Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

7 February 2013 *

(Agreements, decisions and concerted practices — Agreement concluded between a number of banks — Competitor allegedly operating unlawfully on the market concerned — Effect — None)

In Case C-68/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Najvyšší súd Slovenskej republiky (Slovakia), made by decision of 10 January 2012, received at the Court on 10 February 2012, in the proceedings

**Protimonopolný úrad Slovenskej republiky**

v

**Slovenská sporiteľňa a.s.,**

THE COURT,

composed of A. Rosas, President of the Chamber (Rapporteur), E. Juhász and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

— The Protimonopolný úrad Slovenskej republiky, by T. Menyhart, acting as Agent,

— Slovenská sporiteľňa a.s., by M. Nedelka, advokát,

— the Slovak Government, by B. Ricziová, acting as Agent,

— the Czech Government, by M. Smolek and T. Müller, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and S. Fiorentino, avvocato dello Stato,

— the Polish Government, by M. Szpunar and B. Majczyna, acting as Agents,

— the European Commission, by A. Tokár, P. Van Nuffel and N. von Lingen, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Slovak.

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101 TFEU.

2 The request has been made in proceedings between the Protimonopolný úrad Slovenskej republiky (Competition Authority of the Slovak Republic; 'the Protimonopolný úrad') and Slovenská sporiteľňa a.s. ('Slovenská sporiteľňa') concerning the conduct of three banks which, in that authority's view, constituted an agreement intended to restrict competition.

### Legal context

3 In Slovakia the applicable competition law is Law No 136/2001 on the protection of competition.

### The dispute in the main proceedings and the questions referred for a preliminary ruling

4 By decision of 9 June 2009, the Protimonopolný úrad Slovenskej republiky, odbor dohôd obmedzujúcich súťaž (the 'Restrictive Agreements' Division of the Competition Authority of the Slovak Republic; 'the Division'), a first-level authority with competence concerning the protection of competition, found that three major banks with their principal places of business in Bratislava (Slovakia) – namely Slovenská sporiteľňa a.s., Československá obchodná banka a.s. and Všeobecná úverová banka a.s. – had infringed Article 81 EC and the corresponding provision of Law No 136/2001 by entering into an agreement (i) to terminate contracts relating to current accounts of Akcenta CZ a.s. ('Akcenta'), a company whose principal place of business is in Prague (Czech Republic), and (ii) to refrain from concluding new contracts with Akcenta. The Division considered that Akcenta, which is a non-bank financial institution providing services comprising cashless foreign exchange transactions, needed to have current accounts in banks in order to carry on its activities, which included foreign-exchange transfers from and to abroad, including for its customers in Slovakia. In the Division's view, the three banks concerned – regarding Akcenta as a competitor providing services to their customers and not best pleased that their profits had fallen as a result of its business – monitored Akcenta's activity, conferred with each other and decided, by common agreement, to terminate in a coordinated manner the contracts they had concluded with Akcenta. Relying on evidence of contacts between the three banks, including in particular a meeting held on 10 May 2007 and subsequent email correspondence, the Division established that each of the three banks had agreed to terminate its contract with Akcenta on condition that the other two did the same, in order to prevent a part of its clientele switching to whichever bank continued to hold Akcenta's current accounts. The Division concluded that the conduct of the banks on the relevant market, defined as the Slovak market for cashless foreign-exchange operations, constituted an agreement intended to restrict competition and imposed fines of EUR 3 197 912 on Slovenská sporiteľňa, EUR 3 183 427 on Československá obchodná banka a.s. and EUR 3 810 461 on Všeobecná úverová banka a.s.

5 Following the commencement by Slovenská sporiteľňa of proceedings against the Division's decision, the Rada Protimonopolného úradu Slovenskej republiky (Council of the Competition Authority of the Slovak Republic 'the Council'), a second-level administrative authority, adopted, on 19 November 2009, a decision that amended the contested decision by broadening the legal categorisation of the conduct at issue in the main proceedings. The Council did not alter the amounts of the fines imposed by the Division.

