



To what extent might (and should) competition law apply to public authorities?

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Abstract

Even though public authorities, in particular the Government and the municipalities, may disturb effective competition by their exercise of public powers, competition law does not apply to them, except for the specific and limited circumstances when it can be used in connection with other Treaty provisions. This article first explores the limits of applicability of EU competition law on public authorities; it concludes that even though EU competition law as such does not provide protection against the conduct of public authorities that distorts competition, its scope should not be expanded. The aim of competition law is to limit market power, not official authority. Instead, after discussing the legislation of selected countries from Central Europe, it is put forward that specific domestic legislation, applied by competition authorities, may provide an effective remedy to this problem. As comparative research of these issues has been rather limited so far, further elaboration of this topic is recommended.

Keywords

competition law; competition advocacy; distortion of competition; public authorities.

1. Introduction

Competition law is an indispensable tool in the market economy, ensuring effective competition in the market and thus increasing consumer welfare. Its norms are addressed to *undertakings*, entities engaged in economic activity.¹ These would typically be persons of private law, it is nonetheless possible for a public authority to be regarded as an undertaking if it pursues an

¹ Judgment of 23 April 1991, Klaus Höfner and Fritz Elser v Macrotron GmbH., C-41/90, EU:C:1991:161, paragraph 21.

economic activity.² Conversely, if the public authorities exercise their public powers, such as legislation or decision making, competition law does not apply to them.

It is undisputed that not only economic activities but also the exercise of public powers may distort competition. As the Organisation for Economic Cooperation and Development (hereinafter referred to as “OECD”) put it:

“Competition law generally aims at preventing private restrictive business practices that significantly lessen competition, reduce consumer welfare, and result in inefficient use of resources. However, competition may be lessened significantly by various public policies and institutional arrangements as well. Indeed, private restrictive business practices are often facilitated by various government interventions in the marketplace” (Khemani, 1998, 93).

Should such “anticompetitive” conduct of public authorities be regulated? And if so, by competition law? And if so, should it be enforced by competition authorities, and should competition authorities and public authorities themselves, gain powers over other public authorities?

In order to answer these questions, we will briefly introduce EU competition law and its addressees –undertakings (Chapter 2). After that, we will discuss the conditions under which EU competition law may be applied to public authorities (Chapter 3). Finally, we will consider specific legislation focusing on public authorities in selected Member States from Central Europe (Chapter 4). While answering the questions above, we will not only consider the text of law, but also the relevant jurisprudence and practice of competition authorities, as well as scholarly writings.

The principal aim of this article will be to answer whether there is legislation regulating the anticompetitive effects of public authorities’ conduct, and whether more (or less) should be done in this regard.

2. EU Competition Law

In this chapter, we will first briefly outline the basic principles of EU competition law, followed by a discussion of how much these rules may be applied to the conduct of public authorities.

For the purposes of this article, we understand competition law as the regulation of certain coordinated conduct by undertakings, called anticompetitive agreements, and of unilateral conduct by undertakings with significant market power, namely the abuse of dominant position. The legal basis for EU competition law comprises the Treaty on the Functioning of the European Union (hereinafter “TFEU”) itself; Article 101 deals with anticompetitive agreements, Article 102 with abuse of dominance. Merger control³ is not included in our analysis, as this practice is not relevant for the purposes of this article. Neither are the provisions on state aid;⁴ these too subject the conduct of public authorities vis-à-vis undertakings to special conditions, guaranteeing undistorted competition, but they are limited to a very narrow area of financial benefits from public funds.

² Judgment of 16 June 1987, Commission of the European Communities v Italian Republic, C-118/85, EU:C:1987:283, paragraph 7.

³ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

⁴ Articles 107 – 109 TFEU.

The Treaty identifies the concepts of agreements and dominance only in general terms, refined further by the jurisprudence of the Court of Justice of the European Union (hereinafter “CJEU”). It is not our aim to discuss these concepts in detail; we only provide a basic characteristic to enable further analysis of our main topic – distortion of competition by the conduct of public authorities.

2.1. Anticompetitive agreements

Anticompetitive agreements are generally referred to as collusive conduct. It is so because, in order to gain market power and enabling them to distort competition, several undertakings need to coordinate their conduct.

