

92 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 101(1) TFEU must be interpreted as not precluding the same anticompetitive conduct from being regarded as having as both its object and its effect the restriction of competition, within the meaning of that provision.**

2. **Article 101(1) TFEU must be interpreted as meaning that an interbank agreement which fixes at the same amount the interchange fee payable, where a payment transaction by card takes place, to the banks issuing such cards offered by card payment services companies operating on the national market concerned cannot be classified as an agreement which has 'as [its] object' the prevention, restriction or distortion of competition, within the meaning of that provision, unless that agreement, in the light of its wording, its objectives and its context, can be regarded as posing a sufficient degree of harm to competition to be classified thus, a matter which is for the referring court to determine.**

[Signatures]