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Nikola L. Filipović, LLM[1]

FOREIGN COURT PRACTICE

JUDGEMENT OF THE EUROPEAN COURT OF JUSTICE IN THE CASE C-32/11

1. Introduction

The legal issue dealt with by the European Court of Justice in the case C-32/11 *Allianz Hungary* (judgement made on 14th March 2013) was placed in the context of agreements concluded between insurance companies and car repairers and/or repair shops (that were also distribution channels of insurance, i.e. insurance intermediaries). According to agreements, hourly rates for vehicle repair (prices charged by a repair shop to an insurance company) depended on, among other things, the number of insurance agreements concluded via repair shops, i.e. whether such agreements between insurance companies and repair shops, in terms of competition law, aimed to limit competition on the market.

2. EU Regulatory Framework

Article 101 paragraph 1 of the Treaty on the Functioning of the European Union (TFEU) 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, and in particular those which:

– directly or indirectly fix purchase or selling prices or any other trading conditions;
– limit or control production, markets, technical development, or investment;
– share markets or sources of supply;

[1] Compliance Advisor

– apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
– make the conclusion of agreements 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 agreements.

2.1. Hungarian Law

Article 11 of the Law No. LVII id 1996 on the Prohibition of Unfair Market Practices and Restriction of Competition prohibits agreements limiting market competition by prohibiting all agreements between undertakings, decisions by associations of undertakings, public corporations, or other similar organisations [...] which have as their object or effect the prevention, restriction or distortion of competition (except for agreements between undertakings that are not independent of each other, i.e. they do not qualify as such kind of agreements).

This prohibition applies, in particular, to:
– the direct or indirect fixing of purchase or selling prices or other business terms and conditions;
– the limitation or control of production, market, technical development or investments;
– the allocation of markets or sources of supply, exclusion of a specified group of consumers from purchasing certain goods;
– the hindering of market entry;
– cases, where, given transactions of the same value or character, there is discrimination between trading parties, including the application of prices, periods of payment, discriminatory selling or purchase terms and conditions or methods placing certain trading parties at a competitive disadvantage;
– making the conclusion of agreements subject to the acceptance of obligations which, by their nature or according to commercial usage do not belong to the subject of such agreements.

3. Subject Matter of the Proceedings and Legal Issues

Hungarian insurers, primarily *Allianz* (but also *Generali*), negotiated once a year with car repairers about prices that insurance companies would pay to car repairers for repairing damage caused by accidents involving insured vehicles. According to these agreements, car repairers could immediately repair the damaged car in line with agreed terms and prices.

Since 2002, many authorized car dealers, that at the same time have repair shops, requested from their trade association GEMOSZ (*Gépjármű Márkakereskedők Országos Szövetsége*) to negotiate on behalf of members with insurance companies about the hourly rates that these repair shops would apply when repairing damaged cars.

According to such business model, car dealers or their repair shops, would at the same time provide repairs and act as an insurance distribution channel (insurance brokers or agents) offering their clients conclusion of an insurance contract when selling or repairing a car.

In 2004 and 2005, GEMOSZ concluded a framework agreement with *Allianz Insurance*, and according to that agreement, the Association adopted a recommendation, and certain authorized car dealers (members of the Association) signed individual agreements with *Allianz Insurance*. According to those individual agreements, repair shops of those dealers could charge higher hourly rates to the insurance company for repairs if the agreed sales targets were reached (e.g. a defined percentage of *Allianz* insurance policies in the total number of policies sold by dealers or their repair shops). *Generali* insurance also had similar agreements, but not in written form.

Hungarian Competition Authority (*Gazdasági Versenyhivatal*) stated that such agreements violated the Article 11 of the Law on the Prohibition of Unfair Market Practices and Restriction of Competition. The decision by the Association GEMSOZ on recommended prices (hourly rates) for authorised car repairers charged to insurance companies was a horizontal agreement between undertakings, while individual agreements concluded between the *Allianz* and authorised trading companies where hourly rates depended on the number and scale of written insurance policies were vertical agreements between undertakings. Both types of agreements aim to limit insurance market competition and car repair market. As a result, the Hungarian Competition Authority imposed penalties to parties to such agreements - both insurance companies and car dealers that concluded such agreements and their Association, which negotiated the framework agreement and adopted the decision on recommended repair prices.

After a series of appeals, the case was brought before the Supreme Court of Hungary. The court concluded that Article 11 of the Law on the Prohibition of Unfair Market Practices and Restriction of Competition is essentially identical to Article 101 of the TFEU (as a result of harmonization of the Hungarian national law with the European Union acquis in the process of joining the EU). Having in mind that there is a need for uniform interpretation of the EU law, the Supreme Court of Hungary decided to refer the question to the European Court of Justice of whether bilateral agreements between an insurance company and individual car repairers, or between an insurance company and a car repairers' association, under which the hourly repair charge paid by the insurance company to the repairer for the repair of

vehicles insured by the insurance company depends, among other things, on the number and scale of insurance policies taken out with the insurance company by the repairer, as the insurance broker for the insurance company in question, qualify as agreements which have as their object the prevention, restriction or distortion of competition.

3.1. Opinion of the European Court of Justice

The European Court of Justice first considered issues related to its own jurisdiction. The jurisdiction of the European Court of Justice was a potentially controversial issue because the restrictions on competition in the case did not affect trade between Member States, but only the national market of Hungary. Therefore, Article 101 of the TFEU was not directly applicable to the question at issue.