The agreements are described as any direct or indirect contacts between undertakings, the object or effect of which is either to influence the conduct in the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting in the market.⁵ It is possible to distinguish between three forms of anticompetitive agreements: agreements *stricto sensu*, comprising a “concurrence of wills” of independent undertakings in whatever form;⁶ concerted practices, which are a form of coordination between undertakings by which, without it having been taken to the stage where an agreement as properly called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition⁷; and decisions by associations of undertakings.⁸

Not every collusion among undertakings is prohibited, but only those agreements which have as their object or effect the prevention, restriction or distortion of competition within the internal market, for example agreements which directly or indirectly fix purchase or selling prices, share markets or sources of supply or apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.⁹

2.2. Abuse of dominance

The dominant position is described in the CJEU case-law as “*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently*”

⁵ Judgment of 16 December 1975, Coöperatieve Vereniging “Suiker Unie” UA and others v Commission of the European Communities, C-40 to 48, 50, 54 to 56, 111, 113 and 114/73, EU:C:1975:174, paragraph 174.

⁶ Judgment of 26 October 2000, Bayer AG v Commission of the European Communities, T-41/96, EU:T:2000:242, paragraph 69: “*the concept of an agreement within the meaning of Article [101 (1) TFEU], as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention*”.

⁷ Judgment of 4 June 2009, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit, C-8/08, EU:C:2009:343, paragraph 26.

⁸ According to judgment of 27 January 1987, Verband der Sachversicherer e.V. v Commission of the European Communities, C-45/85, EU:C:1987:34, paragraph 32, decisions by associations of undertakings are even non-binding recommendations, “*regardless of what [their] precise legal status may be, [which constitute] a faithful reflection of the [association’s] resolve to coordinate the conduct of its members*”.

⁹ Article 101 (1) TFEU.

of its competitors, customers and ultimately of its consumers”.¹⁰ Since the dominant undertaking itself holds sufficient market power to distort competition and no collusion with other undertakings is therefore necessary, its behaviour is generally referred to as unilateral conduct.

The competition law does not prohibit the dominant position as such, but its abuse; according to the CJEU, the concept of abuse is

*“an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”.*¹¹

The conduct perceived as abusive includes imposing unfair purchase or selling prices, limiting production, markets or technical development to the prejudice of consumers and making the conclusion of contracts 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 contracts.¹² It is possible to distinguish between exploitative abusive practices that dominant undertakings employ in order to extract unfair advantages out of their market strength (e.g. excessive pricing), and exclusionary practices, aimed at pushing the dominant undertaking’s rivals out of the market.

2.3. Undertakings

For our further considerations, it is important to underline that EU competition law is addressed to undertakings. The term undertaking has not been defined in written competition law for decades;¹³ it was nonetheless extensively discussed in the jurisprudence and professional literature.¹⁴ According to the general definition:

*“the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”.*¹⁵

For the purposes of this article, the concept of an economic activity is of utmost importance. In principle, it consists of *“offering goods or services on the market”*;¹⁶ conversely, the activities

¹⁰ Judgment of 14 February 1978, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, C-27/76, EU:C:1978:22, paragraph 65.

¹¹ Judgment of 13 February 1979, Hoffmann-La Roche & Co. AG v Commission of the European Communities, C-85/76, EU:C:1979:36, paragraph 91.

¹² Article 102 TFEU.

¹³ The first definition of this term is contained in Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Article 2 (1) (10). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0001>

¹⁴ In detail, see e.g. Wils (2000).

¹⁵ Judgment of 23 April 1991, Klaus Höfner and Fritz Elser v Macrotron GmbH., C-41/90, EU:C:1991:161, paragraph 21 (emphasis added).

¹⁶ Judgment of 18 June 1998, Commission of the European Communities v Italian Republic, C-35/96, EU:C:1998:303, paragraph 36.

of Member States, performing “*a task in the public interest which forms part of the essential functions of the state*”,¹⁷ in particular “*performance of a State’s sovereign or public functions*” (Bailey & John, 2018, 93), is not an economic activity, and a state (public authority), for the purposes of such activities, cannot be considered an undertaking.

The boundaries of an economic activity are not clear. In principle, three conditions need to be met: an undertaking needs to (i) supply goods or services in the market; (ii) bear the associated financial and economic risks; and (iii) be at least in principle able to make a profit out of these supplies (Odudu, 2006, 26). Only the nature of the activity is relevant, not the organisation of the entity pursuing it; as such, undertakings may not only be companies and other “typical” private entities, but also public authorities, provided they are engaged in an economic activity. As the CJEU ruled with respect to a tobacco monopoly, exercised by a state entity with no separate legal personality from the state itself:

“The State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and service on the market. In order to make such a distinction, it is therefore necessary, in each case, to consider the activities exercised by the State and to determine the category to which those activities belong”.¹⁸

As the economic activity would typically be only a (smaller) part of the activities of public authorities, the entity would be perceived as an undertaking only with regard to its “economic” pursuits.¹⁹

For the purposes of this article, it is not necessary to concentrate on “borderline” cases between “typical” commercial activities and essentially non-profit activities such as social services or provision of public goods, which are in principle not considered to be economic activities, even if pursued by a private entity.²⁰ Our focus shall remain on the “privileged” activities of public authorities, namely their ability to exercise public powers:²¹ “*activities which fall within the exercise of public powers are not of an economic nature justifying the application of the FEU Treaty rules of competition*”.²²

¹⁷ Judgment of 18 March 1997, *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)*, C-343/95, EU:C:1997:160, paragraph 22.

