

## **Slovakia: The Slovak bank cartel: an end to the saga? Banks cannot act in concert to drive a competitor out of a market – even if such competitor is operating unlawfully.**

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This article follows up on our previous articles (e-Competitions articles Art. N° 37004, Art. N° 38345 and Art. N° 51110) concerning a cartel of three Slovak banks. In May 2011, in the case of CSOB bank, the Supreme Court controversially confirmed the decision of the lower courts which reversed the original decision taken by the Slovak National Competition Authority (the “**NCA**”). The NCA had ruled that an undertaking operating unlawfully cannot be a competitor on the relevant market and cannot be afforded legal protection. In May 2013, the Slovak Supreme Court (the “**Supreme Court**”) under the guidance of the Court of Justice of the European Union (the “**CJEU**”) in a preliminary decision ruled in favour of the NCA in the two remaining cases – in the case of SLSP bank and in the case of VUB bank. The judgments now appear to have put an end to the bank cartel saga that has been dragging on since 2009.

### **Background**

To restate the facts of the case, the matter involved three Slovak banks, namely SLSP (Erste group), CSOB (KBC group) and VUB (Intesa San Paolo group) (collectively the “**Banks**”) who in 2007 unilaterally and simultaneously terminated the current account agreements of Akcenta, a Czech trader operating on the spot and forward markets. The principal reason (and defence) presented by the Banks was that Akcenta did not possess a licence for foreign exchange operations and hence was operating illegally.

The NCA found that the termination of current accounts by the Banks constituted a cartel and fined the Banks. The Banks initiated three separate court proceedings for review before the Regional Court, which quashed the NCA’s decisions. The NCA appealed to the Supreme Court against the Regional Court’s decisions and, in the SLSP case, requested that the Supreme Court refer questions to the CJEU for a preliminary ruling; the main question being whether for the purpose of interpreting Art 101(1) TFEU it was of legal relevance that a competitor (in this case, a trader) adversely affected by a restrictive agreement between other competitors (in this case, traders) was operating illegally at the time when the agreement was concluded. The CJEU answered in the negative.

The notable point was that the Supreme Court, while referring the matter to CJEU in the pending case of SLSP, also waited for CJEU’s preliminary ruling in the VUB case, since the facts of that case were essentially identical and CJEU’s ruling was relevant to those proceedings, too.

### **The judgments of the Supreme Court**

The Supreme Court overruled the Regional Court’s decisions in both the SLSP case and the VUB case. The Supreme Court closely adhered to the CJEU’s findings in its preliminary ruling and thus found the Banks’ primary defence (i.e. that Akcenta was operating on the relevant market unlawfully) to be unsubstantiated.

VUB tried to convince the Supreme Court that the CJEU’s ruling did not apply to it since the facts of its case were different to those of the SLSP case. VUB stated that it had signalled the illegality of Akcenta’s actions to the financial police.

## Comments

The judgments of the Supreme Court in the SLSP case and in the VUB case contrast with the earlier and rather controversial judgments of the lower courts and even with Supreme Court judgment in the CSOB case. The decision by the NCA was essentially annulled on the grounds that the NCA had not determined whether Akcenta could be regarded as a competitor to the Banks on the relevant market, given that it was operating in Slovakia without the requisite licence (which was the line of reasoning affirmed by the Supreme Court in the CSOB case).

The CJEU in its reasoning noted that none of the banks had challenged the legality of Akcenta's business before they were investigated in the case that gave rise to the main proceedings. The CJEU went on to argue that the alleged illegality of Akcenta's situation is therefore irrelevant for the purpose of determining whether the conditions for an infringement of competition rules have been met. It remains an open point whether the CJEU intended to leave some leeway in case the undertaking were to challenge the legality of Akcenta's operations on the relevant market. However, given the reasoning of the CJEU that it is for the public authorities and not for private undertakings or associations of undertakings to ensure compliance with statutory requirements, it seems unlikely that the concerted action of the Banks to drive a competitor out of market for lack of requisite licences, however well meant, would be met with an approval.

In the SLSP case, the Supreme Court closely followed the CJEU decision – it decided that Article 101 TFEU must be interpreted to mean that the fact that an undertaking that is adversely affected by an anticompetitive agreement was allegedly operating illegally on the relevant market at the time when the agreement was concluded is of no relevance to the question of whether the agreement constitutes an infringement of that provision.

In the VUB case, the Supreme Court similarly followed the line of reasoning that the CJEU adopted in the SLSP case. Moreover, the Supreme Court also found that the domestic legislation (the Slovak Competition Act) prohibits such collusion, irrespective of whether an undertaking is operating illegally. The Supreme Court – under the guidance of the CJEU (and unlike in the CSOB case) – in the end interpreted the provisions of Section 3 of the Slovak Act on Protection of Competition in such a way that an agreement restricting competition cannot be excused by the intention (on the part of the parties to such anticompetitive agreement) to restrain illegal activity.

Source: Martin Vojtko, The Slovak Supreme Court holds that banks cannot concert to drive a competitor out of the market: an end to the bank cartel case saga? (VUB Bank), 22 May 2013, e-Competitions Bulletin May 2013, Art. N° 61105, [www.concurrences.com](http://www.concurrences.com)

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