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Preliminary Ruling of the ECJ and the Akcenta Case

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Abstract

The article analyses the significance of the ECJ preliminary ruling on competition law. Starting with the general characteristic of the preliminary ruling of the Court of Justice, its legal regulation in TFEU and its effects, it focuses on the concrete judgement of the Court (Tenth Chamber) of 7 February 2013 in Case C-68/12 at the request of the Supreme Court of the Slovak Republic. It explains the preliminary questions and the background of the competition case that was the incentive for them. It describes the quite complicated cartel agreement of the three banks concerned and the impact of the ECJ preliminary ruling on the judgements/decisions of the case.

Keywords

Preliminary Ruling/Questions, Agreement Restricting Competition, Cartel, Procedure, Competition Authority, National Court, European Court of Justice

I. Introduction

The ECJ has undergone significant changes since it was established under the treaties establishing the EEC in the fifties.

The whole judicial structure of the present EU was rebuilt to nowadays represent a three-instance system "with the ECJ at the apex of the hierarchy looking more like a supreme appellate court than it ever has before."[2] The structure thus consists of the ECJ, the General Court and judicial panels set up for specialised cases. At present there is another important reform of the judicial system that should strengthen the position of the General Court and help to reduce the overload of cases pending before it. Therefore, the number of judges has to be increased in several stages.

The task of the ECJ is to "ensure that the interpretation and application of this Treaty is observed" (Art.19 (1) TEU). In its case law, the Court develops the substantive law of the EU using legal principles and building on legal traditions of Member States. The Court influences the further development of the EU law first of all by "filling the gaps".[3]

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[2] Craig, de Búrca (2003).

[3] Steiner, Woods (2009).

Its judgements have great impact, but still they are not binding in the way of English precedents. Due to its activities, the Court has often been criticised for its activism, viewing "the Communities as living and expanding organisms and the interpretation of the provisions of the Treaties as changing to match their growth."[4]

Although the ECJ resembles at present a supreme appellate court, as mentioned above, this does not mean that cases begun in national courts could be appealed to the ECJ for final disposal.[5] National courts carry the proceedings themselves and in the case of EU law application they can/must ask the ECJ "for its view on the interpretation of any point of EC law relevant to the case before the national court."[6] This is the main task of the preliminary ruling procedure under Art. 267 TFEU. Thus, the preliminary rulings procedure does not represent an appeals procedure. It is only a means for the national courts to clarify the questions of EU law before adopting a final decision on the case. Questions to be answered by the ECJ are related either to the validity of EU acts or matters of interpretation (Art. 267 TFEU). The relationship between the national courts and the ECJ is based rather on cooperation than on hierarchy, being an example of "shared jurisdiction"[7] shaping the image of the whole judicial system.

The preliminary rulings procedure targeted at issues of interpretation of EU law has undoubtedly exceeded the original intentions of the European legislator, having great impact on EU law and its principles (direct/indirect effect, priority, liability of the Member State for infringement of EU law). These principles determining application of EU law on the territory of the Member States are at the same time crucial for the mutual relation between EU and national law.

A national court can apply for a preliminary ruling procedure at the ECJ and the question must be a matter of EU law. Due to the overload to which the ECJ was exposed, in terms of resolving the questions of interpretation there must be some limitations for this type of procedure. Thus, the ECJ is expected to give interpretation only if the issue to be resolved is essential in reaching a final judgement. In order to reduce the number of cases, the doctrine of *acte clair* and *acte éclairé* was introduced. So, the national court is not obliged to apply for a preliminary ruling if the meaning of the provision is clear enough and does not require interpretation (*acte clair*) or in cases when the ECJ has already in past answered an identical question to the current question (*acte éclairé*).[8] That means that decisions of the ECJ are relevant not only in cases pending before the national court, but also for national courts dealing with the same questions in similar proceedings at present or in future.

The national court can ask for a preliminary ruling at its own discretion if it finds the question necessary for its own judgement, but there is no discretion if there is no judicial remedy under national law against its decision (Art. 267 TFEU). But it should be stressed that the ECJ always has exclusive competence to declare the acts of EU institutions invalid.

[4] Steiner, Woods (2009).
[5] Ibidem.
[6] Ibidem.
[7] Ibidem.
[8] Bobek, Komárek, Passer, Gillis (2005).

