



Relevant practice of national Competition Authorities and national Courts

Slovenian Competition Day Ljubljana, 28.09.2017

Michaela Nosa
Antimonopoly Office of the Slovak Republic

Views in the presentation are those of the author and do not bind
the Antimonopoly Office of the Slovak Republic

Experience in the Slovak Republic

- no direct reflection on case C - 67/13 P, Groupement des cartes bancaires in Slovak case law yet
- Three examples of infringement decisions:
 1. bank cartel
 2. construction cartel
looking back under the scrutiny of *Cartes Bancaires* judgement
 3. agreement between undertakings active in the area of mapping the earth's surface and product of aerial photogrammetry – open case

Decision of the AMO (bank cartel)

- Cartel case of the three banks
- the banks agreed on the termination of the current accounts of the Akcenta CZ and not opening of the current accounts for this company in the future
- duration: from May 10, 2007 until June 9, 2009
- relevant market – the cashless foreign exchange services regardless the volume of the transaction in the Slovak Republic
- evidence – communication among banks found at the inspections

Decision of the AMO II (bank cartel) – some of the aspects

- Akcenta CZ – Czech non-bank payment institution, foreign exchange trader started operating in the Slovak Republic 2003
- provides foreign exchange services via current accounts (in the same bank as the client)
- relevant market of the cashless exchange services to consumers regardless the volume of the transaction in the Slovak Republic –
- Akcenta CZ opened a current account in a bank and was able, via use of electronic means, to provide cashless exchange services and offer better exchange rate for customers (that had an account in the same bank)
- Akcenta CZ had a licence of the Czech National Bank
- the three banks had all together 56% market share on the market of the current accounts

Decision of the AMO III (bank cartel) - main arguments of the banks

- According to banks, the Akcenta CZ was not their competitor as it was operating on the market illegally, without the licence of the National Bank of Slovakia
- The banks claimed that they only met to inform each other about the illegality of the Akcenta CZ and the possible negative consequences, and their conduct was to protect their clients
- The evidence found by the AMO during the dawn raids however proved the illegal conduct
- Banks claimed also the application of Art. 101 (3) TFEU
- According to banks, the AMO was protecting Akcenta CZ

Bank cartel – preliminary ruling of Court of Justice

- preliminary ruling - C-68/12 – on the relevance of „legality“ issue, among other, the Court of Justice also stated:

17 For the purpose of applying Article 101(1) TFEU, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraph 508; and Case C-389/10 P *KME Germany and Others v Commission* [2011] ECR I-13125, paragraph 75).

18 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 (Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paragraph 63).

19 In that regard, ***it is apparent from the order for reference that the agreement entered into by the banks concerned specifically had as its object the restriction*** of competition and that none of the banks had challenged the legality of Akcenta's business before they were investigated in the case giving rise to the main proceedings. The alleged illegality of Akcenta's situation is therefore irrelevant for the purpose of determining whether the conditions for an infringement of the competition rules are met.

Bank cartel – judgement of the court

- decision of the AMO was upheld (case was reviewed in three separate proceedings with each bank; proceeding with one bank is still pending at the Supreme Court)
- Along the preliminary ruling, court also refers to case law in - C-439/09, 13.10.2011, bod 34; T-Mobile Netherlands BV a i., C-8/08, 04.06.2009, points 28 a 30,; GlaxoSmithKline Services a i., C-501/06 P, C-513/06 P, C-515/06 P a C-519/06 P, 06.10.2009; Beef Industry Development Society a Barry Brothers, C-209/07, 20.11.2008, points 16 a 21)
- In order to assess the anti-competitive nature of an agreement or a decision by an association of undertakings, regard must be had inter alia to the content of its provisions, its objectives and the economic and legal context of which it forms a part.

Construction cartel

- construction of a certain section of a motorway
- based on the analysis, the AMO found that 6 construction companies (in 3 consortias) cooperated in setting offer prices for the tender
- main piece of evidence - submitted bids included complex of construction works valued at nearly 900 unit prices, ratios between prices in the bids submitted by the tenderers showed extremely constant figures
- such a strong convergence is not a standard one and cannot be objectively justified otherwise than by anti-competitive agreement between the bidders
- during the administrative proceedings all possible alternative explanations submitted by the parties were rebut and thus excluded
- further pieces of evidence supported this conclusion (such as external expert opinion, communication platform of the undertakings, etc.)
- AMO referred to the *Woodpulp II* judgements of the Court of Justice

Construction cartel – judgement of the court

- decision of the AMO was upheld (the first instance court dismissed the decision of the AMO, AMO appealed to the Supreme Court which upheld the decision of the AMO, in-between the case was also submitted to the Constitutional Court)
- Supreme Court upheld the decision also on the part that it is an agreement by object
- court stated that it acknowledges that the evidence on secret cartels is not easy to discover therefore the competition authority has recourse also to indirect evidence
- court examines the indirect evidence in the case, while it states that the strength of evidence in question emerge from the application of logic rules of thinking and assessment
- Court refers to ruling of the Court of Justice in C -08/2008
- assessing the economic and legal context the court comes to conclusion that it is an infringement by object

Scrutiny under the Cartes Bancaires?

Par. 90: By simply reproducing on a number of occasions, in particular, in paragraphs 126 to 136 of the judgment under appeal, the contents of the decision at issue, the General Court failed to review, even though required to do so, whether the **evidence used** by the Commission in the decision at issue **enabled it correctly to conclude that the measures at issue, in the light of their wording, objectives and context, displayed a sufficient degree of harm to competition to be regarded as having as their object a restriction of competition within the meaning of Article 81(1) EC and, consequently, whether that evidence constituted all the relevant data which had to be taken into consideration for that purpose.**

- bank cartel as well as construction cartel both show evidence and elaborate economic and legal context which prove that these are infringements by object
- Cartes bancaires judgement does not deny previous jurisprudence
- The conditions for assessment of the agreement remain – i.e. assessment of its nature, its provisions, its objectives and the economic and legal context, as well as question whether it reveals sufficient degree of harm

Thank you for your attention!