

Antitrust Supervision of the Regulatory Activities of Public Bodies: One Step Forward, Two Steps Back?

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Articles 101 and 102 TFEU apply to public bodies executing regulatory and administrative tasks only in connection with other provisions of EU Treaties. Their applicability is therefore limited. However, these activities may be scrutinised under the domestic competition laws of some EU Member States whose national competition authorities have specific legal instruments at their disposal applicable to public bodies beyond their classical advocacy or consultation powers. Those competition authorities can commence administrative proceedings and even impose a fine for anticompetitive practices. This article aims to discuss the relevant competition law provisions of selected EU countries regarding the activities of their public bodies. The US approach to antitrust liability of public bodies, notably municipalities, will also be taken into account with a focus on state action immunity doctrine. Lastly, the question of whether public bodies carrying out their conventional tasks are entitled to claim state action defence and other objective justifications is also addressed.

I. Introduction

National competition laws in the European Union (EU) generally govern conduct of *undertakings*. Nevertheless, recent legislative changes in the Czech competition law extended the power of the Office for the Protection of Competition to declare a breach of national competition rules to cover even regulatory and other administrative activities of state administration bodies and municipalities.¹ They

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must not distort competition either by favouring a particular undertaking or by any other means in the course of exercising their regulatory and other administrative powers.² Since corresponding provisions concerning public restrictions can also be found in other Member States, in particular in those that joined the EU after 2004, such as Slovakia and Lithuania, this article aims to analyse selected national competition laws that are also applied to regulatory and other administrative activities of public bodies.

The article begins with describing the EU concept of an undertaking in order to distinguish conventional activities of public bodies from those of an economic nature. It further considers the application of EU competition law to public bodies of Member States and its limitations. The second part deals with specific competition law provisions of selected European jurisdictions concerning the conventional tasks of public bodies. In that regard, the article takes into account the enforcement powers of the national competition authorities and practical experience with this specific competence. It then discusses the US approach and the development of *state action doctrine* in order to present the reasons and conditions for granting antitrust immunity to public bodies, in particular municipalities. The fourth part explores whether and under which conditions public bodies might claim state action defence and what its modifications and other objective justifications are. Finally, some *de lege ferenda* suggestions are made.

II. EU competition law and its application to public bodies

EU Competition law plays an important role in achieving internal market goals. The previous approach of the Court of Justice of the European Union (CJEU) pursued *effective competition* as a primary goal.³ Its recent decision making practise suggests that *consumer welfare* should also be protected.⁴ Thus, maintaining effective competition is not an aim in itself, but it serves as a means to achieve also other objectives such as maximization of consumer welfare and efficient allocation of resources.⁵ Accomplishing these goals might nevertheless be

¹ For summary of all recent legislative changes of the APC (Leniency, Settlement, Prioritization etc.) see Michael Mikulík, 'Recent Legislative Changes in Czech Competition Law' (2013) *International Antitrust Bulletin* 3, p. 12-13.

² The concept of 'abuse of administrative power' can also be found in Russia and Ukraine, and in some countries outside Europe (China, Indonesia, Malaysia or Mexico etc.).

³ See Case 2/76 *United Brands v. Commission* [1978] ECR I-207, para. 65; Joined Cases C 241-242/91 *Radio Telefís Eireann and Independent Television Publications Limited v EC Commission* [1995] ECR I-743, para. 134.

⁴ See Case C-8/08 *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-04529, para. 38; Case C-501/06 *Commission v. GlaxoSmithKline Services Unlimited* [2009] ECR I-09291, para. 63.

⁵ Alison Jones and Brenda Sufrin, *EC Competition Law: Text, cases and materials* (3rd edn. Oxford University Press 2008) p. 3-19.

hampered by both undertakings which are engaged in economic activity, and by EU Member States including their public bodies which are not.

