BRUSSELS À JOUR

Be My Fee-lentine

Markus Röhrig and Laura Stoicescu report on the latest developments from the European capital of competition law.

It's February and love is in the air, they say. However, not a lot of love was shown by the Court of Justice towards notaries in Lithuania and lawyers in Bulgaria when it ruled that their efforts to establish minimum fees was in breach of competition law. In the two judgments (C-438/22 and C-128/21) the Court consolidates its practice regarding minimum fees established by various professional organizations. And we think it's not pure coincidence that both judgments were handed down within a week from each other. The cherry on the top… potentially far-reaching on NCAs' powers to directly rely on Article 23(2) of Regulation 1/2003 where they lack sufficient enforcement powers under their national laws.

Existential Questions

In the case of the Lithuanian notaries, it was the Lithuanian Competition Council noting that the Chamber of Notaries had adopted a set of rules to clarify the methods for calculating fees payable for certain services provided by notaries. According to the Competition Council, these rules in fact established a mechanism which fixed, in all cases, the amount of those fees to the highest amount of the range authorized by government regulation. The Competition Council characterized the clarifications as a "by object" infringement and fined the Chamber of Notaries, which appealed the decision. The court asked the ECJ to adopt a preliminary ruling on, among other things, whether the Chamber of Notaries' clarifying rules amounted to a restriction of competition "by object" or "by effect".

In the case of the Bulgarian lawyers, the case started as a benign run-of-the-mill insurance claim where lawyers' fees were submitted to the court for reimbursement. The court concluded that the claimed legal fees were excessive and reduced them to reflect the complexity of the case, as it was entitled to do under Bulgaria's Code of Civil Procedure. However, the Code of Civil Procedure did not allow the court to set the amount of legal fees lower than the minimum provided for in a regulation adopted by Supreme Council of the Legal Profession. The decision on costs was further appealed by the applicant in the main proceedings, and the referring court forwarded a number of questions to the Court of Justice, asking, amongst others, whether a scheme fixing minimum amounts for lawyers' fees is in

compliance with Article 101(1) TFEU. As a side note… The difference between the amount claimed and the court's amendment was less than EUR 100, but that's how judicial legends are born at the ECJ.

Background noise

The debate regarding minimum fees is not exactly new at national level. For at least a decade, bar associations and NCAs are engaged in a (more or less) tacit tug-of-war regarding whether such fees are in breach of competition law.

In 2018, the Cyprus bar association avoided being fined by the European Commission for a minimum fee scale for out-of-court legal work such as drawing up wills, contracts, the administration of estates and the registration of companies, by amending the national law. The amendment entailed abolishing the minimum fee scale.

In 2017, the Romanian national union of public notaries agreed to a number of commitments with the NCA to remove the competitive constraints regarding establishing, among others, minimum fees. Also in Romania, in 2004, the NCA had the Parliament abolish from the lawyers' regulation a scheme setting minimum fees for lawyers. An attempt to re-introduce the scheme in the same law in 2016 was swiftly nipped in the bud by the same NCA. In 2017, the national bar association council adopted the same scheme making its enforcement mandatory, but had to recall it only three months later, after being told off by the NCA. Local attempts to reinstate the scheme since then were swiftly addressed by the NCA.

Labels, labels, labels, …

In the two judgments the Court consolidates its own case-law regarding if and in which circumstances notaries, lawyers and their professional organizations qualify as undertakings or associations of undertakings.

In *CHEZ Elektro Bulgaria* (Case C-427/16), the Court had already held that the (Bulgarian) lawyers' professional organization's governing body qualified as an association of undertakings within the meaning of Article 101(1) TFEU when it adopted regulations determining the minimum amount of professional fees. At the time, the judgment marked a departure from *Wouters* (Case C-309/99), where the Court had stated that the Dutch bar association could not qualify as an undertaking or group of undertakings because it did not carry out any economic activity, and its members were not sufficiently linked to each other. In *CHEZ Elektro Bulgaria*, the Court had come out the other way, referring to the absence of any provision indicating that the governing body acted on behalf of the State when issuing the regulations on fees. This rationale was carried over and upheld by the Court in Case C-438/22 in January 2024.

However, the Court had not had yet the opportunity to undertake a similar assessment regarding notaries. Partially building on *Wouters* (*gasp*), the Court in Case C-128/21 starts from the premise that the notion of "undertaking" in competition law comprises any entity engaged in an economic activity. According to the Court, notaries established in Lithuania carried out their activities in the context of a liberal profession and not a public officials. While it was acknowledged that activities which were connected to the

exercise of prerogatives of public authority did not have an economic character justifying the application of the EU competition laws, the notaries' activities specifically listed in the request for a preliminary ruling (approval of mortgages, drafting notarial deeds, validation of certain exchange contracts) did not fall in that category. In relation to these specific activities notaries should therefore be considered undertakings.