¹⁸ Judgment of 16 June 1987, *Commission of the European Communities v Italian Republic*, C-118/85, EU:C:1987:283, paragraph 7.

¹⁹ Judgment of 12 July 2012, *Compass-Datenbank GmbH v Republik Österreich*, C-138/11, EU:C:2012:449, paragraph 38: “*In so far as a public entity exercises an economic activity which can be separated from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking, while, if that economic activity cannot be separated from the exercise of its public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers*”.

²⁰ Judgment of 16 March 2004, *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft and See-Krankenkasse v Ichthyol-Gesellschaft Cordes, Hermani & Co.* (C-264/01), *Mundipharma GmbH* (C-306/01), *Gödecke GmbH* (C-354/01) and *Intersan, Institut für pharmazeutische und klinische Forschung GmbH* (C-355/01), EU:C:2004:150., paragraph 47.

²¹ Opinion of Mr. Advocate General Mayras delivered on 28 May 1974, *Jean Reyners v Belgian State*, C-2/74, EU:C:1974:59, p. 665: “*official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens. Connection with the exercise of this authority can therefore arise only from the State itself either directly or by delegation to certain persons who may even be unconnected with the public administration*”.

²² Judgment of 12 July 2012, *Compass-Datenbank GmbH v Republik Österreich*, C-138/11, EU:C:2012:449, paragraph 36.

2.4. Partial conclusions

Competition law protects the effective competition by prohibiting undertakings – entities engaged in economic activities – from abusing their market power, either in collusion (anticompetitive agreements) or individually (abuse of dominance). Even though undertakings will typically be private entities, it is well-established under EU competition law that, when public authorities are involved in economic activities, they are regarded as undertakings, and the competition law applies to them; we will not discuss this any further.

Instead, we will concentrate on cases when public authorities are exercising their “core” public powers, in particular legislation and decision-making. These are clearly non-economic activities, and competition law as such cannot apply to them. Even such activities may however distort competition. In the following Chapter, we will therefore discuss situations in which competition law may be applied in connection with other provisions of the TFEU.

3. “Indirect” Application of EU Competition Law

Even though the EU competition law, i.e. Articles 101 and 102 TFEU, cannot be directly applied to public authorities exercising public powers, it can be to some extent employed “indirectly”, in connection with other provisions of the TFEU. Two scenarios need to be considered: the principle of loyalty [Article 3 (4) of the Treaty on the European Union (hereinafter “TEU”)] and the rules on public undertakings and granting exclusive and special rights under Article 106 TFEU; the former scenario is typically associated with the breach of Article 101 TFEU, the latter with Article 102 TFEU (Whish & Bailey, 2018, 224).

3.1. The principle of loyalty

Thanks to the combination of Article 4 (3) TEU, Protocol No. 27 on the internal market and competition to TFEU and Articles 101 or 102 TFEU, the Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives, among which competition law plays a substantial role.

Before the Treaty of Lisbon entered into force, a corresponding obligation stemmed from Article 10 of the Treaty establishing the European Economic Community (hereinafter referred to as “TEC”); at the same time, Article 3 (1) (g) TEC contained an objective of ensuring that competition in the internal market shall not be distorted. As the CJEU explained already in 1977 in the *INNO* case in relation to abuse of dominance (the same interpretation however applies to anticompetitive agreements):

*“while it is true that Article [102 TFEU] is directed at undertakings, nonetheless, it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness”.*²³

The obligations of Member States derived from these provisions were originally interpreted very broadly; in essence, every state measure producing restrictive effects on competition were to be prohibited, even in the absence of any behaviour by the undertakings (Faull & Nikpay,

²³ Judgment of 16 November 1977, SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB), C-13/77, EU:C:1977:185, paragraph 31.