The EU Member States and their public bodies exercising regulatory and other state powers might be assessed under Articles 101 and 102 TFEU only in connection with Article 4 (3) TEU⁶ or Article 106 TFEU⁷. Restrictive public measures in themselves, however, cannot be subject to competition rules per se; they are more likely to be covered by the EU internal market rules.⁸

1. The concept of undertaking and Articles 101 and 102 TFEU

At the EU level, Articles 101 and 102 TFEU cover anticompetitive agreements and unilateral abusive conduct; they refer to *undertakings* or *associations of undertakings*. Regardless of the legal nature of an entity and its funding,⁹ public bodies might also be covered by the term undertaking if their particular activity is carried out on a commercial basis. To be considered an undertaking, an entity must: supply goods or services, bear the economic or financial risk and have the potential to make profit from the activity (i.e. functional approach).¹⁰ Since each particular activity needs to be assessed on a case-by-case basis, one entity can act as an undertaking in respect to some of its functions and, at the same time, not in respect to others. It is generally recognized that an activity pursuing *purely social objectives*¹¹ or exercising *state powers* (i.e. state prerogatives and essential functions of the state)¹² fall outside the scope of Articles 101 and 102 TFEU. The

⁶ Consolidated Version of the Treaty on the European Union [2008], OJ C 115/13 ('TEU').

⁷ Consolidated Version of the Treaty on the Functioning of the European Union [2008], OJ C 115/47 ('TFEU').

⁸ In particular rules governing the free movement of goods (Articles 34 - 36 TFEU), workers (Article 45 TFEU), services (Article 56 TFEU), capital (Article 63 TFEU), etc. See also Damien Gerard, 'EU Competition Policy after Lisbon: time for a review of the 'state action doctrine''? Available at <<http://ssrn.com/abstract=1533842>>.

⁹ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-01979 ('Höfner').

¹⁰ Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press 2007). p. 26.

¹¹ Case C-205/03 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental v Commission* [2006] ECR I-06295 ('Fenin').

¹² See Opinion of A.G. Mayras in Case C-2/74 *Reyners* [1974] ECR 631, p. 665 regarding the concept of *public power* or *imperium*: '[public] 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.'

third category, not considered offering goods and services to the market place, is *work*.¹³

The CJEU dealt with regional public authorities empowered by national legislation to regulate various aspects of funeral services in *Corinne Bodson*¹⁴. Despite the fact that some of them granted exclusive concessions to operate these services to particular undertakings, the CJEU concluded that they were carrying out their regulatory functions and not economic activities as undertaking. In *Diego Cali*¹⁵, the CJEU further ruled that the anti-pollution monitoring system was an essential part of the state policy and granting its operation to a particular undertaking did not amount to economic activity; on the contrary, that entity acted as a *public authority*. This interpretation has been confirmed by the CJEU's rulings on many occasions.¹⁶

It seems that according to the CJEU a public body exercising state powers is generally not subject to EU competition rules since it does not offer goods or services.¹⁷ Overall, where an entity acts in a *purely administrative capacity* and *merely regulates the provision of goods and services* on a market it falls outside the scope of Articles 101 and 102 TFEU.¹⁸ The CJEU's approach is understandable because public bodies' objectives do not necessarily include *efficiency* while exercising their conventional tasks.¹⁹

2. Principle of loyalty and Articles 101 and 102 TFEU

Regulatory activities of EU Member States, which do not fall within the scope of Articles 101 and 102 TFEU, may also adversely affect the trade on the EU internal market. There is a concern that the effectiveness of competition rules would be at stake if the EU Member States were allowed to act as *de facto* intermediaries of cartels and abusive conduct of undertakings by adopting measures that have the same restrictive effect on competition as the undertakings would have achieved

¹³ *Odudu* (n 10) p. 25-33. Activities which do not involve offering goods or services to a market are *work, consumption* and *regulation*.

¹⁴ Case C-30/87 *Corinne Bodson v SA Pompes funebres des regions liberes* [1988] ECR I-2479 ('*Corinne Bodson*'). See also The Office of Fair Trading, 'Public Bodies and Competition Law: A guide to the application of the Competition Act 1998' (2011) OFT 1389 ('OFT Report'). p. 10-11.

¹⁵ Case C-343/95 *Diego Cali & Figli SrL v Servizi Ecologici Porto di Genova Spa* [1997] ECR I-1547 ('*Cali*'), paras. 22 and 23.

