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The Court of Justice of the European Union rules in favour of the Antimonopoly Office in 'Akcenta' case

On 9 June 2009, the Antimonopoly Office of the Slovak Republic (the ''AMO"), a first-level authority, found that three major banks – Slovenská sporiteľna, a.s. (the "SLSP"), Československá obchodná banka a.s. (the "CSOB") and Všeobecná úverová banka a.s. (the "VUB") (jointly refered to as the "Banks") – had infringed Article 101 TFEU and Section 4(1), 4(2)(a) and 4(3)(c) of (Slovak) Act No. 136/2001 Coll., on protection of the competition, as amended (the ''Competition Act"), by entering into an agreement to terminate the existing and not to conclude new contracts on bank accounts with Akcenta CZ, a.s. (the "Akcenta"). The AMO ruled that such agreement on the relevant market for cashless foreign-exchange transactions constituted an agreement restricting competition and imposed on SLSP, CSOB and VUB fines of approx. 3.2, 3.2 and 3.8 million EUR, respectively.

The Banks appealed against the AMO's decision. However, the Council of the AMO (the ''Council") upheld the above fines. The Banks, each separately, appealed to the Regional Court in Bratislava, which has, in three separate proceedings, annulled the decision of the Council in respect of each of the Banks. This was followed by three appeals by the Council to the Supreme Court of the Slovak Republic (the ''Supreme Court"). In the case of CSOB, in its judgement No. 5Sžh/4/2010 of 19 May 2011 the Supreme Court has upheld the decision of Regional Court annulling the decision of the Council and referred the case back to the AMO. At the present, VUB and SLSP cases are still pending before the Supreme Court which has asked the Court of Justice of the European Union (the ''CJEU") in February 2012, concerning the SLSP case, four preliminary questions regarding the application of Article 101 TFEU by the AMO. The CJEU answered them in judgement in Case C-68/12 of 7 February 2013.

Summary of the Decision

Akcenta is a non-bank financial institution providing services comprising of cashless foreign exchange transactions using accounts established with the Banks. Banks usually provided such services only to clients with sufficient turnovers, while Akcenta's targets were small and medium enterprises. In order to carry out such activities, Akcenta needed to have current accounts in the Banks and it provided the above services both from and to within Slovakia and abroad. However, Akcenta did not have the necessary licence from the National Bank of Slovakia to provide such banking services.

From the evidence of contacts and subsequent correspondence, AMO's proceedings established that representatives of the Banks met and made an agreement to jointly terminate the accounts with Akcenta.

Surprisingly, in its SLSP judgment, the Regional Court decided that whereas Akcenta was operating in Slovakia without statutory licence, the Council did not prove Akcenta could be seen as a competitor to the Banks on the relevant market, nor had the authority to consider whether Akcenta's alleged illegal activity could be accorded a legal protection. Also, during the proceedings before the Supreme Court, SLSP argued that as far as Akcenta did not have necessary licence, i.e. the necessary conditions of competition law were not met, a restriction of competition could not be pleaded. Finally, SLSP argued the alleged meeting of the Banks, at which Banks allegedly arrived at an agreement, was attended by its employee who '**merely gathered information on the projected terminations of Akcenta accounts'**.

The Council submitted that its original findings were sufficiently substantiated as far as the concepts of '**competitor**' and '**relevant markets'** were concerned, i.e. Akcenta was a competitor to the Banks on

the relevant market. Regarding the allegedly illegal nature of Akcenta' business, the Council pointed out that this was not relevant for the purpose of considering whether the conduct of the Banks was in conformity with the competition rules. In addition, the Council submitted the Banks had not objected the illegality of Akcenta's business before the initiation of AMO proceedings.

Taking into account the above arguments on competition law concepts of '**competitor'** and '**relevant markets'**, the Supreme Court stayed the SLSP case and referred to the CJEU with the following four preliminary questions:

(i) Is Article 101(1) TFEU to be interpreted as meaning that it is of legal relevance where a competitor adversely affected by a restrictive agreement between other competitors was operating on the relevant market illegally at the time of such agreement?

(ii) Is it of legal relevance that at the time of the agreement the legality of that competitor's conduct was not called in question by the competent supervisory bodies in the Slovak Republic?

(iii) Is Article 101(1) TFEU to be interpreted as meaning that in order to find an agreement restrictive, it is necessary to demonstrate personal conduct or consent on the part of the representative authorised to act on behalf of the undertakings, in a form of a mandate to the employee who conducted the agreement, where the undertaking did not distance itself from the conduct of that employee and at the same time the agreement has been implemented? and

(iv) Is Article 101(3) TFEU to be interpreted as applying also to an agreement prohibited under Article 101(1) aimed at excluding a competitor from the market which was carrying out its business without holding necessary licence (i.e. illegally)?

The CJEU considered first two questions jointly. In its reasoning, the CJEU noted that Article 101 TFEU is intended to protect not only the interests of competitors or consumers but also the structure of the market and thus competition as such. The CJEU has therefore decided that the alleged illegality of Akcenta's situation is irrelevant for the purpose of determining whether the conditions for an infringement of the competition rules are met. Moreover, according the CJEU, it is for public authorities, rather than for private undertakings, to ensure compliance with statutory requirements.

As regards the third question, the CJEU observed that for Article 101 TFEU to apply, an action or even knowledge on the part of the partners or principal managers of the undertaking concerned is not necessary. It will suffice if there is an action by a person authorised to act on behalf of the undertaking. The CJEU went further to state that in practice it is rarely the case that an undertaking's representative attends a meeting with a mandate to commit an infringement; moreover, the burden of proof is on the undertakings to put forward evidence to establish that their participation at the meeting did not follow anti-competition purposes. The undertakings would have to publicly distance themselves from the initiative in such a way that the other participants would consider it as putting an end to their participation in the agreement.

The fourth question is in essence the question whether the exception under Article 101(3) TFEU applies in this case. SLSP tried to establish that the exception of Article 101(3) applies, by claiming the purpose of the agreement was to prevent the other competitor without the requisite licence from acting illegally. The CJEU noted that SLSP only put forward one out of four conditions required in Article 101(3) TFEU. Therefore, the exception under Article 101(3) TFEU, did not apply according to the CJEU.

Comments

The findings of the CJEU do in fact correspond with the findings of the AMO (and the Council) as far as the alleged illegality of the competitor is concerned. The argument that because of the alleged illegality of competitor's business Article 101(1) TFEU does not apply was rejected by the CJEU.

CJCE pointed out that Article 101 TFEU protects the structure of the market and thus competition as such. For this reason, when considering agreement restricting competition, it is irrelevant whether the undertaking against which the agreement is aimed carries out its business illegally. This could be regarded as a significant turning point in all three cases with the Banks. It will be interesting to observe how the Supreme Court would deal with the CJEU answers in the pending cases of SLSP and VUB, especially after it had already dismissed almost identical argumentation of the Council in CSOB case.

Source: *Michal Miko, Jakub Berthoty, The EU Court of Justice rules in favour of the Slovakian NCA and rules that an agreement intended to exclude a competitor is contrary to the competition rules even if the competitor is operating unlawfully on the market (Akcenta case), 7 February 2013, e-Competitions, N°51110, www.concurrences.com*

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