6 Slovenská sporiteľňa challenged the Council's decision, bringing proceedings before the Krajský súd Bratislava (Bratislava Regional Court).

7 By judgment of 23 September 2010, the Krajský súd Bratislava annulled the decisions of 9 June and 19 November 2009 in so far as they concerned Slovenská sporiteľňa and referred the case back to the Protimonopolný úrad.

8 In its judgment the Krajský súd Bratislava stated, inter alia, that the Protimonopolný úrad had misinterpreted the concepts of 'competitor' and 'relevant market'. According to that court, the Protimonopolný úrad had not determined whether Akcenta could be regarded as one of Slovenská sporiteľňa's competitors on the relevant market, given that it was operating in Slovakia without the requisite authorisation from the Národná banka Slovenska (Slovak National Bank); nor had that authority considered the question as to whether Akcenta's illegal activity could be accorded legal protection. The Krajský súd Bratislava pointed out in that regard that the Národná banka Slovenska had imposed a fine of EUR 35 000 on Akcenta on the ground that, from January 2008 to June 2009, it had been carrying out foreign exchange transactions in Slovakia without a licence. At the same time, however, the Krajský súd Bratislava stated that the decision of the Národná banka Slovenska imposing the fine had been annulled by the Banková rada Národnej banky Slovenska (Banking Council of the Slovak National Bank) and that the investigation into Akcenta had been closed on the basis that a penalty could no longer be imposed on it because the limitation period applicable in relation to financial penalties had expired. In addition, the Krajský súd Bratislava pointed out that it was clear from the documents before it that Akcenta was not a competitor of the banks concerned but just one of their customers, since it was not providing services at the same level as the banks and was operating on the basis of a different set of rules. The Krajský súd Bratislava also noted that the Protimonopolný úrad had not taken sufficient account of the circumstances in which the agreement at issue in the main proceedings had been entered into. It considered that it had not been proved, inter alia, that Akcenta had attempted unsuccessfully to reopen bank accounts with Slovenská sporiteľňa.

9 The Protimonopolný úrad brought an appeal against the judgment of the Krajský súd Bratislava before the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic).

10 The Protimonopolný úrad submitted that it had sufficiently substantiated its finding that Akcenta was one of the competitors of the banks concerned on the relevant market, namely the Slovak market for cashless foreign exchange operations. With regard to the allegedly illegal nature of the business carried on by Akcenta in Slovakia, the Protimonopolný úrad maintained that the fact that Akcenta carried on its business activity without the requisite licence was not relevant for the purpose of examining the conduct of the banks concerned under the competition rules. It also noted that neither Slovenská sporiteľňa nor the other banks had called in question the legality of Akcenta's activity before it initiated the procedure at issue in the main proceedings. It did not consider there to be any proof that Akcenta was operating illegally. So far as the decision of the Banking Council of the Slovak National Bank was concerned, the Protimonopolný úrad noted that it concerned the period from January 2008 to June 2009, while Akcenta had been operating on the Slovak market since 2003 and the relevant banks had coordinated their conduct and terminated the contracts with Akcenta in 2007. The Protimonopolný úrad also points out that that decision was annulled.

11 Slovenská sporiteľňa contended that the Protimonopolný úrad had not given sufficient weight to the fact that Akcenta, which did not have the requisite licence, was operating illegally on the relevant Slovak market. It submitted that since the necessary conditions of competition law were not met, a restriction of competition could not be pleaded. It argued that there was no reason to penalise conduct resulting in the exclusion of an undertaking that was operating illegally. It had not been established that the meeting held by the three banks on 10 May 2007 resulted in an agreement, given that at that meeting the employee who attended from Slovenská sporiteľňa merely gathered information on the projected termination of contracts relating to Akcenta's current accounts.

12 In those circumstances, the Najvyšší súd Slovenskej republiky decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Is Article 101(1) TFEU … to be interpreted as meaning that it is of legal relevance that a competitor (trader) adversely affected by a restrictive agreement between other competitors (traders) was operating on the relevant market illegally at the time when the agreement was concluded?

