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Insights from the Slovak banking cartel case. Case comment to the preliminary ruling of the Court of Justice of the European Union of 7 February 2013 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* (Case C-68/12)

Legal context

By the decision of 9 June 2009, the Antimonopoly Office of the Slovak Republic (Protimonopolný úrad Slovenskej republiky, hereafter AMO) has found that three major Slovak banks had infringed Article 81 TEC (now Article 101 TFEU) as well as the applicable Slovak competition rules contained in the Law No. 136/2001. The decision was addressed to: Slovenská sporiteľňa, Československá obchodná banka a.s. and Všeobecná úverová banka a.s. The banks had concluded a prohibited agreement to terminate current accounts contracts which they all had with the Czech company Akcenta CZ a.s. (hereafter: Akcenta). The AMO found that the aim of the agreement was to exclude Akcenta from the Slovak market for cashless foreign-exchange operations and to take over its clients. The banks considered Akcenta to be a competitor. The AMO imposed a total fine of € 10 191 800[1].

In the course of the antitrust proceedings, the case was analyzed by the Supreme Court of the Slovak Republic which has ultimately requested the Court of Justice (CJ) to give a preliminary ruling on this case under the provisions of Article 267 TFEU. The resulting judgment was issued on 7 February 2013.

Background of the ruling

Akcenta is a non-bank financial institution, but it could be considered a competitor of the three banks seeing as it is providing services that consist of cashless foreign exchange transactions. Akcenta needed to have current accounts in the banks in question in order to carry out its activities. Since the agreement between the investigated banks covered their joint refusal to deal with Akcenta in the future also, such behaviour was driving Akcenta out of business. The three banks justified their actions by stating,

[1] European Competition Network (ECN), "Slovakia: Cartel in the Banking Sector" (2010) 2 *ECN Brief*, available at http://ec.europa.eu/competition/ecn/brief/02_2010/brief_02_2010_short.pdf (4.05.2014).

among others, that Akcenta, which is a Czech company, was operating in the contested market without the necessary license from the National Bank of Slovakia.

The banks have appealed the AMO's decision to the Regional Court of Bratislava (RCB), which annulled the original decision in three separate judgments delivered in September 2010. The RCB stated that the antitrust decision failed to specify the place where the agreement had been concluded[2]. Noted also were some other shortcomings of the decision including: the misinterpretation of the concepts of "competitor" and the "relevant market", problems with determining whether Akcenta could be seen as a competitor and determining whether the illegality of an activity could be accorded legal protection (para. 8). The RCB has come to the conclusion that Akcenta was not a competitor of the banks after all, but a customer instead. This is because the services which it was providing were not at the same level as the services provided by the three banks concerned.

As a response, the AMO submitted an appeal to the Supreme Court of the Slovak Republic (Supreme Court) against two of the judgments. On 10 February 2012, the Supreme Court stalled its proceeding in the matter of Slovenská sporiteľňa and referred four prejudicial questions to the CJ[3] in the framework of its review concerning the decision of the AMO[4]. The Supreme Court submitted the following questions to the CJ:

1) 'Is Article 101(1) TFEU (…) to be interpreted as meaning that it is of legal relevance that a competitor (trader) adversely affected by a restrictive agreement between other competitor's (trader's) was operating on the relevant market illegally at the time when the agreement was concluded?
2) For the purposes of interpreting Article 101(1) TFEU (…) is it of legal relevance that, at the time when the restrictive agreement was concluded, the legality of that competitor's (trader's) conduct was not called into question by the competent supervisory bodies in the Slovak Republic?
3) Is Article 101(1) TFEU (…) to be interpreted as meaning that, in order to find that an agreement is restrictive of competition, it is necessary to demonstrate personal conduct on the part of a representative authorized under the undertaking's constitution or personal assent, in the form of a mandate, of that representative, who has, or may have taken part in that agreement, to the conduct of one of the undertaking's employees, where the undertaking has not distanced itself from the conduct of that employee and, at the same time, the agreement has been implemented?

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[2] ECN, "Slovakia: Regional Court in Bratislava annuls Authority's decision in Banking Cartel" (2010) 5 *ECN Brief*, available at http://ec.europa.eu/competition/ecn/brief/05_2010/sk_banking.pdf (4.05.2014).

[3] Request for a preliminary ruling under Article 267 TFEU from the Najvyšší súd Slovenskej republiky (Slovakia), made by decision of 10 January 2012, received on 10 February 2012.

[4] ECN, "Slovakia: Slovak Court refers Banking Cartel Case to ECJ for Preliminary Ruling" (2012) 2 *ECN Brief*, available at http://ec.europa.eu/competition/ecn/brief/02_2012/brief_02_2012.pdf (4.05.2014).

4) Is Article 101(3) TFEU (…) to be interpreted as also applying to an agreement prohibited under Article 101(1) TFEU (…) which by its nature has the effect of excluding from the market a specific individual competitor (trader) which has subsequently been found to have been carrying out foreign exchange transactions on the cashless foreign-exchange operations market without holding the appropriate license as required under national law?' (para. 12).