As far as effects of the preliminary rulings decision are concerned, the ECJ as a general rule declares how the relevant provision has "to be understood and applied from the time of its coming in force"[9], so the interpreted rule a judge may/must apply on the legal relations established already before this decision[10] The ECJ in its preliminary rulings decision does not resolve a concrete case, but gives a general interpretation of law. This interpretation becomes a part of the interpreted norm and it is binding for all subjects applying the EU law. In other words, the preliminary rulings decision has the character of a declaratory judgement with effects reaching back to the time of the coming into force of the rule being interpreted.[11]

But the retroactive effect of the ruling is, according to J. Steiner and L. Woods, less clear[12] as the ECJ can decide on temporal restrictions in relation to the interpretation it gives.[13]

The ECJ clarified the effects of preliminary rulings for administrative authorities in the case *Kühne & Heinz*.[14] This interpretation enables the review and annulment of a decision conflicting with the later case law of the ECJ, if the person affected applied to the administrative body immediately after having heard about that case law.[15]

II. AKCENTA Case

Facts and the Legal Context of the Case

The Slovak Competition Authority[16], a first level authority, found that three major banks with their principal place of business in Bratislava (Slovakia)[17] had infringed Art. 81 EC[18] and the corresponding provision of the Act No. 136/2001 Coll. on Protection of Competition as amended by an agreement intended to restrict competition by:

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[9] Steiner, Woods, (2009).
[10] Naômé (2011).
[11] Judgement of 12 February 2008, Kempter C-2/06, N. 35.
[12] Steiner, Woods (2009).
[13] Ibidem (with reference to Sabena case 43/75).
[14] Judgement of 13 January 2004, Kühne & Heinz, C-453/00.
[15] Ibidem.
[16] Protimonopolný úrad SR.
[17] Slovenská sporiteľňa (SLSP), Československá obchodná banka (ČSOB), Všeobecná úverová banka (VÚB).
[18] Now Art. 101 TFEU: "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;
b) limit or control production, markets, technical development, or investment;
c) share markets or sources of supply;
d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

- terminating contracts relating to current accounts of Akcenta CZ, a Czech Company, with principal place of business in Prague,
- concluding no new contracts with Akcenta.[19]

Akcenta, a non-bank financial institution, needed to have current accounts in banks so as to be able to carry on cashless foreign exchange transactions from and to abroad for its clients, Slovak customers included. The banks regarded Akcenta as a competitor providing similar services as the banks and therefore decided to terminate their contracts with Akcenta in a coordinated manner, so the termination took place within the same period of time. The relevant market was defined as the Slovak market for cashless foreign exchange operations. The conduct was prohibited as an agreement restricting competition and the participating banks were fined[20].

A second level administrative authority[21] acting on commencement by SLSP in principle confirmed the decision of the first level authority.[22] SLSP challenged the decision at the Bratislava Regional Court and that annulled both the decisions of the first and second level administrative authority and referred the case back to the Competition Authority. In its judgement, the Regional Court's main objection was that Akcenta was regarded as a competitor of the banks although it acted on the Slovak market without authorisation from the Slovak National Bank, i.e. illegally.[23]

The Slovak Competition Authority appealed against the judgement before the Supreme Court of the Slovak Republic, arguing that the illegal nature of business carried on by Akcenta was not relevant for the purpose of examining the conduct under competition rules. The arguments of the SLSP concerning the illegal character of Akcenta's activities remained practically the same. In these circumstances the Supreme Court decided to stay the proceedings and to refer to the ECJ for a preliminary ruling.[24]

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2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of
   - any agreement or category of agreements between undertakings;
   - any decision or category of decisions by associations of undertakings;
   - any concerted practice or category of concerted practices;

   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
   a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

[19] Decision No. 2009/KH/1/1/030.

[20] Judgement of the Court of 7 February 2013, case C-68/12, N. 4.

[21] Council of the Competition Authority.

[22] Decision No. 2009/KH/R/2/054.

[23] Akcenta was already fined for its illegal activities (from January 2008 to June 2009), but that decision was annulled by the Banking Council of the Slovak National Bank.

[24] Judgement of the Court of 7 February 2013 (Case 68/12).

