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Wouters Exception for Hardcore Price Fixing?

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Let the waves (or the CJEU) carry you where the light cannot. On January 18, the CJEU delivered its judgment in the *Lietuvos notar? r?mai* case (C-128/21), where it dealt with the scope of the *Wouters* exception to the prohibition of cartels (see originally C-309/99). Here, the CJEU had to decide whether a decision of the Lithuanian Chamber of Notaries infringed Article 101 TFEU by fixing the methods for calculating fees charged by notaries in Lithuania. The CJEU has recently reviewed the *Wouters* exception in one similar case concerning a professional association of lawyers fixing the minimum amount of fees in Bulgaria as well as in three highly anticipated rulings in the sports area.

Application of Article 101 TFEU to Notaries

As the Chamber of Notaries' decision extended to the entire territory of Lithuania by regulating the calculation of fees for all notaries in the country, Article 101 TFEU was applicable due to the decision's effect of consolidating national divisions. In addition, the CJEU stated that notaries fall under the notion of "undertaking" as their activity on the market constitutes – at least partly – an economic activity. This aligns the judgement with settled case law of the CJEU regarding notaries (235/85, C-392/15).

Likewise, the National Chamber of Notaries was assigned to being an "association of undertakings". The CJEU held that a professional organization which, while having regulatory powers, does not exercise typical prerogatives of public authority but acts as the regulatory body of a profession, cannot escape the application of the competition rules. That is common knowledge to the antitrust community ever since the decisions on bar associations (*Wouters*) and associations of geologists (*Consiglio nazionale dei geologi*). Because (among other reasons) the Republic of Lithuania has no "effective control and ultimate decision-making power of the State" over the chamber's acts, the latter cannot fall outside of the scope of Article 101 TFEU by claiming to be a public authority.

Wouters Exception to Price-Fixing Agreements?

The knowledgeable reader, given such context, instantly thinks of the so-called *Wouters* exception when applying articles 101 and 102 TFEU, especially when a case concerns professions (such as

notaries) partly exercising prerogatives of public authority and partly carrying out economic activity. According to the *Wouters* doctrine, non-competitive interests underlying an agreement can lead to an inherent exception to the prohibition of cartels. This is why the CJEU takes into account the specific needs of general public interests by excluding related conduct from the scope of Article 101 para 1 TFEU (instead of only dealing with such interests at the level of Article 101 para 3 TFEU). We recall that respective exceptions were already made in the past, e.g. related to the needs of the administration of justice (*Wouters*), sports (*Meca-Medina*) or safer road traffic (*API*).

In the light of this case law, the Chamber of Notaries argued that its decision on fee calculation was necessary to standardize notarial practice in Lithuania and thus pursued a "legitimate objective in the public interest". However, the nature of the decision thwarted the chamber's plans to benefit from the *Wouters* doctrine. The CJEU ruled: No *Wouters* exception for hardcore price-fixing agreements! As the Chamber of Notaries had established a calculation mechanism that effectively adds up to prohibited price fixing, it had restricted competition by object. That led to an *a priori* – exclusion of the case from the *Wouters* doctrine due to its four criteria:

To fall under the exception, an agreement must

1. not restrict competition by object (no such luck!).
2. pursue a legitimate objective in the general interest.
3. be genuinely necessary as a means of pursuing these objectives.
4. not go beyond what is necessary (e.g. by eliminating all competition).

Some (see here and here) might say that excluding restrictions by object from the *Wouters* doctrine leads to undesirable consequences. However, the clarification regarding the first criterion is necessary in order to prevent articles 101 and 102 TFEU from softening up. Additionally, to differentiate between restrictions by object and restrictions by effect is not the Herculean task one might be afraid of – competition economics are the answer here. Had the CJEU, in contrast, accepted hardcore restrictions under the *Wouters* exception (such as price fixing in the case of interest), it would have opened Pandora's box to any kind of (supposed) "legitimate objectives in the general interest". This of course to the great disadvantage of the system ensuring that competition is not distorted as set out in protocol 27 on the internal market and competition. Thus, general interests are usually better addressed by legislation than by competition law.

Fining the "Deepest Pocket"

After the Lithuanian NCA had found the Chamber of Notaries guilty as charged, it went from only fining the association of undertakings (the chamber) to additionally fining the undertakings (the notaries). The NCA ~~complained~~ argued, that it was caught between the devil and the deep blue sea: It would not have been possible to ensure the deterrent effect of penalties, had the fines been imposed only on the Chamber of Notaries. This is due to the fact that the chambers' turnover mainly consisted of the contributions periodically requested from individual notaries. A fine calculated on this basis would have been too low and thus not proportionate to the infringement. This is why the NCA decided to fine the party with the deep(est) pocket: the notaries themselves. According to the NCA, the individual fines on the notaries were not imposed because they were

joint perpetrators of the infringement but because of their status as members of that chamber's board that had adopted the decision of interest. However, the sea does not like to be restrained: ~~anatomy of~~ corporate law tells us that decisions of an association's board must be regarded as decisions of the association itself. Despite that, the NCA's motto was to go after the bigger fish – overboard with the principle of personal liability, sailors!

Thankfully, the CJEU found a (legally valid) solution to the problem: Even though Lithuanian law did not allow to calculate fines based on the turnover of the association's members, it does not follow that the NCA was deprived of the possibility of imposing a deterrent fine. The CJEU pointed out that national competition law can be interpreted in the light of Regulation 1/2003. According to Article 23, the turnover of each member active on the market affected by the infringement can be incorporated into the fine (Article 23 para 2 subpara 3). Furthermore, if there is nothing to gain from the association, the provision allows for payment of the fine directly by its members ("deficiency liability" pursuant to Article 23 para 4 subparas 2 and 3). Even though the provision refers expressly only to the powers of the Commission, the CJEU finds it "relevant" to determine the powers of NCAs to impose fines. Thus, the CJEU used legal methodology to navigate us through the wild ocean of public enforcement of competition law. The interpretation of national law in line with Union law was the simple key to success. Let the waves (or the CJEU) carry you where the light cannot…

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