¹⁶ Case C-5/79 *Procureur Général v Buys* [1979] ECR 3203; Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* [1994] ECR I-43, para. 9. Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165. Compare Case C-309/99 *Wouters and Others* [2002] ECR I-1577 ('*Wouters*').

¹⁷ This applies to all entities regardless of their legal status and the way in which they are financed.

¹⁸ See *Corinne Bodson* (n 14).

¹⁹ *Odudu* (n 10) p. 31.

themselves.²⁰ Article 4 (3) TEU bounds the EU Member States to ensure compliance with the EU Treaties, to facilitate achievement of EU tasks and to abstain from any contravening measures (principle of *sincere cooperation* and *loyalty*).

In *Inno*²¹, the CJEU held that although Articles 101 and 102 TFEU are solely addressed to conduct of undertakings and not to legislation and regulations of EU Member States, these articles ‘*in conjunction with [art. 4 (3) TEU], [...] none the less require 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.*’ This interpretation was further confirmed in *CIF*²², where the CJEU ruled that the obligation to disapply such contravening national measure applies not only to the EU Member states itself, but also to national courts and to all state organs, including national competition authorities.²³

No doubt, Article 4 (3) TEU imposes serious duties on the EU Member States in pursuit of achieving EU objectives, including those of competition law. For the purposes of this article it is crucial, however, that a state measure itself cannot be challenged; a regulatory action of the state might contradict Articles 101 and 102 TFEU (in combination with Article 4 (3) TEU) only if it *strengthens, encourages, favours* or *requires* the adoption of anticompetitive agreement (or alternatively other abusive behaviour) of undertakings.²⁴ This approach was widely applied in the decision making practise of the CJEU.²⁵ Therefore, liability of the EU Member States, including their public bodies, for infringements of EU competition law is considerably limited.²⁶

²⁰ Richard Whish and David Bailey, *Competition Law* (7th edn. OUP: Oxford, 2012), p. 217.

²¹ Case C-13/77 *GB-Inno-BM* [1977] ECR I-2115 (*Inno*), para. 31. See also Case C-267/86 *Van Eycke* [1988] ECR I-4769 (*Van Eycke*), para. 16.

²² Case C-198/01 *Consortio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 (*CIF*), para. 45.

²³ *Ibid* paras. 49-51.

²⁴ Whish, Bailey (n 20) p. 216 – 222. ‘Article 4 (3) cannot be used simply because a state measure produces effects similar to those of a cartel’.

²⁵ Case C-231/83 *Cullet v Centre Leclerc Toulouse* [1985] ECR I-305; Case C-209/84 *Ministere public Asjes* [1986] ECR I-1425; Case C-66/86 *Ahmed Saeed Flugreisen and Others v Zentrale Zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR I-803; Case C-311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801 etc.

²⁶ Whish, Bailey (n 20) 216 – 222.

3. Exclusive and special rights under Article 106 and Article 102 TFEU

Article 106 (1) TFEU is designed to prevent the EU Member States from enacting or maintaining in force measures²⁷ relating to *public undertakings* and *undertakings granted with special or exclusive rights* which would be inconsistent with EU law, in particular with competition rules.²⁸ This provision is considered a specific obligation to those presumed by Article 4 (3) TEU and applies only in conjunction with another article of the Treaties²⁹ (so called ‘a reference rule’). The CJEU applies this provision mainly together with Article 102 TFEU.³⁰

In *Höfner*³¹, the CJEU ruled that a member state which granted a public employment agency with exclusive right would infringe Article 106 TFEU if that entity cannot avoid infringing Article 102 TFEU. A state’s confer of specific rights to a dominant undertaking which might be otherwise carried out by another entity also breaches Article 106 and 102 TFEU (*RTT v GB-Inno-BM*³²). In *Paul Corbeau*³³, the CJEU pointed out that although the mere fact that a Member State has created a dominant position by the grant of exclusive rights is not as such incompatible with Article 102 TFEU, the state is nonetheless required not to adopt or maintain in force any measure which might deprive the effectiveness of competition law.³⁴ In *Ambulanz Glöckner*³⁵, the court reiterated that the adoption of a measure that creates (or even that is liable to create) a situation in which an undertaking is led to abuse its dominant position is in contradiction with Article 106 TFEU.³⁶ A state failed to guarantee equality of chances by enacting a measure which imposed an entrance fee on a new market operator whilst on a state-owned

²⁷ ‘Measures’ refer to ‘laws, regulation, administrative provisions, administrative practices, and all instruments issued by a public authority, including recommendations and also measures which are not legally binding, provided that it might be capable of exerting an influence and of frustrating the aims of the EU.’