Round up the usual suspects

In *CHEZ Elektro Bulgaria* (2017), the Court had already established that the fixing of minimum amounts for lawyers' fees, made mandatory by national legislation, amounted to horizontal fixing of minimum tariffs and prohibited by Article 101(1) TFEU as a by object restriction. The Court reached a similar decision in the Bulgarian case at hand, stating that national legislation which did not allow a lawyer to set its fees below the minimum amount laid down in a regulation issued by a professional organization of lawyers, and did not authorize the courts to order reimbursement of fees in an amount less than that minimum amount, amounted to a restriction on competition "by object" within the meaning of Article 101(1) TFEU.

For notaries, however, the Court had not yet ruled on whether the fixing of minimum fees for certain "economic" activities might amount to a "by object" infringement. In the Lithuanian case, the Court, having established notaries sometimes qualify as undertakings, built a somewhat classical assessment of the behavior and, quite unsurprisingly, reached the same conclusion as in the case of the lawyers. To start with, the Court, building again on *Wouters* (*gasp, again*), classified the notaries' professional organization as an association of undertakings, since its governing body is composed exclusively of members of the profession elected by their peers, without the intervention of national authorities. Therefore, the clarifications it had issued regarding minimum fees constitute decisions of an association of undertakings. And its content – a mechanism for calculating notaries' fees resulting in them using the highest price in the price range proposed by the Ministry of Justice – was found to amount to horizontal fixing of the prices for the services in questions and thus a "by object" infringement.

When life doesn´t give you lemons ...

...then, according to the Court, you pass by the lemonade stand and grab yourself a glassful. Tucked away in the last paragraphs of the judgment in Case C-128/21 you will find rather sweeping language affording NCAs the power to directly rely on Article 23 of Regulation 1/2003 when imposing fines for infringements of Articles 101 and 102 TFEU.

According to settled case law, and as established in Article 23(3) of Regulation 1/2003, where its internal rules allows an association to bind its members, the fine imposed on the association for an infringement of Article 101 TFEU may and—in fact, must—be calculated by reference to the turnover achieved by its members. However, the national law applicable at the time the conduct before the Court had occurred did not allow the Lithuanian NCA to take into account the turnover of an association's members for purposes of calculating an antitrust fine to be imposed on the association (or so its seems). Not a problem, says the

Court of Justice. The lack of a national provision allowing the NCA to take into account the members' turnover did not prevent the NCA from doing it just that… apparently relying on some sort of direct application of Article 23 of Regulation in favor of NCAs.

The Court builds (quite loosely) on the *Schenker* case (Case C-681/11). However, there, the Court merely established that NCAs may exceptionally not impose fines on undertakings which had infringed competition law but had taken part in a leniency program. The key notion of not imposing a fine being the exception was tied, in essence to effective enforcement of Article 101 TFEU and the powers conferred to NCAs under Article 5 of Regulation 1/2003. This is quite different from what the Court could be read to suggest in Case C-128/21, namely that Article 23 of Regulation 1/2003 conferred some subsidiary power for NCAs to impose and calculate fines in direct application of that provision where their respective national law does not allow afford them the impose fines which have a sufficient deterrent effect. Or even more broadly, that NCAs may resort to the enforcement powers that Regulation 1/2003 grants to the Commission where national law does not provide for such powers… Where a Member State fails to fully implement the ECN+ Directive, would that Member State's NCA be able—or even required—to directly resort to the powers granted to the Commission in Regulation 1/2003… where the "normal" sanction for a failure to implement a directive would be the Commission going after the Member State? Such a broad reading of the Court's holding in Case C-128/21 (which is really just an *obiter dictum*) would be worrying from a rule of law perspective.

We´ll always have Luxemburg

It appears that the Court is putting all its ducks in a row regarding horizontal price fixing by liberal profession's organizations. That will not only bring some peace and quiet on the national level, but it also sends a strong message to similar structures that times are changing and that the niches somewhat forgotten until now are front and center today.

Until next time, don't forget that you can buy yourself flowers and follow us on LinkedIn for your favorite EU Competition Law topics!

Follow us

Don't miss any edition of our Brussels à Jour Newsletter.

You can simply follow the hashtag **#Brusselsajour** on LinkedIn to make sure you receive our updates in your feed.

Contact

Markus Röhrig
Partner

T +32 2 7885 525
markus.roehrig@hengeler.com

Laura Stoicescu
Associate

T +32 2 7885 548
laura.stoicescu@hengeler.com

www.hengeler.com