Competition - Portugal

Chartered accountants' mandatory training regulation breaches competition law

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Introduction

In a recent preliminary ruling(1) on a referral from the Lisbon Court of Appeal, the European Court of Justice (ECJ) clarified that a regulation adopted by a professional association that implements a system of compulsory training for its members must be regarded as a decision of an association of undertakings under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and constitutes a prohibited restriction of competition to the extent that it eliminates competition in a substantial part of the relevant market and imposes discriminatory conditions that are detrimental to competitors.

Facts

In 2007 the Portuguese Order of Chartered Accountants (OTOC), a professional association under a public law statute and with wide ethical, training and disciplinary powers over all chartered accountants in Portugal, adopted a regulation that established a system of compulsory training for accountants. Under the regulation, accountants had to obtain 35 training credits annually, either provided or approved by the OTOC. Furthermore, at least 12 credits had to be earned from 'institutional training', which could be provided only by the OTOC. Bodies wishing to provide 'professional training', also offered by the association, had to:

- register with the OTOC;
- pay an application fee for each course provided; and
- comply with criteria set by the OTOC, which formally approved the training.

Further to complaints, on May 7 2010 the Portuguese Competition Authority decided that by adopting the contested regulation, the OTOC had infringed TFEU Articles 101 and 102 and the corresponding provisions of the Portuguese Competition Act. The authority found that the regulation constituted both a decision of an association of undertakings and an abuse of dominant position in the market for the compulsory training of chartered accountants in Portugal, and imposed a fine of €229,300 on the association. The decision was upheld on appeal by the Lisbon Commerce Court with regard to the infringement of Article 101, although the court dismissed the claim that the regulation also breached Article 102. The OTOC appealed again, this time to the Lisbon Court of Appeal, which stayed the proceedings and submitted four questions to the ECJ for a preliminary ruling.

Decision

Public regulations as decisions of association of undertakings

It was not disputed that chartered accountants, which carry on an economic activity, are 'undertakings' for the purposes of TFEU Article 101. Nevertheless, the Lisbon Court of Appeal was unsure as to whether a regulation adopted by a professional association such as the OTOC – which is required by law to adopt binding rules of general application and, in particular, to establish a compulsory training system for its members with a view to providing citizens and corporations with quality, reliable accounting services – should be regarded as a decision of an association of undertakings within the meaning of TFEU Article 101(1) or, on the contrary, as a decision of a public authority outside the scope of that provision.

Recalling *Wouters*,(2) the ECJ stated that EU competition rules do not apply to activities

that, by the nature of their aims and the rules to which they are subject, do not belong to the sphere of 'economic activity'. The OTOC claimed that the regulation had no direct effect on the economic activity of the chartered accountants themselves. However, the court noted that the association provided training for chartered accountants and the regulation set out the standards that should be met by other providers wishing to offer such training. Consequently, the regulation had a direct impact on the market of compulsory training for chartered accountants, where the OTOC itself carried on an economic activity.

The fact that the OTOC was legally required to implement a system of compulsory training for its members was found to be irrelevant. Rules adopted by a professional association remain government measures – and thus outside the scope of EU rules applicable to undertakings – only when the EU member state in question defines the public interest criteria and the essential principles with which the association's rules must comply, and retains its power to adopt decisions in the last resort. This was not the case with the OTOC, as the law allowed the association a wide discretion as to the principles, conditions and methods to be followed by the compulsory training scheme, and did not lay down conditions of access to the market for training bodies providing compulsory training for accountants. According to the court, the rules drawn up by the association were "a matter for it alone". The court therefore concluded that the regulation at issue must be regarded as a decision of an association of undertakings within the meaning of TFU Article 101(1).

Restriction of competition and discriminatory conditions

Replying to the question of whether the contested regulation infringed TFEU Article 101, the ECJ observed at the outset that the regulation was capable of affecting trade between EU member states. Not only did it apply to the entire territory of Portugal, but more importantly, its provisions on access to the market of compulsory training for chartered accountants appeared to be of significant importance for undertakings in other EU member states considering whether to enter the Portuguese market.

The court recognised that the contested regulation did not aim to restrict competition, as it sought to guarantee the quality of the services offered by chartered accountants by implementing a system of compulsory training. Rather, the court found the regulation to have anti-competitive effects on two accounts.