²⁸ Article 106 TFEU is addressed not only to the EU Member States themselves, but also to their public authorities at all levels (including state administration bodies) and all other public bodies to the extent that they exercise powers of the state (delegated powers). National parliaments, central governmental bodies, local authorities as well as national courts are also covered.

²⁹ Rf. *TEU* and *TFEU* (n 6, 7).

³⁰ Which, Bailey (n 20) p. 222, 223; ‘The relationship of Article 106 (1) with Articles 101 and 102 TFEU is one of the most difficult areas of competition law’ Ibid p. 227.

³¹ *Höfner* (n 9).

³² Case C-18/88 *Régie des Télégraphes et des Téléphones (RTT) and GB-Inno-BM SA* [1991] ECR I-5941, para. 20 (*RTT v GB-Inno-BM*).

³³ Case C-320/91 *Corbeau* [1993] ECR I-2533, para.11.

³⁴ Whish, Bailey (n 20).

³⁵ Case C-475/99 *Ambulanz Glöckner and Landkreis Südwestpfalz* [2001] ECR I-08089 (*Ambulanz Glöckner*).

³⁶ See also Cases C-553/12 and C-154/12 *Commission v DEI* [2014] (*Greek lignite*), para. 93.

undertaking not in *Connect Austria*³⁷. In recent judgement *Greek Lignite*³⁸, the CJEU confirmed its previous interpretation of given provisions and further added that creating a risk of anti-competitive consequence resulting from the state measure suffices. The identification of such consequence is, therefore, a requirement to declare a breach of Article 106 (1) in connection with Article 102 TFEU.

Public undertakings and undertakings granted with special or exclusive rights are still bound by Articles 101 and 102 TFEU. However, under Article 106 (2) TFEU they can rely, under certain circumstances, on limited immunity. This provision sets that the application of competition rules on undertakings granted with *operation of services of general economic interest* and undertakings being a *revenue-producing monopolies* is admitted to the extent that it does not hamper the performance of their particular tasks. Thus, the EU Member States are allowed to provide these particular undertakings with exclusive or special rights which may even hinder the effective competition in so far as those competition restrictions are necessary to ensure the performance of the particular tasks assigned to them.³⁹ Any such restriction, however, shall meet the test of proportionality.

In order for Article 106 TFEU to be applied, national legislation or other legal measures do not necessarily need to have an actual adverse effect on trade between the EU Member States; it is enough when they are capable of having such effect. However, what is more important for the applicability of Article 106 TFEU in relation to competition rules (Article 101 and 102 TFEU) is that, in certain circumstances, a state can be responsible for an infringement of those competition rules committed by undertakings. Such infringement may occur only if there is a casual link between a state measure, e.g. legislative, regulatory or mere administrative, and (potential) anticompetitive conduct of undertaking.⁴⁰

4. Reflections

While adopting legislation or any other measures, the EU Member States and its public bodies are obliged not to do so in contradiction with common EU law principles and objectives, including those governing free competition and EU internal market. As indicated above, the exercising of state powers themselves cannot be scrutinised under the traditional competition rules (Articles 101 and 102 TFEU) which are intended to apply to the conduct of undertakings.

³⁷ Case C-462/99 *Connect Austria* [2003] ECR I-05197. See also *RTT v GB-Inno-BM* (n 32) para. 21; Case C-203/96 *Dusseldorp and Others* [1998] ECR I-4075, para. 61.

³⁸ *Greek lignite* (n 36), paras. 41, 42.

³⁹ See Case C-320/91 *Corbeau* [1993] ECR I-2533, para. 14; Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-04075.

⁴⁰ Whish, Bailey (n 20) p. 217-222.