2. For the purposes of interpreting Article 101(1) TFEU … is it of legal relevance that, at the time when the restrictive agreement was concluded, the legality of that competitor’s (trader’s) conduct was not called in question by the competent supervisory bodies in the Slovak Republic?

3. Is Article 101(1) TFEU … to be interpreted as meaning that, in order to find that an agreement is restrictive of competition, it is necessary to demonstrate personal conduct on the part of a representative authorised under the undertaking’s constitution or the personal assent, in the form of a mandate, of that representative, who has, or may have, taken part in that agreement, to the conduct of one of the undertaking’s employees, where the undertaking has not distanced itself from the conduct of that employee and, at the same time, the agreement has been implemented?

4. Is Article 101(3) TFEU … to be interpreted as also applying to an agreement prohibited under Article 101(1) TFEU … which by its nature has the effect of excluding from the market a specific individual competitor (trader) which has subsequently been found to have been carrying out foreign exchange transactions on the cashless foreign-exchange operations market without holding the appropriate licence as required under national law?’

## Consideration of the questions referred

13 Observations have been submitted by the Protimonopolný úrad, Slovenská sporiteľňa, the Slovak, Czech, Italian and Polish Governments and by the European Commission.

### *The first and second questions*

14 By its first and second questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that it is of legal relevance that a competitor adversely affected by an agreement between other competitors was allegedly operating illegally on the relevant market at the time when that agreement was concluded.

15 In its observations, the Czech Government has set out the facts relating to that question, as they were dealt with under Commission Recommendation 2001/893/EC of 7 December 2001 on principles for using ‘Solvit’ – the Internal Market Problem Solving Network (OJ L 331, p. 79). In essence, taking the view that Akcenta, a Czech company holding the requisite licences in the Czech Republic, was working exclusively by telephone with its Slovak clients, the Solvit centre in the Czech Republic, concluded that the services provided did not require a licence to be issued in Slovakia. The Slovak Solvit centre expressed the opposite view, however, considering that the matter concerned a question related to the freedom of establishment, since various services were supplied through intermediaries established in Slovakia. According to the Solvit database, the case was closed as unresolved on 2 January 2006.

16 It must be recalled that Article 101(1) TFEU prohibits 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.

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.

20 Moreover, it is for public authorities and not private undertakings or associations of undertakings to ensure compliance with statutory requirements. The Czech Government's description of Akcenta's situation is evidence enough of the fact that the application of statutory provisions may call for complex assessments which are not within the area of responsibility of those private undertakings or associations of undertakings.

21 It follows from those considerations that the answer to the first and second questions is that Article 101 TFEU must be interpreted as meaning that the fact that an undertaking that is 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.

*The third question*

22 By its third question, the referring court asks whether Article 101(1) TFEU is to be interpreted as meaning that, in order to find that an agreement is restrictive of competition, it is necessary to demonstrate personal conduct on the part of a representative authorised under the undertaking's constitution or the personal assent, in the form of a mandate, of that representative, who has, or may have, taken part in that agreement, to the conduct of one of the undertaking's employees, when the undertaking has not distanced itself from the conduct of that employee and when, at the same time, the agreement has been implemented.

23 The Czech and Slovak Governments and the Commission have doubts as to the relevance of this question in view of the facts set out by the referring court but they endeavour none the less to suggest an answer.

24 The Protimonopolný úrad explains that this question arises because, in the present case, Slovenská sporiteľňa has maintained that its employee who took part in the meeting of the representatives of the banks concerned on 10 May 2007 had not been given authority to that effect; nor had it been shown that he had endorsed the conclusions of that meeting.

25 The Court observes in that regard that, for Article 101 TFEU to apply, it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who is authorised to act on behalf of the undertaking suffices (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 97).

26 Furthermore, as the Commission has pointed out, participation in agreements that are prohibited by the FEU Treaty is more often than not clandestine and is not governed by any formal rules. It is rarely the case that an undertaking's representative attends a meeting with a mandate to commit an infringement.