2014, 811). This was however later re-interpreted as meaning that only such State measures that require or favour anticompetitive conduct by undertakings are prohibited:

“In interpreting Article [3 (1) (g) TEC], [...] Article [10 TEC] and Article [101 TFEU] it should be noted that Article [101 TFEU], read in isolation, relates only to the conduct of undertakings and does not cover measures adopted by Member States by legislation or regulations. However, the Court has consistently held that Article [101 TFEU], read in conjunction with Article [10 TEC], requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. By virtue of the same case-law, such is the case where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article [101 TFEU] or reinforces their effects or deprives its own legislation of its official character by delegating to private traders responsibility for taking economic decisions affecting the economic sphere”.²⁴

After the Treaty of Lisbon, undistorted competition is no longer listed among the EU’s goals. That provision has nonetheless been replaced by a new Protocol No. 27 to TFEU on internal market and competition, affirming that the internal market needs to include a system to ensure that competition is not distorted. The “status” of competition law has thus not been diminished (Petra, 2008, 127), as was also affirmed by the jurisprudence.²⁵

Thus, even under the Treaty of Lisbon, State measures disturbing competition are prohibited, as the Court of Justice recently summarised in the *AG2R* case:

“It must be borne in mind that Article 101 TFEU, read in conjunction with Article 4(3) EU, requires the Member States not to introduce or maintain in force measures, whether legislative or regulatory, which may render ineffective the competition rules applicable to undertakings”.²⁶

Still, only those state measures that impose or induce anti-competitive behaviour by undertakings, reinforce the effects of anti-competitive behaviour or delegate regulatory powers to private operators can be considered as violating these provisions (Bach, 1994, 1357); Article 4 (3) TEU cannot be used simply because a state measure produces effects similar to those of a cartel (Whish & Bailey, 2018, 228).

Even so, these provisions were applied a number of times, in particular with respect to actions by associations of undertakings, for example when France made binding the production quotas set by an association of French wine-growers and dealers,²⁷ or when Italy required cus-

²⁴ Judgment of 17 November 1993, Criminal proceedings against Wolf W. Meng, C-2/91, EU:C:1993:885, paragraph 14 (emphasis added).

²⁵ Judgment of 22 March 2012, Slovak Telekom a.s. v European Commission, T-458/09 and T-171/10, EU:T:2012:145, paragraph 36.

²⁶ Judgment of 3 March 2011, AG2R Prévoyance v Beaudout Père et Fils SARL, C-437/09, EU:C:2011:112, paragraph 24.

²⁷ Judgment of 30 January 1985, Bureau national interprofessionnel du cognac v Guy Clair, C-123/83, EU:C:1985:33.

toms agents to set compulsory tariffs²⁸ or made mandatory the minimum prices set by operators of road haulage services.²⁹ In a similar vein of argument, also a Dutch administrative decision approving air tariffs fixed by airlines themselves³⁰ and Italian legislation facilitating price fixing and market sharing by producers and distributors of matches³¹ were found illegal.

Article 4 (3) TEU thus provides an important tool for preventing the distortion of competition; however, it cannot be employed against the anticompetitive actions of public authorities alone, but only in connection with anticompetitive practices by undertakings that are required or facilitated by actions of the public authorities, or when the public authorities reinforce the effects of such practices.

3.2. Exclusive and Special Rights

Article 106 (1) TFEU obliges the Member States not to maintain in force regulations (“measures”) concerning public undertakings or undertakings with special or exclusive rights that would be contrary to the rules contained in the Treaties, among other “competition” Articles 101 and 102 TFEU. Similarly to Article 4 (3) TEU, it is thus a reference rule; in other words it is not applicable on its own, but only in conjunction with other Treaty provisions (Whish & Bailey, 2018, 230). It is also more precise than Article 4 (3) TEU, while it is bound to concrete provisions of law, not merely to general principles (Whish & Bailey, 2018, 230), but also more limited in scope, as it applies only to measures regarding public undertakings³² and undertakings with exclusive or special rights.³³ Article 106 (1) has been employed in the process of liberalising markets in the EU, especially the utility ones (Whish & Bailey, 2018, 230).

Similarly to Article 3 (4) TEU, however, this provision does not apply to activities of public authorities on their own but only in connection with the anticompetitive conduct of undertakings they regulate; as Advocate General Jacobs explained in *Albany*, this provision may be infringed “*only where there is a causal link between a Member State’s legislative or administrative intervention on the one hand and anticompetitive behaviour of undertakings on the other hand*”.³⁴

²⁸ Judgment of 18 June 1998, Commission of the European Communities v Italian Republic, C-35/96, EU:C:1998:303.

²⁹ Judgment of 4 September 2014, API – Anonima Petroli Italiana SpA and Others v Ministero delle Infrastrutture e dei Trasporti and Others, C-184/13, EU:C:2014:2147.

³⁰ Judgment of 11 April 1989, Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V., C-66/86, EU:C:1989:140.