Anticompetitive regulatory actions might constitute, however, under certain circumstances, an infringement of Articles 101 and 102 TFEU, but always with either Article 4 (3) TEU or Article 106 TFEU.

Nonetheless, the application of competition rules is considerably limited since potential or actual ‘anticompetitive’ behaviour of an undertaking which resulted from a state action is a precondition for concluding that an EU member state infringed upon rules on competition law. 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 scrutinised under the EU competition rules; these are covered by the EU internal market rules.⁴¹

III. National competition laws and their application to public bodies

Not only the European Commission and EU courts but also national competition authorities and national courts apply EU competition rules if trade between the EU Member States might be affected. Concerning the assessment of states’ regulatory measures, the CJEU pointed out that a national competition authority, when investigating conduct of undertakings under the traditional competition rules, can also find, if that conduct were imposed by national legislation, that the legislation was contrary to, or incompatible with, Article 4 (3) TFEU in conjunction with Articles 101 and 102 TFEU.⁴² Nevertheless, if only a national market or a certain territory within a national market is likely to be impeded (i.e. without any effect on trade among the EU Member States), scrutiny of public bodies’ non-economic activities remains within the jurisdiction of a state concerned.⁴³

Articles 101 and 102 TFEU are often mirrored in domestic competition rules of the EU Member States and their national competition authorities follow the European approach in interpreting the term *undertaking*. Accordingly, their national equivalents are applicable to public bodies only if they are engaged in economic activity, i.e. not if they exercise state powers or act ‘*in a purely administrative capacity*’ and ‘*merely regulates the provision of goods and services on a market*’⁴⁴. However, these activities may influence competition, even at national levels, since public bodies (e.g. state administration bodies, municipalities) adopt bylaws or regulations concerning various types of businesses, grant licences, decide on individual rights and obligations of *undertakings*, etc. National competition

⁴¹ Public bodies are further bound by legal provisions on state aids and public procurements. *See TFEU* (n 7) Arts. 107 - 109.

⁴² *See CIF* (n 22) para. 45.

⁴³ They are usually assessed under traditional administrative, constitutional or criminal laws. Public procurement and State aid laws are also applicable to them.

⁴⁴ *See supra* n 12.

authorities usually provide them with consultation assistance and recommendations on their potentially restrictive legislation and other measures. Some of them even play a regular part in regulatory impact assessment procedures (RIA); they are supposed to review any proposal with a potential effect on competition as part of their *ex ante* competition advocacy powers and provide them with binding or non-binding recommendations.⁴⁵

Yet, in some EU Member States, competition authorities are empowered to scrutinise these very conventional activities carried out by public administrative bodies (state actors) or by municipalities, as will be demonstrated below. Some of these authorities can even apply the same enforcement mechanisms as in the case of undertakings (e.g. commencing formal proceedings and imposition of fines). Seemingly, a lot of various anticompetitive activities carried out by public bodies will materially resemble state aid⁴⁶; however, specific legal provisions concerning this conduct are far more reaching. According to them, potentially restrictive behaviour might take another form, even the form bearing similar features as an abuse of a dominant position or conclusion of a restrictive agreement; enactment of anticompetitive municipal ordinance, conspiracy with private parties or intra-municipal conspiracy can also be included. Public restrictions do not necessarily lead (or have potential to lead) to the infringement of traditional competition rules on the part of undertakings. Therefore, unlike the EU approach, in these countries a public body exercising state powers might be held responsible for its anticompetitive conduct in itself.

For the purposes of this article the selected EU countries are organised into three groups. The first group involve countries where a competition authority may declare a breach of competition rules and impose a fine on a public body (Czech Republic and Slovakia).⁴⁷ The second group consists of those who may only declare a breach of competition rules (Lithuania, Romania). Countries with a modest approach, *ex post* consultation and advocacy powers (Bulgaria and Slovenia) and their modifications (Italy), are grouped in the last category.

⁴⁵ For example UK, Hungary, Greece, Lithuania. See Ioannis Lianos, 'Towards a bureaucracy theory of the interaction between competition law and state action' (2012) CLES.

