

The Czech Regional Court rules that internal guidelines of an association of undertakings containing rules on determination of prices violate the ban on cartels (*Sdruzeni pohrebnictvi*)

Czech Republic, Anticompetitive practices, Association of undertakings, Judicial review, Price coordination, Professional association, Services

Regional Court in Brno, 1 November 2010, ref. n 62Ca 22/2009, *Sdruzeni pohrebnictvi*

EUCLH n CZ16

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I. Introduction

On 1 November 2010, the Regional Court in Brno (hereinafter the "Regional Court") dismissed an administrative lawsuit brought by the Association of Funeral Services in the Czech Republic (in Czech: *Sdruzeni pohrebnictvi v CR*; hereinafter the "AFS") against the first-instance decision of the Competition Office of 4 June 2008 and the second-instance decision of the Chairman of the Competition Office of 18 March 2009 and affirmed that internal guidelines of the AFS containing rules on determination of prices for various services provided by the AFS's members violated the ban on cartels enshrined in Section 3(1) of Act No. 143/2001 Coll., on Protection of Competition, then in force (hereinafter the "Competition Act"). At the same time, the Regional Court upheld the fine of CZK 500,000 (approx. EUR 20,000) imposed upon the AFS by the Competition Office.

II. Circumstances of the case

The AFS is a voluntary association of natural and legal persons active in the field of funeral services in the Czech Republic. The AFS provides consultations related to provision of crematory, cemetery and funeral services. The members of the AFS include mainly providers of funeral services, operators of cemeteries and crematories. The AFS itself is a member of the European Federation of Funeral Services.

Among the various internal documents adopted by the AFS which were scrutinized by the Competition Office were the following materials:

(i) *Code of Honour* which contained a rule providing that if a member of the AFS offers services under manifestly more

advantageous conditions (e.g. by charging lower than usual prices), the Board of the AFS shall be entitled to carry out inspection to verify the member's compliance with ethical rules and, eventually, to exclude the member from the AFS (hereinafter the "*Code of Honour*");

(ii) *Principles governing basic rules of activity of undertakings seeking the Sign of Quality* providing that a member should refrain from disclosing information that would compare prices of different members in cases where customers are unable to gather such information on their own (hereinafter the "*Principles*");

(iii) *Methodical guidelines How to dig graves, How to determine rent for lease of grave locations and Template of lease agreement for grave location and pricelist of rent and related services* which contained rules for determination of prices for the relevant services provided by the individual members of the AFS (hereinafter the "*Methodical Guidelines*").

III. Reasoning of the Regional Court

3.1 Relevant legal framework

Given that the AFS's character as an association of undertakings was undisputed, the introductory parts of the Regional Court's reasoning focused on the legal qualification of the AFS's conduct. Thus, at the outset of its analysis, the Regional Court explained that a "decision" by an association of undertakings may consist in a formally or only materially manifested expression of will of competitors, the adoption and implementation of which falls within the competence of their association rather than the competitors themselves.

In addition, the Court emphasized, the form of decision is not decisive. It may be embodied in a resolution adopted by the association's executive organ or in a particular provision of its internal regulations. At the same time, it is not decisive whether the decision is binding or non-binding upon the members, whether it is based on the consensus of all or some members, whether it applies to all or some of them or whether it may potentially affect only the activity of the members or also that of non-members. As the Court recalled, the EU courts construe the notion of decision by an association of undertakings rather extensively. The concept is taken to mean any measure adopted by an association of undertakings provided it constitutes "the faithful reflection of the [association]'s resolve to coordinate the conduct of its members, regardless of what its precise legal status may be" [1].

Furthermore, the Regional Court explained, if a measure adopted by an association of undertakings is to qualify as a "decision" within the above-stated meaning, it must fulfill the following criteria. First, it must represent an act of the association itself. The body which has adopted it must be empowered to act on behalf of the association or it must be perceived as such by individual members. Second, the measure must be addressed *vis-À-vis* the members of the association. Third, the measure must disclose, at least indirectly, a clear intention to coordinate (unify) the commercial behaviour of the members. Fourth, the measure must have the object or effect of distorting free competition on the relevant market.

3.2 Legal assessment

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Having analyzed the internal documents of the AFS, the Regional Court affirmed that all the above-stated conditions were met. First, all the documents were the result of standard activity of the AFS. They were adopted by the General Meeting of the AFS, they had official character and were perceived as authoritative also by the AFS's members themselves. Second, the documents were clearly addressed to both the AFS's current members as well as to undertakings wishing to obtain membership. Third, the documents unequivocally revealed a manifest intention of the AFS to regulate the business conduct of its members.