The CJ stated in its preliminary ruling that the first two questions should be analyzed together. Accordingly, Article 101 TFEU must be interpreted as meaning that the fact that the undertaking adversely affected by an agreement restrictive by object, was allegedly operating illegally on the relevant market at the time when the agreement was concluded, is of no relevance to the question whether the agreement constitutes an infringement of that provision. Moreover, Article 101(1) TFEU must be interpreted as meaning that, in order to find that an agreement is restrictive of competition, it is not necessary to demonstrate personal conduct on the part of a representative authorized under the undertaking's constitution or personal assent, in the form of a mandate, of that representative to the conduct of an employee of the undertaking who has participated in an anti-competitive meeting. Finally, the CJ made it clear that Article 101(3) TFEU must be interpreted as meaning that it can apply to an agreement prohibited under Article 101(1) TFEU only when the undertaking which is relying on Article 101(3) TFEU has proven that its four cumulative conditions are in fact met.

Analysis of the preliminary ruling

The following analysis focuses on the above-mentioned three issues stressed by the CJ in its preliminary ruling.

The CJ noted that even if the competitor of the three banks was operating illegally, their agreement, restrictive by object, would still be treated as an infringement of Article 101(1) TFEU (para. 14). The Court stressed also that Akcenta was operating on the market way before the agreement between the three banks came into effect and yet none of the banks had challenged the legality of Akcenta's activities. The CJ clearly stated that it is not admissible to boycott competitors that act illegally – the illegality of the operations of a rival does not affect the conditions for an infringement of competition rules (para. 19). It was further stressed that private undertakings, or their associations, are not allowed to act by themselves in such a situation, but should inform the relevant public authorities instead (para. 20).

As noted by Kühnert and Augustinič[5], this approach imposes a stricter requirement on multilateral practices than the approach applicable to unilateral refusals to deal under Article 102 TFEU, whereby a refusal to deal will not infringe competition rules

[5] H. Kühnert, I. Augustinič, "Slovak Bank Case: Court of Justice Rejects Illegality Defence for Boycotts" (2013) *Journal of European Competition Law and Practice* 2, 25 April 2013, available at http://jeclap.oxfordjournals.org/content/early/2013/04/25/jeclap.lpt013 (5.05.2014).

if it can be objectively justified[6]. Nevertheless, the objective justification criterion does not seem to hold in connection to multilateral restrictions by object because of their serious nature and the fact that they are very likely to produce negative market effects. As a result, they do not fulfil the objectives pursued by European competition rules[7]. Moreover, for Article 101(1) TFEU to apply it is unnecessary to demonstrate any actual negative effects on the market. Consequently, if there is a restriction of competition by object, there is no need to examine its actual or potential benefits[8]. Such definition of competition restrictions by object seems to exclude their practical justification on the basis of, for instance, efficiencies that they may produce.

Attempts were made to propose a stricter criterion to qualify a restriction as 'by object' on the basis of the *T-Mobile* ruling[9]. In light of an interpretation of the judgment, an additional requirement to be fulfilled for finding an agreement restrictive of competition by object has been proposed[10]. Accordingly, a restriction by object should be at least capable of having restrictive effects on competition[11]. Such an interpretation would, however, lead to a situation where restrictions by object could be justified on grounds such as market power of the parties, for instance.[12] If such an interpretation was allowed, the difference between restriction by object and those by effect would in practice disappear. An alternative to that would be the treatment of restrictions by object as cases of collective boycotts to be analysed under Article 102 TFEU instead.

The second issue highlighted in the reviewed CJ judgment is that, in order to find that an agreement is restrictive of competition, it is not necessary to demonstrate personal conduct on the part of a representative authorised under the undertaking's constitution or the personal assent. There is thus no need for an undertaking to give a mandate to a representative or authorize it in any way (para. 28). This issue arose as one of the three banks, Slovenská sporitel'ňa, claimed in the course of the proceedings that the employee who took part in the meeting of the representatives of the three banks, had not in fact been given the authority to do so. It has also not been shown that he has endorsed the conclusions of that meeting (para. 24).

The CJ stated that it is not necessary for the application of Article 101(1) TFEU to show that there has been an action by (or even knowledge on the part of) the partners or principal managers of the undertaking concerned; action by a person who is authorized to act on behalf of an undertaking suffices (para. 25). It was also stressed that it is established in settled jurisprudence that an undertaking which has participated in anti-competitive meetings between competing undertakings can prove

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[6] *Ibid*.

[7] Communication from the Commission – Guidelines on the application of Article 81(3) of the Treaty (hereinafter Article 101(3) Guidelines); OJ C 101, 27.04.2004, para. 21.

[8] *Ibid*, para. 24.

[9] *T-Mobile Netherlands and Others*, Case C–8/08, Court of Justice, (2009) 5 *CMLR* 11.

[10] J. Faull, A. Nikpay, *Faul and Nikpay The EU Law of Competition*, Oxford 2014, p. 239.

[11] *Ibid*.

[12] *Ibid*.

that its participation in those meetings was not aimed at an anticompetitive restriction (para. 27).