⁴⁶ State aid law provisions are, however, of different nature than those in competition laws; under them unlawful aid is regularly ordered to be clawed back to the state. Thus, it sentences its recipients, not a public administration body which granted it.

⁴⁷ This approach applies even to Ukraine as an EU candidate country.

1. Competition law infringement and its penalization

a) Czech Republic

Pursuant to Article 1 Act on Protection of Competition ('APC')⁴⁸, a breach of competition rules can be committed not only by undertakings but even by public administration bodies. According to Article 19a (1) APC, '[a] public administration body shall not restrict⁴⁹ competition by favouring a particular competitor⁵⁰ or by any other means.' The Czech Office for the Protection of Competition is empowered to supervise the following public bodies: state administration bodies while carrying out their public functions delegated by the state ('state administration')⁵¹, professional self-governing bodies while executing public functions delegated by the state⁵² and local bodies while exercising self-government and the powers delegated by the state ('municipalities')⁵³.

As has been apparent from the foregoing, the definition of public bodies and the scope of their potential anticompetitive activities are very broad. They can distort competition either by issuance of (i) generally binding acts (e.g. generally binding regulations or municipality' ordinances, decrees etc.), (ii) individual administrative acts (e.g. a broadcast license, a permit for billboard construction), or by (iii) any other means. Concerning self-government of professions, their bodies might be responsible only if they carry out delegated powers of the state; their self-government powers still remain beyond the scope of the relevant provisions.⁵⁴

If the office finds that a particular public body engaged in an anticompetitive action, it can issue a decision declaring an infringement of competition law and impose a fine of up to 10 million Czech Crowns (~EUR 370.000).⁵⁵ However, the office' investigatory powers are highly limited. First, public bodies cannot be

⁴⁸ Act No. 143/2001 Coll., on the Protection of Competition, as amended ('APC').

⁴⁹ The term 'restrict' refers to 'prevention, restriction or distortion'.

⁵⁰ The term 'competitor' reflects the concept of an undertaking.

⁵¹ Central state administration bodies (Ministries, the Czech Tax Office, the Energy Regulatory Office, and the Trade Licence Office etc.) and local state administration bodies (building authorities etc.).

⁵² The term 'professional self-governance' refers to professional associations or chambers etc.

⁵³ The term 'municipalities' refers to communities and regions.

⁵⁴ Activities of professional self-governance are still assessed as those of undertakings.

⁵⁵ APC (n 48) art. 22aa. No methodology on setting fines for public bodies has been published yet. The methods applied to undertakings seem to be inappropriate since we cannot operate with the term 'turnover' as in case of public bodies. See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210.

compelled to comply with the office's requests for information.⁵⁶ Second, public bodies cannot be subject to unannounced inspections. Last but not least, a lack of clear provisions also casts doubt on whether remedial measures and commitments may be used. The office may still consult public bodies on draft legislation (*ex ante*) or even approach them with competition advocacy (*ex post*).

Since 2012, the office has received a number of complaints against public bodies. Mostly they concerned conduct of municipalities, however, some of them regarded ministries' and sector regulators' actions. All investigations were terminated after the preliminary assessment without necessity to commence a formal administrative proceeding. In 2013, the Office was supposed to scrutinise a municipal ordinance governing conditions for operating fairgrounds. The municipality allegedly breached Article 19a APC by amending 'a market ordinance' and extending restricted areas, which favoured one fairground operator to another. However, the municipality was authorized by a legislator to define localities for organizing these events and establish restrictions where necessary. In addition, such action was assessed as objectively justified since the municipality took into account a great deal of complaints of citizens on distracting unbearable noise from the nearby fairground site; thus the Office terminated preliminary assessment.

b) Slovakia

Slovakian competition rules⁵⁷ relating to anticompetitive conduct of public bodies are almost identical to those in the Czech Republic. Article 39 SkCA states that '*State administration authorities during the performance of state administration, local self-administration authorities during the performance of self-administration and transferred performance of state administration, and special interest bodies during the transferred performance of state administration must not provide evident support giving advantage to certain undertakings or otherwise restrict competition.*' Slovakian competition law calls to responsibility identical entities that are subject to competition rules in the Czech Republic. Relevant provisions of the SkCA, however, apply only to actions which might discernibly harm effective competition.⁵⁸

⁵⁶ The office can only rely on fundamental administrative law principles that urge cooperation between public bodies. See Act No. 500/2004 Sb., the Administrative Procedure Code.