First, by decreeing that 12 of the 35 mandatory annual credits had to be obtained from institutional training, which could be provided only by the OTOC, the court found that the regulation reserved for the association a significant part of the relevant market. In addition, each professional training programme (the category that was open to competition with private training bodies) had to last longer than 16 hours, which would have prevented alternative training bodies from offering short training programmes. Such rules therefore appeared to the court as likely to distort competition on the relevant market "by affecting the normal play of supply and demand".

Second, the court found the conditions of access to the relevant market (for bodies other than the OTOC) to be discriminatory. The court noted that although private bodies had to ask for specific approval of each training session at least three months in advance and pay a fee for each session, the OTOC, which also provided professional training in competition with those training bodies, was subject to no such approval procedure.

Moreover, the regulation's rules for training bodies were found to be vaguely worded, which could lead the OTOC (holding the power to decide unilaterally on applications) to distort competition by favouring its own training programmes. The requirement of three months' notice before the start of the session was also found to prevent alternative training bodies from offering, in the near future, training on current issues giving entitlement to those credits, while requiring them systematically to "reveal detailed information about all training proposed".

Again evoking *Wouters*, the court recognised that not every decision of an association which restricts the freedom of action of the parties necessarily falls within the prohibition of TFEU Article 101(1). Accordingly, the court analysed whether the restrictive effects of the regulation – which recognisably pursued the public interest objective of ensuring continued professional education of accountants – could reasonably be regarded as necessary to guarantee the quality of services offered by chartered accountants, and whether those effects did not go beyond what was necessary to ensure the pursuit of that objective.

In this respect, the court stated clearly that elimination of competition for training sessions lasting less than 16 hours could not "in any event" be regarded as necessary to guarantee the quality of accountants' services. Similarly, the restrictions underlying the conditions for access could be achieved by implementing a monitoring system organised on the basis of clearly defined, transparent, non-discriminatory and reviewable criteria intended to ensure equal access for training bodies to the relevant market. For these reasons, the contested regulation was found to infringe TFEU Article 101(1).

The court finally dismissed the argument that the contested regulation was exempt under TFEU Articles 101(3) and 106(2). The restrictions on competition imposed by the regulation appeared to go beyond what was necessary to ensure either the improvements in accountants' services (under Article 101(3)) or the performance of the particular tasks assigned to the OTOC (under Article 106(2)), even if the compulsory training could be viewed as a general economic interest activity, which the court doubted. The regulation also made it possible for the OTOC to eliminate competition in a substantial part of the training services for chartered accountants, which further precluded the application of Article 101(3).

Comment

The reference in *OTOC* gave the ECJ an opportunity to recall and articulate long-established principles of competition law, such as that public law entities that carry out economic activities are subject to competition law rules, and that professional associations, when putting in place rules of general application, must take care to ensure that those rules do not distort competition "by affecting the normal play of supply and demand" and to allow for "equality of opportunity between the various economic operators".

The court also confirmed that the public interest objective exception provided in *Wouters* is subject to a strict proportionality test similar to the examinations carried out under Articles 101(3) and 106(2), both of which have been rendered more exacting by case law in recent years.

The judgment offers food for thought for professional associations organising compulsory training programmes that could be provided by private training bodies, which is a widespread practice in many jurisdictions for so-called 'liberal' professionals, such as lawyers, doctors, pharmacists, accountants, architects and engineers. In particular, when the associations themselves provide training services – that is, operate on the market – rules on access to the market (including with regard to approval procedures) should be clear, objective, transparent and non-discriminatory, and allow for further review – including by the courts. The ECJ also appeared to be concerned with 'equality of opportunity' of third parties in accessing the market, and with the professional association systematically acquiring 'detailed information' (ie, commercially sensitive information) about all training proposed by competing providers.

The *OTOC* judgment appears to suggest that in such cases, the 'commercial' and 'regulatory' functions of the professional association should be kept separate in order to prevent the association from distorting competition by favouring its own training, a line of thought reminiscent of the principle of 'unbundling' of activities which has been thoroughly developed and detailed by EU law in certain network industries, such as the energy sector.(3) Associations of undertakings which are subject to public law duties and simultaneously carry out economic activities in actual or potential competition with other economic operators should therefore take caution when regulating and exercising activities that are, or have no reason not to be, open to competition.

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Endnotes

(1) C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, February 28 2013, not yet reported.

(2) Case C-309/99 [2002] ECR I-1577.

(3) See EU Directives 2009/72/EC and 2009/73/EC (July 13 2009), concerning common rules for the internal market in electricity and natural gas, respectively (OJ L 211, August 14 2009, p55–136).