27 Moreover, it is settled case-law that when it is established that an undertaking has participated in anti-competitive meetings between competing undertakings, it is for that undertaking to put forward evidence to establish that its participation in those meeting was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. If an undertaking's participation in such a meeting is not to be regarded as tacit approval of an unlawful initiative or as subscribing to what is decided there, the undertaking must publicly distance itself from that initiative in such a way that the other participants will think that it is putting an end to its participation, or it must report the initiative to the administrative authorities (judgment of 3 May 2012 in Case C-290/11 P *Comap* v *Commission*, not published in the ECR, paragraphs 74 and 75 and the case-law cited).

28 In view of the foregoing considerations, the answer to the third question is that Article 101(1) TFEU must be interpreted as meaning that, in order to find that an agreement is restrictive of competition, it is not necessary to demonstrate personal conduct on the part of a representative authorised under the undertaking's constitution or the personal assent, in the form of a mandate, of that representative to the conduct of an employee of the undertaking who has participated in an anti-competitive meeting.

*The fourth question*

29 By its fourth question, the referring court asks whether Article 101(3) TFEU must be interpreted as applying to an agreement prohibited under Article 101(1) TFEU which, by its nature, has the effect of excluding from the market a specific individual competitor which has subsequently been found to have been carrying out foreign currency transactions on the cashless foreign-exchange operations market without holding the appropriate licence as required under national law.

30 Since Article 101(3) TFEU is applicable only when an agreement prohibited under Article 101(1) TFEU has been found to exist, the Court's answer assumes that such a finding has been made.

31 As the Commission has submitted, for the exception in Article 101(3) TFEU to apply, the four conditions laid down in that provision must all be satisfied. Firstly, the agreement must contribute to improving the production or distribution of goods or promoting technical or economic progress, secondly, consumers must be allowed a fair share of the resulting benefit, thirdly, the agreement must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives and, fourthly, it must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

32 It is the person who relies on that provision who must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied (*GlaxoSmithKline Services and Others* v *Commission and Others*, paragraph 82).

33 In its observations, Slovenská sporiteľňa has contended that the fact that the purpose of an anti-competitive agreement is to prevent a competitor without the requisite licence from acting illegally on the market should be a ground for applying the exception provided for in Article 101(3) TFEU, since – it argues – such an agreement protects the conditions for healthy competition and, in the broader sense, thus seeks to promote economic progress as referred to in that provision.

34 The Court notes that Slovenská sporiteľňa puts forward only one of the four cumulative conditions referred to in Article 101(3) TFEU.

35 Even if that condition were met, the agreement at issue in the main proceedings does not appear to meet the other three conditions – more particularly, the third condition, whereby an agreement must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives referred to in the first condition laid down in Article 101(3) TFEU. Even if, as stated by the parties to that agreement, the purpose was to force Akcenta to comply with Slovak law, it was for those parties – as has been observed in paragraph 20 of this judgment – to lodge a complaint with the competent authorities in that respect and not to take it upon themselves to eliminate the competing undertaking from the market.

36 It follows from those considerations that Article 101(3) TFEU must be interpreted as meaning that it can apply to an agreement prohibited under Article 101(1) TFEU only when the undertaking which is relying on Article 101(3) TFEU has proved that the four cumulative conditions laid down therein are met.

## Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

1. **Article 101 TFEU must be interpreted as meaning that the fact that an undertaking that is 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.**

2. **Article 101(1) TFEU must be interpreted as meaning that, in order to find that an agreement is restrictive of competition, it is not necessary to demonstrate personal conduct on the part of a representative authorised under the undertaking's constitution or the personal assent, in the form of a mandate, of that representative to the conduct of an employee of the undertaking who has participated in an anti-competitive meeting.**

3. **Article 101(3) TFEU must be interpreted as meaning that it can apply to an agreement prohibited under Article 101(1) TFEU only when the undertaking which is relying on Article 101(3) TFEU has proved that the four cumulative conditions laid down therein are met.**

[Signatures]