⁵⁷ Act No. 136/2001 Coll. on Protection of Competition, as amended ('SkCA'). See s. 7 SkCA 'Other forms of unlawful restriction of competition'. An English version is available at the official website of the Antimonopoly Office of the Slovak Republic <http://www.antimon.gov.sk/data/files/163_act-no-136-2001-on-protection-of-competition-amended-by-387-2011.pdf>.

⁵⁸ See The Antimonopoly Office of the Slovak Republic, 'Annual report 2008' (2009) p. 32-37.

The Slovakian Antimonopoly Office can declare a breach of domestic competition law and oblige a public body to refrain from anticompetitive conduct and to restore a previous status.⁵⁹ A fine of up to EUR 66.000 can also be imposed.⁶⁰ Unlike the Czech Republic, an administrative proceeding conducted with a public administration body might be settled. Public bodies may be further exposed to penalties for non-compliance with the office's request for information.

The Office has dealt with a number of cases where municipalities granted a particular undertaking with a special right.⁶¹ A municipality further infringed Article 39 SkCA by refusing to permit the launch of a new pharmacy on the grounds that other well-established pharmacies were capable of providing sufficient medical care to its citizens. The Office concluded that this conduct restricted competition since new operators were prevented from entering the relevant market.⁶² Obstructions in granting a building permit to disconnect from central heating system, and thus, prevent citizens from establishing alternative sources of energy created by a municipality, also led to the launch of administrative proceeding. However, no negative impact on consumers was found in the given case.⁶³ Favouring a particular undertaking in providing services on nearly 50 % of parking places in the locality for the upcoming twenty years by a municipality was also found in breach of competition rules.⁶⁴

According to Slovakian annual reports, no formal proceedings were initiated between 2009 and 2011.⁶⁵ In 2012, the office issued one first-instance decision declaring a breach of Article 39 SkCA by the city of Bratislava⁶⁶. There was no decision concerning a public body in 2013. Overall, the cases were particularly concerned with municipal activities, predominantly waste management, heat management and parking services. Slovak Antimonopoly Office imposed also a fine for non-compliance with its request for information in two cases.

⁵⁹ SkCA (n 57) art. 22 (1).

⁶⁰ SkCA (n 57) art. 38 (3).

⁶¹ *Marianum - funeral services* [2008]

⁶² *Municipality Bratislava – New Town* [2007].

⁶³ *City Stara Lubovna* [2008]. See 'Annual Report 2008' of the Slovakian Antimonopoly Office. See also *Municipality of Prievidza Heat management* [2012].

⁶⁴ *Municipality of Bratislava – Old Town* [2008]. See 'Annual Report 2008' of the Slovakian Antimonopoly Office.

⁶⁵ See The Antimonopoly Office of the Slovak Republic, 'Annual report 2009' (2010), 'Annual report 2010' (2011), and 'Annual report 2011' (2012).

⁶⁶ The office conducted 15 investigations regarding potential violation of art. 39 SkCA. See The Antimonopoly Office of the Slovak Republic, 'Annual report 2012' (2013), p. 22.

2. Competition law infringement without penalization

a) Lithuania

Lithuanian competition law regulates activities of ‘entities of public administration’ which restrict or may restrict competition. Pursuant to Article 4 (1) LCA⁶⁷: ‘When carrying out the assigned tasks related to the regulation of economic activity within the Republic of Lithuania, entities of public administration must ensure freedom of fair competition; (2) Entities of public administration shall be prohibited from adopting legal acts or other decisions which grant privileges to or discriminate against any individual economic entities or their groups and which give or may give rise to differences in the conditions of competition for economic entities competing in a relevant market, except where the difference in the conditions of competition may not be avoided when meeting the requirements of the laws of the Republic of Lithuania.’