³¹ Judgment of 9 September 2003, Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato, C198/01, EU:C:2003:430.

³² According to CJEU, public undertaking is any undertaking over which the public authorities may directly or indirectly exercise dominant influence. See e.g. Judgment of 6 July 1982, French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities, C-188/80, EU:C:1982:257, paragraph 25.

³³ Opinion of Mr Advocate General Jacobs delivered on 17 May 2001, Firma Ambulanz Glöckner v Landkreis Südwestpfalz, C-475/99, EU:C:2001:284: “*rights granted by the authorities of a Member State to one undertaking or to a limited number of undertakings which substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions*”.

³⁴ Opinion of Mr Advocate General Jacobs delivered on 28 January 1999, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, C-67/96, EU:C:1999:28, paragraph 388.

This “causal link” is however not entirely clear. Article 106 (1) TFEU is not breached when the state only creates a dominant position for an undertaking; on the other hand, the dominant position however does not necessarily have to be abused (Whish & Bailey, 2018, 237). As the CJEU explained in one of the early cases concerning the relationship between Articles 102 and 106 (1) TFEU:

*“a Member State is in breach of the prohibitions contained in those two provisions if the undertaking in question, merely by exercising the exclusive rights granted to it, cannot avoid abusing its dominant position [...] or when such rights are liable to create a situation in which that undertaking is induced to commit such abuses”.*³⁵

The subsequent case-law did not entirely clarify the precise meaning of this “causal link”;³⁶ for the purposes of this article, we nonetheless do not need to explore this question in more detail.

3.3. Partial conclusions

The EU competition law is addressed to undertakings; even though with respect to some activities, public authorities may be considered to be undertakings, it is clearly not so in a situation when they exercise their public powers. Thus, competition law cannot apply to the legislation adopted by public authorities, to their decision-making or broadly speaking, to their regulatory activities.

To some extent, the regulatory activities of public authorities may be targeted by competition law in connection with other Treaty provisions, in particular the principle of loyalty [Article 3 (4) TFEU] and the regulation of public undertakings and undertakings with special or exclusive rights [Article 106 (1) TFEU]. These provisions, however, do not apply to the regulation as such, but only in connection with anticompetitive conduct of the undertakings to which that regulation applies.³⁷

EU competition law is thus not sufficient to remedy the distortions of competition that may be produced by public authorities. It is therefore necessary to consider national rules that can to some extent address this problem, left by the limits of EU law.

4. National Legislation

Several EU Member States have indeed adopted specific provisions of competition law, which do not apply to undertakings, but specifically to activities by public authorities. They differ in

³⁵ Judgment of 10 December 1991, *Mercati convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA*, C-179/90, EU:C:1991:464, paragraph 17 (emphasis added).

³⁶ Some later cases require even less than such “induction”; in the judgment of 17 July 2014, *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)*, C-553/12 P, EU:C:2014:2083, paragraph 44 that “*if inequality of opportunity between economic operators, and thus distorted competition, is the result of State measures, such a measure constitutes an infringement of Article [106 (1) TFEU], read in conjunction with Article [102 TFEU]*”.

³⁷ For the same conclusions, see e.g. Kuncová (2014, 224): “*The obstacle is that not all state measures restricting competition (can) lead to anticompetitive conduct of undertakings. Thus, in case where regulatory actions themselves might have anticompetitive effect without any further implications, they cannot be scrutinized under the EU competition rules [...]*”.

scope, in their applicability and in their mode of enforcement. In this Chapter, we will consider several approaches, adopted in Central Europe.

4.1. Directly enforceable provisions

Using an example from Czechia and Slovakia, we will first consider specific regulation that is directly applied by competition authorities to public authorities in the same way as antitrust rules are applied to undertakings.

In the former Czechoslovakia,³⁸ the first legislation on competition entered into force as early as 1991.³⁹ Next to “classic” anticompetitive conduct by undertakings, namely collusive practices, abuse of dominance and merger control, it also contained a provision on anticompetitive conduct by public authorities.⁴⁰ This specific regulation was probably included into the competition law due to the economic situation in then Czechoslovakia, where – before the revolution of 1989 – all the producers and providers of services were state-controlled and no private entrepreneurs existed at all. It needs to be emphasised that the competition authority lacked any decision-making competences in this regard – it was not allowed to decide that certain conduct by public authorities distorted competition or to impose fines, it could only “request” public authorities to remedy the situation,⁴¹ without any legal consequences when they did not.