As regards the last condition, the Court specifically emphasized that the *Code of Honour* was to be regarded as mandatory, since the failure to comply with it constituted a ground for expulsion. Likewise, the *Principles* were held to be binding on the ground that undertakings wishing to apply for, or retain, the *Sign of Quality* were, as a matter of fact, compelled to abide by them. Finally, the *Methodical Guidelines* were, strictly taken, not binding, yet they contained a model of conduct which was considered by the AFS, perceived by its members as a superior authority, appropriate and desirable. In light of these findings, the Regional Court concluded, the potential of the AFS's internal documents to unify the conduct of its members was undisputable.

At the last stage of its analysis, the Regional Court went on to examine whether the documents of the AFS, qualified as a "decision by an association of undertakings", had the potential to distort free competition on the relevant market. To this effect, the Regional Court applied a three-tier test. Namely, the Court analyzed with respect to each document (i) whether the rules contained therein in fact motivated individual members to act in conformity with them, (ii) whether the rules interfered with the members' ability to determine their business conduct independently, and (iii) whether the rules were in practice applied by the AFS. The Regional Court answered all these questions in the affirmative based on the following reasoning.

First, with respect to the *Code of Honour*, the Court held that the rules contained therein in fact induced individual members to refrain from providing their services under "manifestly more advantageous" conditions, since in such a case the Board of the AFS was empowered to discuss the matter and propose inspection in order to verify compliance on the part of the member with ethical rules. It was therefore undisputable, according to the Court, that the rule interfered with the freedom of the individual members to determine their business conduct purely on the basis of their own commercial discretion. Also, the rule was applied in practice, as the AFS's members were aware of it, were obliged to abide by it by virtue of their membership and, at least some of them, followed it in practice.

Second, as regards the *Principles*, the Regional Court held that the rule precluding individual members from disclosing information that would compare prices of different members in cases where customers were unable to gather such information on their own distorted free competition on the relevant market. □As the Court underlined, comparison of prices is one of the structural features of free competition and, consequently, a rule inducing competitors to refrain from giving information that would indicate price differences among individual competitors has anticompetitive effects. In addition, the Court underscored, the rule was applied in practice since the members of the AFS were acquainted with it, undertook to abide by it and complied with it in practice.

Third, as concerns the *Methodical Guidelines*, the Court held that although they contained neither fixed nor recommended prices, they contained a unified and detailed algorithm for price determination to be used by all AFS's members. The *Methodical Guidelines* therefore represented a non-binding price recommendation capable of coordinating future conduct of individual members and capable of unifying the price level on the market. As in the cases of the above-stated documents, also these guidelines were followed in practice, as a result of which they diminished the free choice of consumers based on prices resulting from unrestrained competition.

IV. Concluding comments

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The decision of the Regional Court offers a well-structured insight into the concept of "decision by an association of undertakings". The judgment makes clear that the notion embraces rules contained in the association's decisions, regulations, codes of conduct, recommendations and, in general, any other measures which reflect the resolve of the association to coordinate its members' business conduct. In addition, the judgment rightly states that the concept involves not only binding but also non-binding measures which have the object or effect of influencing commercial behaviour of the individual members of the association.

Nevertheless, a certain aspect of the judgment merits a critical reassessment. Specifically, the Regional Court suggests that its task is to assess whether the decision in question had the potential to distort competition on the relevant market. Yet, in fact, the Regional Court's reasoning seems to imply that the Court analyzed the real effects of the AFS' documents on the market. This is evident from the three-tier test, especially from its last stage pursuant to which, in order for the decision to qualify as anticompetitive, it must be established that it was applied in practice.

This reasoning is in line with the approach of the Court that was applied also in other judgments and pursuant to which in cases where an agreement (or decision by an association of undertakings) have the effect of restricting competition, the negative impact on the market must be real (i.e. not only potential). However, this approach of the Regional Court has been recently rejected by the Supreme Administrative Court which ruled, *inter alia*, that prohibited are not only agreements which have the real effect of restricting competition but also agreements which may have potentially such an effect [2].

In light of this judgment, therefore, the approach of the Regional Court taken in the present case seems in this aspect obsolete. It is no longer necessary to examine whether decision by an association of undertakings has in fact resulted in restriction of competition. Instead, a mere potentiality of this effect, if convincingly established, will be sufficient. This, of course, does not preclude the Competition Office and the courts from examining the real effects of the decision. Examination of this aspect, however, will be relevant for the purpose of determining the amount of fine, not for the assessment of the decision's legality.

[1] ECJ, January 27th, 1987, *Verband der Sachversicherer e.V. v. Commission*, Case [45/85](#), [1987] ECR 405.

[2] Judgment of the Supreme Administrative Court dated 29 February 2009 ref. no. 1 AFS 78/2008 (*Cartel of Building Savings Associations*). For comments, see [Jiri Kindl, The Czech Supreme Administrative Court takes a liberal approach towards information exchange agreements \(Building savings banks\)](#), 25 February 2009, e-Competitions.

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