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Slovak Bank Case: Court of Justice Rejects Illegality Defence for Boycotts

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Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.*, 7 February 2013

Anticompetitive conduct targeting a competitor may not be excused on the ground that the targeted competitor is operating unlawfully on the market.

Legal context

On 7 February 2013, the Court of Justice gave a preliminary ruling on questions referred to it by the Supreme Court of the Slovak Republic. The main issue referred to the Court was whether a collective boycott aimed at excluding a competitor could be justified, under Art 101(1) or 101(3) TFEU, by the fact that the competitor in question was operating illegally on the market.

Facts

By decision of 9 June 2009, the Slovak Competition Authority fined three banks for having entered into an agreement to terminate the current accounts of Akcenta CZ a.s. (Akcenta), a financial institution based in the Czech Republic which also provided cashless foreign exchange transactions to customers in Slovakia. The authority considered that, in order to carry out its activities, Akcenta needed to have current accounts, and that the banks' decision to terminate its accounts was motivated by the fact that Akcenta's activities had led to a fall in their profits.

On separate appeals by each of the three banks, the Bratislava Regional Court annulled the authority's decision in all three judgments, based *inter alia* on the finding that Akcenta was operating in Slovakia without the requisite authorisation from the Slovak National Bank. The authority challenged these judgments in the Supreme Court of the Slovak Republic, which decided to refer four questions to the Court of Justice. Three of these questions concerned the relevance of the alleged illegality of Akcenta's activities for the analysis under Article 101(1) and 101(3) TFEU, while the remaining question related to the imputation of anticompetitive conduct by employees to undertakings concerned under European competition law.

Analysis

Before going into a legal analysis of Article 101 TFEU, the Court of Justice set the stage by pointing out the nature of the alleged illegality of Akcenta's conduct—namely, that it was operating in Slovakia without a licence issued by the Slovak National Bank. Based on the Czech Government's observations, the Court pointed out that the question whether Akcenta needed a Slovak licence under the internal market rules had been addressed by the Czech and Slovak SOLVIT centres, within the Internal Market Problem Solving Network.[1] The case was closed as unresolved, as the Czech centre considered that no Slovak licence was required, while the Slovak centre took the opposite view (para. 15).

The Court then proceeded to an analysis of the case under Article 101(1) TFEU, by recalling the distinction between restrictions by object and restrictions by effect (para. 17). Based on the order for reference, the Court held that the banks' agreement to cease to provide current accounts to Akcenta specifically had as its object the restriction of competition. It further noted that none of the banks had challenged the legality of Akcenta's conduct before they were investigated by the Slovak Competition Authority. From this, the Court concluded 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' (para. 19).

Somewhat emphatically, the Court went on to hold that 'it is for public authorities and not private undertakings or associations of undertakings to ensure compliance with statutory requirements' (para. 20). Referring to

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1 SOLVIT is an online network seeking to promote out-of-court solutions to complaints by consumers and businesses regarding the misapplication of the internal market rules by public authorities. See Commission Recommendation of 7 December 2001 on principles for using 'SOLVIT'—the Internal Market Problem Solving Network, OJ L 331 of 15 December 2001, p. 79.

Akcenta's situation, the Court observed that the application of statutory rules may call for complex assessments which are not within the area of responsibility of private undertakings or their associations (para. 20).

As regards the applicant bank's defence under Article 101(3) TFEU, the Court noted that the bank had only put forwards arguments as regards the first of the four conditions required by that provision (para. 34). It further observed that, in particular, the indispensability requirement of Article 101(3) TFEU was unlikely to be met, as it was for the banks 'to lodge a complaint with the competent authorities ... and not to take it upon themselves to eliminate the competing undertaking from the market' (para. 35).

On the referring court's unrelated question regarding the imputation of conduct on the part of employees to an undertaking concerned, the Court of Justice noted that Article 101 TFEU does not require there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned (para. 25). Indeed, persons attending a meeting on behalf of the undertakings concerned will rarely have been granted a mandate to commit an infringement (para. 26).

Practical significance

The Court of Justice's judgment is apodictic: collective boycotts of competitors who rely on services provided by the undertakings concerned are infringements by object, and may not be justified by the fact that the competitor operated illegally. In the face of illegalities committed by a competitor, undertakings are to turn to the competent authorities, but may not agree between themselves to take steps to exclude the competitor in question.

The Court's judgment is stricter than the standard for unilateral refusals to deal under Article 102 TFEU, which will not infringe the competition rules if they are objectively justified. While the Court and the Commission typically are sceptical of public interest (e.g. health or safety) justifications relied on by dominant undertakings, it is not excluded that an undertaking may justify its refusal to deal under Article 102 TFEU based on illegal behaviour by the competitor seeking to be supplied.[2]

More importantly however, the judgment makes no mention of potential defences under Articles 101(1) and (3) TFEU. In fact, pursuant to the *Wouters* (ECJ: Case C-309/99 [2002] ECR I-1577) and *Meca Medina* (ECJ: Case C-519/04 P [2006] ECR I-6991) judgments, restrictions of competition may be compatible with Article 101(1) TFEU if they are inherent to achieving a public interest objective, such as the sound administration of justice or the fairness of competitive sports. Moreover, under Article 101(3) TFEU horizontal co-operation may give rise to economic efficiencies even if it leads to the exclusion of competitors, for example in the case of standardisation agreements (see para. 308 *et seqq* of the Horizontal Guidelines, OJ C 11 of 14 January 2011, p. 1).

In this regard, the Court of Justice's reference to the main proceedings is probably instructive. Based on the Court's summary, it appears doubtful whether the licensing requirement relied on by the banks to justify the termination of Akcenta was compatible with the internal market rules. Furthermore, the Court pointed out that the banks had not challenged Akcenta's conduct before they were investigated by the Slovak Competition Authority. These considerations reveal that the Court may have had little sympathy for the defence relied on by the banks. It is not implausible that, in a case where the illegality of the excluded competitor is evident, and there is credible harm to the public interest, the Court may be more willing to consider an 'illegality defence' than it was in the case at hand.

On the national level, it will also be interesting to see how the referring court will further deal with the case against its duty to apply European competition rules in line with the principles of equivalence and effectiveness. This is because, before referring the question to the Court of Justice in the case at hand, the Slovak Supreme Court accepted the 'illegality defence' in its judgment on the appeal brought by one of the other banks in the Akcenta case. The facts of the case being the same, the referring court will now be bound to follow the judgment of the Court of Justice.

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2 See in this regard the UK Competition Appeal Tribunal's judgment in the *Floe Telecom* case, where—in relation to objective justifications for refusals to supply under Art. 102 TFEU—the CAT held that 'if the relevant law is clear, then competition law does not require any undertaking to act in furtherance of an illegal act'. Case No 1024/2/3/04 *Floe Telecom Ltd v OFCOM* [2006] CAT 17, para. 363.