This seems reasonable as there are no formal rules on how the participation in agreements should be dealt with (para. 26). It seems doubtful that companies would actually give permission to their employees to be involved in anticompetitive agreements. Nevertheless, as practiced in some EU countries, managers involved in an anticompetitive behaviour can face criminal sanctions that may have, to some extent, a deterrence effect.

Finally, the third issue pointed out by the CJ is that Article 101(3) TFEU must be interpreted as meaning that it can apply to an agreement prohibited under Article 101(1) TFEU only when the undertaking which is relying on Article 101(3) TFEU has managed to prove that its four cumulative conditions are met (para. 31). These include: (a) contributing to improving the production or distribution of goods or promoting technical or economic progress, (b) allowing consumers a fair share of the resulting benefit, (c) the agreement must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives and (d) it must not afford such undertakings a possibility of eliminating competition in respect of a substantial part of the products or services in question[13].

Although theoretically Article 101(3) TFEU could also be applied to agreements that restrict competition by object, a successful application of that rule has not yet occurred in that form. The distinction between agreements restrictive by object and those by effect is vivid and is constantly being applied[14].

The agreement between the three aforementioned Slovakian banks was found to be restrictive by object, which, in theory, excludes the possibility of analyzing its effects, seeing as where there is a restriction of competition by object, there is no need to also examine its actual or potential benefits[15]. Nevertheless, an Article 101(3) TFEU defence was used in the course of the proceedings even though it was ultimately rejected because the agreement was found to not fulfil all of the four conditions cumulatively.

The exemption cannot be applied if at least one of the conditions is not satisfied. One of the banks claimed that the positive effect of the agreement was enhanced in that it 'protects the conditions for healthy competition and, in the broader sense, thus seeks to promote economic progress as referred to in that provision' (para. 33). The CJ has, however, stressed that even if this was indeed the case, the agreement does not met the other three conditions. In particular, the agreement does seem to impose on the undertakings concerned restrictions which are not indispensable to the attainment of their justifiable objectives, seeing as the parties should have complained about the illegality to competent authorities rather than eliminating the competing

[13] Article 101(3) TFEU.

[14] See *Société Technique Minière v Maschinenbau Ulm GmbH*, Case 56/65, Court of Justice, (1966) *ECR* 235, (1966) *CMLR* 357, para. 249; see also *T-Mobile Netherlands and Others*, Case C–8/08, Court of Justice, (2009) 5 *CMLR* 11, paras 26–30.

[15] Article 101(3) Guidelines, para. 24.

undertaking from the market (para. 35). The CJ confirmed that the four conditions of Article 101(3) TFEU need to be met cumulatively (para. 36).

Although there is a possibility of applying Article 101(3) TFEU to restrictions by object, that possibility is held back by the clear distinction between restrictions by object and by effect and the anticompetitive nature of the former. On the one hand, this situation ensures legal certainty but on the other hand, it rules out any possibility of using an 'objective justification' for object-based restrictions. The conditions of Article 101(3) TFEU seem to be quite strict as they exclude the possibility of justifying agreements that affect the structure of the market in question and exclude competitors. Therefore, even if competition on the merits is visible on the market, there is practically no possibility of using Article 101(3) TFEU as a defence.

The CJ has also noted that the aim of Article 101 TFEU is to protect not only the interest of competitors, but also the structure of the market and thus competition as such (para. 18). Such an approach stems away from the aim of Article 101 TFEU, which is promoting consumer welfare and leads to a more interventionist approach.

Follow-up proceedings

After the Court of Justice's preliminary ruling, the Supreme Court of the Slovak Republic upheld the decision of the AMO as regards Slovenská sporiteľňa, a. s. on 21 May 2013. The Supreme Court changed also the verdict of the Regional Court of Bratislava by dismissing the complaint that Slovenská sporiteľňa, a. s. had previously filed against the AMO[16]. On 22 May 2013, thus only a day later, the Supreme Court has also upheld the same decision of the AMO in regards to the second bank – Všeobecná úverová banka a.s.[17]

However, the proceedings regarding the third bank involved in the cartel, Československá obchodná banka a.s, are still pending before the AMO as the Supreme Court annulled the original AMO decision because of its contradictions with the opinion of the CJ[18].

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[16] AMO, "The Supreme Court of the Slovak Republic upheld the correctness of the AMO SR decision in the matter of banks cartel", Press Release of 27.05.2013; http://www.antimon.gov.sk/the-supreme-court-of-the-slovak-republic-upheld-the-correctness-of-the-amo-sr-decision-in-the-matter-of-banks-cartel/ (6.05.2014).

[17] AMO, "The correctness of the AMO SR decision upheld also in relation to VÚB", News of 27.05.2013; http://www.antimon.gov.sk/2403-en/the-correctness-of-the-amo-sr-decision-upeld-also-in-relation-to-vub/ (6.05.2014).

[18] AMO, "The European Court of Justice has ruled in the matter of prejudicial questions of the Supreme Court of the Slovak Republic", Press Release of 14.03.2013; http://www.antimon.gov.sk/the-european-court-of-justice-has-ruled-in-the-matter-of-prejudicial-questions-of-the-supreme-court-of-the-slovak-republic/ (6.05.2014).