The referred questions and their consideration

The preliminary ruling of the ECJ concerned several questions. Except for the question of the illegal character of the business of Akcenta and its relevance for the competition case, the Slovak Supreme Court also asked if it was necessary for agreement restricting competition to prove the personal conduct on the part of the representative authorised under undertaking's constitution or the personal assent. The last question related to Art. 101 (3) and its application on the agreement prohibited under Art. 101 (1) which has the effect of excluding a competitor from the market whose business has subsequently been found illegal in respect of lacking a licence required by national law.[25]

The ECJ considered both questions related to the illegal character of business together and focused on the impact of the fact that one of the competitors acted illegally on the relevant market in the time when that agreement was concluded.[26]

The crucial argument for the ECJ was the character of the considered agreement. As it was an agreement having its object in the prevention, restriction or distortion of competition, it was not necessary to evaluate its impact on the relevant market.[27]

Moreover, the aim of Art. 101 TFEU is to protect primary competition on the relevant market, not the interest of competitors/consumers in the first place. The ECJ concluded "that the fact that an undertaking that was adversely affected by an agreement whose object is the restriction of competition 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."[28]

The ECJ also concluded that it was not necessary for the qualification of an agreement as anticompetitive "to demonstrate personal conduct on the part of the representative authorised under the undertaking's constitution or the personal assent."[29]

Regarding the application of Art. 101 (3) TFEU on the prohibited agreement, the ECJ stressed the fact that the undertaking concerned has to prove that all conditions laid down in Art. 101 (3) TFEU were fulfilled cumulatively (and this was not the case in the agreement under consideration).

III. Impact on case law in the Slovak Republic

To summarize the quite complicate context of the whole cartel agreement, it has to be said: At the beginning there was the original decision of the Competition Authority of the Slovak Republic comprising the conduct of all three banks concerned and their agreement restricting competition was prohibited. Consequently, the participating subjects were fined. The case was later reviewed by the Regional Court in Bratislava in three separate proceedings and the court annulled the respective decisions. Proceedings on the Supreme

[25] Ibidem. See also Šramelová (2014).

[26] It should be added that, according to the Solvit centre in the Czech Republic, there was no need for a special license for Akcenta's business activities in Slovakia. The Slovak Solvit centre disagreed with this opinion. (Judgement of the Court, case C-68/12, N. 15).

[27] Judgement of the Court of 7 February 2013 (Case 68/12), N. 17.

[28] Ibidem, N. 21.

[29] Ibidem, N. 28.

Court followed separately for each bank. In the first case (ČSOB) the Supreme Court confirmed the judgement of the Regional Court and the case returned to the Slovak Competition Authority. In the second proceeding (SLSP), the Supreme Court referred to the ECJ with the preliminary questions described above. Following the judgement of the ECJ, the Supreme Court rejected the SLSP's suit and its judgement was the same in the case of the last bank (VÚB). Respecting the opinion of the ECJ, the Supreme Court stated that conclusion of the agreement restricting competition cannot be justified by an effort to prevent illegal activity and the kind of self-help in the form of protection of own rights cannot be accepted under the rule of law. The Supreme Court also took into account the fact that it was not proved that the banks had explicitly demonstrated that they were no longer willing to participate in the cartel or to continue their conduct.[30]

SLSP also lodged a complaint to the Constitutional Court and objected to the different judgement of the Supreme Court, although the same decision of the Slovak Competition Authority was challenged.[31] The complaint was rejected as unjustified by the Constitutional Court.

Only the case concerning ČSOB returned to the Slovak Competition Authority.[32] In this decision, the authority evaluated the impact of the ECJ preliminary ruling as described above and also both judgements of the Supreme Court in the case of the two other banks and confirmed the decision of 2013. The same case was reviewed by the Regional Court, which changed this decision by reducing the fine. At present there is the judgement of the Supreme Court[33], which reviewed the case again. This judgement upheld the conclusions of the Slovak Competition Authority and stressed the impact of the ECJ judgement in the preliminary ruling initiated in the case of SLSP.[34]

IV. Conclusion

The presented case illustrates the application of the preliminary rulings procedure in practice. The questions referred to the ECJ relate to the interpretation of one of the most important EU competition provisions regulating agreements restricting competition. The case shows that the interpretation was strictly observed by the Slovak courts and the Slovak Competition Authority. On the other hand, the impact of the preliminary ruling is broader and gives guidance as to how Art. 101 TFEU has to be understood from its coming in force until the present day and for the future. The latest judgement of the Supreme Court confirmed that ECJ judgements on preliminary questions are relevant not only in the case pending before the national court (SLSP), but also for national courts dealing with the same questions in similar proceedings (CSOB) related in this case to the same cartel agreement.

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[30] Šramelová (2014).

[31] Šabová (2014).

[32] Decision of the Council of the Competition Authority of the Slovak Republic N. 2014/KH/R/2/008 of 11. April 2014.

[33] Judgement of the Supreme Court 3 Sžh/1/2016 of 23 November 2017.

[34] Šabová, Z. Výber z rozhodnutí slovenských súdov vo veciach ochrany hospodárskej súťaže. ANTITRUST 2/2018, p. 62.

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