4.1.1. Czech Republic

In the Czech Republic, this provision was not much used in practice. When the new Czech Competition Act entered into force in 2001,⁴² it did not include any regulation of public authorities, only of undertakings. However, in 2012, the same regulation as the original 1991 one was re-introduced into the Czech Competition Act. Curiously, it was added into an amendment of the Czech Competition Act (concerning primarily leniency and settlements)⁴³ not by the Government, but by one of the Members of Parliament; it was however later endorsed by the Prime Minister.

The wording of the provision in question was very brief; it only stated that “*public authorities are prohibited from distorting competition by aid favouring a particular undertaking or by any other means*”.⁴⁴ Unlike under the original competition law from 1991, however, the Czech Competition Authority (hereinafter “CCA”) was, under these new provisions, allowed to take enforceable decisions – it could decide that there was a breach of competition law⁴⁵ and impose

³⁸ The federation split in 1993; the successor countries originally kept the legal order of the former federation and only gradually adopted new regulations.

³⁹ Z. č. 63/1991 Sb., o ochraně hospodářské soutěže [Act on the Protection of Competition], as amended.

⁴⁰ *Ibid*, Section 18.

⁴¹ *Ibid*, Section 18 (2).

⁴² Z. č. 143/2001 Sb., o ochraně hospodářské soutěže [Act on the Protection of Competition], as amended (hereinafter “Czech Competition Act”).

⁴³ Z. č. 360/2012 Sb., kterým se mění zákon č. 143/2001 Sb., o ochraně hospodářské soutěže [Act Amending Act No. 143/2001 Coll., on the Protection of Competition].

⁴⁴ Czech Competition Act, Section 19a (1).

⁴⁵ *Ibid*, Section 19a (2).

a fine of up to CZK 10 million (circa EUR 400 000) on the public authority in question.⁴⁶

As this particular provision of the amendment of the Competition Act was not part of the official Governmental proposal, it lacked any substantiation. The Member of Parliament who brought it only mentioned that his motivation was to enable the review of instances of public procurement, where the contracting authorities set the selection criteria in such a way that they clearly favoured a particular tenderer (Plachý, 2012); the same motivation was mentioned by the Prime Minister (Nečas, 2012); as will be discussed below, the legislation in Lithuania and Romania is used for this exact purpose.

This view was nonetheless not shared by the CCA itself. Two years after the amendment was adopted, it published Guidelines concerning its interpretation of the provisions in question (Kolářová et al., 2014). According to these Guidelines, the legislation should only be applicable in situations where the public authority in question exercises its public (governmental) powers, where it is not acting in its private capacity: to put it simply, the legislation shall only be applied when the public authority *directs* some undertakings, not when it is *contracting* with them. In addition to that, the CCA explicitly excluded the public procurement from review under this provision.

This interpretation was heavily criticised by some commentators for being too restrictive (Kindl & Munková, 2016, 389 et seq).

Nevertheless, the CCA itself prepared a further amendment of the Competition Act that entered into force in 2016 and which codified the abovementioned interpretation.⁴⁷ Thus, the Czech Competition Act currently provides that a public authority “*shall not distort competition by exercising its public powers without justifiable reasons*“, in particular, by favouring a certain undertaking or a group of undertakings, eliminating a certain undertaking or a group of undertakings from competition or eliminating competition from the relevant market.⁴⁸ At the same time, it adds that the CCA does not supervise the activities of public authorities which are carried out in the form of a decision that is reviewable in administrative proceedings or provided in the form of state aid, including *de minimis* aid.⁴⁹

Even though the potential scope of application of the provisions on anticompetitive conduct of administrative authorities is quite broad, the CCA dedicated itself almost exclusively to a single type of practice – the limitation of places where certain types of lotteries and gambling games, in particular gaming machines, may be offered to the public.

In the Czech Republic, municipalities are allowed to regulate places where lotteries, including gaming machines and similar gambling devices, can be operated, in the form of a municipal decree, a generally binding legal norm issued by the municipalities. The municipalities welcomed this power and regulated gambling sites, either by completely prohibiting them or, more frequently, by designating specific addresses where gambling was allowed. The CCA was confronted with numerous complaints that some municipalities favoured those undertakings on the premises of which the gambling had been allowed, over those not on the list of authorised premises. In 2014, the CCA published its guidance letter on gambling sites, informing the municipalities that such regulatory activities fall within the scope of the Competition Act and that

⁴⁶ *Ibid*, Section 22aa (2).

⁴⁷ Z. č. 293/2016 Sb., kterým se mění zákon č. 143/2001 Sb., o ochraně hospodářské soutěže [Act Amending Act No. 143/2001 Coll., on the Protection of Competition].

⁴⁸ Competition Act, Section 19a (1).