However, according to Article 276 of the TFEU, when a national court refers a question to the European Court of Justice regarding the interpretation of provisions of the EU law, the European Court is obliged to provide an answer. Having in mind that Article 11 of the Hungarian Law is practically identical to Article 101 of the TFEU and that the purpose of Article 11 of the Hungarian Law is to prohibit those forms of behaviour covered by Article 101 of the TFEU. Considering that in the preamble of the law, the Hungarian legislator clarifies that the purpose of the law is harmonization with the EU regulations, including competition, and that the Supreme Court of Hungary considers that Article 11 of the national law should be interpreted in the same way as the Article 101 of the TFEU, the European Court of Justice decided that there is jurisdiction to decide.

Furthermore, the European Court of Justice considered whether the said agreements qualify as agreements that have as their object to prevent, limit or distort competition.

The court reminded of the dichotomy of prohibited agreements according to the Antitrust Law in the European Economic Community i.e. that according to Article 101 of the TFEU, agreements whose aim or consequence is to distort or restrict competition (so-called restrictive agreements) are prohibited. Aim or consequence is an alternative condition to qualify an agreement as a restrictive and therefore prohibited.

According to the Court's previous practice, when it is deemed that an agreement aims to distort or limit competition, such an agreement is *per se* prohibited, and the effect (consequence) of such an agreement on the market does not have to be determined. Such agreements are by their nature harmful to proper functioning of the market and competition (e.g. cartel agreements on prices) and the conclusion of such an agreement is a violation of competition rules.

On the other hand, when the aim of an agreement is not to restrict or distort competition, the agreement may still restrict or distort competition and as

such would be contrary to Article 101 of the TFEU under the second condition (the effect of the agreement is a restriction of competition). However, in this case, the competent authority must perform a complex economic analysis and determine the effects of the agreement on the market and competition in order to prove a violation of Article 101 of the TFEU.

Regarding agreements whose aim is to restrict or distort competition, the court reminded that when determining such violation it is necessary to take into account the content of provisions, as well as the economic and legal context of the agreement. In case of agreements whose aim is to restrict or distort competition, the intention of the contracting parties (market participants) is not relevant.

The court further concluded that the agreements created a link between the car repair fee and insurance brokerage fees – vertical agreements between participants at different levels of distribution. That fact (that the agreement is vertical) did not mean that such agreement could not be aimed at restricting or distorting competition (which was one of the arguments of the parties to the proceedings).

The court deemed that such an agreement may be *per se* a violation of competition law (the agreement may aim at a restriction of competition) when the requesting court determined that it was likely that, given the economic context, competition in the concerned market would be eliminated or significantly weakened after the conclusion of such an agreement. In order to determine the likelihood of such consequences, the court should take into account the structure of the market, the existence of alternative distribution channels and the market power of the participants in the agreement.

Furthermore, the Court stated that bilateral agreements between insurers and car dealers (i.e. their repair shops) were concluded based on the decision of the Association of Car Dealers GEMSOZ about recommended hourly rates for car repairs. If the national court deemed that the Association's decision is aimed to limit competition, then the accompanying individual (bilateral) agreements between an insurance company and a repair shop (concluded according to the framework agreement and the decision of the Association) must be considered as agreements aimed at limiting competition. Such agreements may be in conflict with Article 101 of the TFEU if, after a specific and individual examination of the text and purpose of those agreements and the economic and legal context, it was obvious that they were, by their nature, harmful to proper functioning of competition on one of the two listed markets.

4. Brief Overview of Judgement

The competition law considered this judgment as questionable, because the court's reasoning in this case somewhat blurred the line between agreements

aiming to distort competition and agreements aiming to distort competition.[2] Although it is considered that the court's decision is essentially correct, the manner of reaching the conclusion was questionable

The court stated that agreements can be deemed prohibited *per se* (anti-competitive) if "it is determined that it is likely, given the economic context, that competition in the concerned market would be eliminated or significantly weakened after the conclusion of such agreement". However, such analysis is usually done when it is necessary to assess consequences of the agreement, i.e. when the court or competent authority proved that it was an agreement that did not aim at a restriction or distortion of competition, but may cause a restriction or distortion of competition. This is contrary to previous practice of the court that there is no need to prove the consequences (effects) of the agreement on the market and competition if it is determined that the aim of the agreement was to limit competition. In other words, it seemed as if the court evaluated the aim of the agreement by analysing the effect of the agreement. If such mode of thinking were applied to all restrictive agreements, competent authorities or courts in the EU would have to conduct an economic analysis even for obvious violations of competition such as cartel price fixing among market participants.

However, the scope of this judgement is somewhat narrower, since the case refers to the agreements aiming to limit competition, but such aim is not visible at first sight. Therefore, it should not be considered that this judgment created additional conditions to qualify the agreement as a violation of competition, but that it referred to agreements where the anti-competitive aim is revealed only when the agreement is viewed in the context of the market and the conditions of competition on the market. When seemingly harmless strategies such as encouraging repair shops to offer a larger volume of intermediary insurance services, in order to better charge their primary services from an insurance company, due to the structure of the market, alternative distribution channels and the market share of the parties to the agreement, may aim to limit competition.

Translated by
Jelena Rajković

[2] J. Faull and A. Nikpay, *Faull and Nikpay: The EU Law of Competition 3rd edition*, Oxford University Press, 2014, str. 241–243.