⁴⁹ Competition Act, Section 19a (2).

the municipalities must set the criteria for determining permitted gambling sites in an objective and non-discriminatory manner; the CCA also informed the municipalities that it would not intervene until the end of that year, so that they could put their regulation in line with the competition law (ÚOHS, 2014).

At the end of 2016, the CCA issued its first decision based on its new competence concerning public authorities, finding that the regulation of gaming sites adopted by the town of Bílina, distorted competition in that market.⁵⁰ Several similar decisions were issued thereafter. This interpretation of the Competition Act was also endorsed by courts, for the first time by the Regional Court in Brno, which reviews all of the CCA's decisions, in February 2020 in the *Děčín* case,⁵¹ another action concerning municipal the regulation of gambling sites similar to *Bílina*.⁵²

The only decision concerning public authorities not connected with municipal lotteries so far was issued in 2020. It involved municipal rules on parking in the city of Prague, that allegedly favoured only specific types of hybrid and electric cars,⁵³ thus granting an advantage to their producers and sellers.

4.1.2. Slovakia

Unlike the Czech Republic, where the original Competition Act from 1991 remained in force until 2001, Slovakia adopted its own new competition act in 1994; as regards public authorities, however, it kept the same regime as the original 1991 Competition Act discussed above.⁵⁴ Similarly in 2001, when Slovakia adopted a new Competition Act, those provisions remained intact.⁵⁵ The Slovak Competition Act was however amended in 2004, when direct enforceability was introduced, akin to the system described above in the Czech Republic; a fine up to EUR 66 000 was introduced for public authorities.⁵⁶ Yet another new competition act was adopted in 2021, with identical provisions on the public authorities, including the direct enforceability of these measures.⁵⁷

Unlike the Czech Republic, the cases the Slovak Competition Authority dealt with under these provisions have been much more diverse (Lapšanský, 2020), including the refusal to allow certain homes to disconnect from a central heating system,⁵⁸ refusal to allow the opening of a new pharmacy,⁵⁹ financial grants to a Slovak press agency (TASR), which could have been

⁵⁰ Úřad pro ochranu hospodářské soutěže [Office for the Protection of Competition], decision of 20 December 2016, S538/2015/VS (*Bílina*).

⁵¹ Krajský soud v Brně [Regional Court in Brno], judgment of 6 February 2020, 62 Af 64/2018 (*Děčín*).

⁵² The judgment is analysed in detail in Petr (2020).

⁵³ Úřad pro ochranu hospodářské soutěže [Office for the Protection of Competition], decision of 9 July 2020, S55/2019/VS (*Praha*).

⁵⁴ Z. č. 188/1994 Z.z., o ochrane hospodárskej súťaže [Act on the Protection of Competition], Section 18.

⁵⁵ Z. č. 136/2001 Z.z., o ochrane hospodárskej súťaže [Act on the Protection of Competition], Section 39.

⁵⁶ *Ibid*, Section 38 (2).

⁵⁷ Z. č. 187/2017 Z. z. o ochrane hospodárskej súťaže [Act on the Protection of Competition], Section 6.

⁵⁸ Protimonopolný úrad Slovenskej republiky [Antimonopoly Office of the Slovak Republic], decision of 27 November 2008, 2008/39/2/1/104 (*Stará Lubovňa*).

⁵⁹ Protimonopolný úrad Slovenskej republiky [Antimonopoly Office of the Slovak Republic], decision of 12 March 2008, 2007/39/1/1/083 (*Bratislava*).

invested in areas where TASR was competing with other press agencies,⁶⁰ and financial grants from the Ministry of Agriculture being conditional upon employing a specific rendering plant.⁶¹

Arguably, this Slovak approach is much more in line with the purpose of such provisions on public authorities than the Czech one, which only concentrates on a single kind of practice.

4.2. Provisions enforced by courts

In other countries, competition authorities may decide that public authorities distort competition and request them to alter their practice; if they do not comply, however, the case must be referred to a court.

In Romania, the Competition Act prohibits any actions by the central or local public administrative bodies which have as an object or may have as an effect the restriction, prevention or distortion of competition;⁶² if the public authority does not comply with the decision within 6 months, the Competition Council may refer the case to a court.⁶³ Not many decisions are taken in this area. According to the OECD, they represent approximately 5 % of all Romanian cases; it is interesting that these provisions are successfully employed in order to remove restrictive conditions on public procurement (OECD, 2014, 45).

Similarly, in Lithuania, public administration entities are prohibited from adopting legal acts or other decisions which grant privileges to or discriminate against any individual undertaking or their groups and which give or may give rise to differences in the conditions of competition for undertakings competing in a relevant market;⁶⁴ if the public authority decides not to comply with the requirement of the competition authority, it may appeal such decision to a court.⁶⁵

Whereas in Romania the number of such cases is small, they constitute a significant proportion of enforcement activities in Lithuania (Kuncová, 2014, 230–231), covering all types of situations, including the allocation of fisheries quotas in the Baltic Sea and public procurement by municipalities (OECD, 2019, 22 et seq). For example in 2020, the Lithuanian Competition Authority identified three cases of an infringement of competition law, two of them being the activities of public authorities (Lithuanian Competition Council, 2020, 79).

4.3. Competition advocacy

In addition to their enforcement activities, competition authorities need to be engaged in competition advocacy, arguing before state and other regulatory bodies in favour of competition, explaining that regulation cannot distort competition, suggesting legislative changes, etc. As the OECD puts it:

⁶⁰ Protimonopolný úrad Slovenskej republiky [Antimonopoly Office of the Slovak Republic], decision of 29 March 2006, 2005/39/2/1/111 (*Ministerstvo kultury*).

⁶¹ Protimonopolný úrad Slovenskej republiky [Antimonopoly Office of the Slovak Republic], decision of 17 December 2004, 2004/39/2/1/218 (*Ministerstvo pôdohospodárstva*).

⁶² Act No. 61/96 Coll., Competition Law, Section 9 (1).

⁶³ *Ibid*, Section 9 (3).

⁶⁴ Act No. VIII-1099 Coll., Law on Competition, Section 4 (2).

⁶⁵ *Ibid*, Section 18 (3).

“the mandate of the competition office extends beyond merely enforcing the competition law. It must also participate more broadly in the formulation of its country’s economic policies, which may adversely affect competitive market structure, business conduct, and economic performance. It must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace” (Khemani, 1998, 93).

All competition authorities pursue such “advocacy”, some on the basis of specific legal provisions, for example in Slovenia, where the competition law prohibits the government, state authorities, local community authorities and holders of public authority from restricting the free performance of undertakings on the market;⁶⁶ in the of anticompetitive measures, the competition authority shall send its opinion to the authority responsible for it.⁶⁷ This opinion is however not binding; it may only be published in order to increase the “pressure” on the public authority.

In other countries, this advocacy role is assumed without any specific legal provisions, as is the case for example in the Czech Republic. In both situations, however, the opinions of the competition authority cannot be enforced, so their success depends entirely on their persuasiveness.

5. Conclusions

Even though competition law ranks high in the hierarchy of EU law and public authorities may distort effective competition by their “sovereign” measures, EU competition law does not address this issue. Competition law may be applied to public authorities as long as they are involved in an economic activity, i.e. as long as they are themselves undertakings, but not when they exercise public powers. The only exception are the situations when public authorities use their powers to enable or facilitate the anticompetitive conduct of undertakings, when competition law should apply in connection with Articles 4 (3) TEU or 106 (1) TFEU. In addition to that, EU law contains other “pro-competitive” rules addressed to public authorities, in particular the regulation of state aid and public procurement.

We agree that the competition law as such, namely Articles 101 and 102 TFEU, cannot be directly applied to public authorities; it is evident that public authorities do not wield *market* power, they use *public* power to regulate the markets instead. There is no space for competition law to be applied in this regard.

At the same time, it is evident that at least some Member States, in particular those with a history of strong involvement of the public sector in the economy, perceive the activities of public authorities as a potential threat to competition and adopt specific regulation addressing this issue. These provisions are not part of competition law (competition law applies to undertakings with significant market power), but they are included in competition regulation, with the competition authority in charge of applying them. This may arguably be a suitable model, guaranteeing undistorted competition.

Concerning the actual content of such provisions, we have been confronted with an astonishing diversity of approaches, ranging from directly enforceable rules, as we have seen in

⁶⁶ Act No. 36/2008 Coll., on the Prevention of the Restriction of Competition, Section 64 (1).

⁶⁷ *Ibid*, Section 71 (1).

Czechia and Slovakia, to a mere formalised advocacy role in Slovenia. These clearly reflect the different experience and needs of different countries. We however argue that, where public authorities are involved in practices that disturb competition, competition advocacy alone might not suffice and a system of enforceable rules might be preferable; this would generally be the case in Central Europe.

In our opinion, the time has not yet come for a unified approach across the Member States, nor for extensive harmonisation of regulation by the EU. More attention should however be directed to these issues. A thorough comparative study, mapping the legislation in (Central) Europe and assessing its effectiveness, would be a valuable starting point for identifying best practices and for possible future thoughts concerning harmonisation.

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