The Competition Council of the Republic of Lithuania may launch an investigation into public anticompetitive actions and declare an infringement of competition rules. Special attention should be paid, however, to the general exemption from competition law which applies if the criteria established in Article 4 LCA are met.⁶⁸ In the council’s resolution, a public body can be further requested to amend or revoke an anticompetitive legal act or its provisions. In the event of a failure to comply with the council’s requirements, the case might be passed on to other competent authorities (the Supreme Administrative Court etc.) to enforce them.⁶⁹

In 2012 and 2013, the Council predominantly dealt with municipalities’ restrictive practices. Most of them concerned a municipality’s grant of exclusive rights to a specific undertaking (waste management system⁷⁰, public transportation system⁷¹,

⁶⁷ Act No. VIII-1099 Coll. on Law on Competition (‘LCA’). An English version is available at the official website of the Competition Council of the Republic of Lithuania <http://kt.gov.lt/en/index.php?show=antitrust&antitrust_doc=law_competition>.

⁶⁸ In general, anticompetitive actions of public bodies derived from imperative provisions of law passed by the Parliament are shielded from the application of competition rules.

⁶⁹ LCA (n 68) art. 18.

⁷⁰ *Vilnius District Municipality and JSC Nemėžio komunalininkas* [2013]; *Molėtai and Kaišiadorys municipalities* (ongoing); *Municipalities of Pakruojis, Joniškis and UAB Pakruojo komunalininkas and UAB Joniškio komunalinis ūkis* [2012]. In the other case (2011), the Council struggled with the question of whether municipalities may rely on specific provisions in the Act on Waste Management, which allows them to authorise an undertaking controlled by the municipality to provide waste collection services, or they should be held responsible for the infringement of Article 4 LCA. The Council requested the Constitutional Court for the assessment. See annual reports of the Competition Council of the Republic of Lithuania.

⁷¹ See *Vilnius Municipality and Vilniaus viešasis transportas* [2013]; *Passenger transportation Nemenčinė* [2011]. See annual reports of the Competition Council of the Republic of Lithuania.

modernization and renovation of the heat economy⁷²). In 2011, a municipality infringed Article 4 LCA by refusing to extend permissions to passenger carriage operators without any legitimate reason whilst new entrants could receive them.⁷³ In the same year, decisions of a number of municipalities concerning restrictions on time for selling alcoholic beverages, which allegedly discriminated against small enterprises, were challenged. The Council, however, concluded that such limitations were objectively justified since municipalities were expressly allowed by a legislator to do so as far as necessary in pursuit of public interests. Therefore, the exception under Article 4 (2) LCA applied.⁷⁴

According to Lithuanian annual reports, the number of decisions declaring infringements of Article 4 LCA was 6, 11 and 5 in the period 2010 - 2012, respectively. While taking into consideration the total number of all decisions issued by the council in that period (16, 13 and 11)⁷⁵, public restraints are significant to Lithuanian competition policy.

b) Romania

Romanian competition law⁷⁶ includes general prohibition concerning anticompetitive actions of public administration bodies in Article 9 RCA: *'Any actions by the central or local public administrative body are prohibited which have as an object or may have as an effect the restriction, prevention or distortion of competition, especially: a) making decisions which limit the freedom of trade or the undertakings' autonomy which are being exercised under the law; b) setting discriminatory business conditions to undertakings.'* According to Article 2 (1) b RCA, competition law is applicable to public administration bodies *'...except for situations when such measures are taken to enforce other laws or protect a major public interest.'*

The Competition Council of Romania may declare a breach of Article 9 RCA and demand a cessation of anticompetitive conduct.⁷⁷ In case of non-compliance with

⁷² *Kazlų Rūda city and UAB Litesko* [2012]. See 'Annual Report 2012' of the Competition Council of the Republic of Lithuania.

⁷³ *Alytus City Municipality* [2010]. See 'Annual Report 2010' of the Competition Council of the Republic of Lithuania.

⁷⁴ *Municipalities Kaunas, Klaipeda and Pasvalys* [2010]. See 'Annual Report 2010' of the Competition Council of the Republic of Lithuania.

⁷⁵ A total number of decisions refer to anticompetitive agreements, abuse of dominance and public restraints.

⁷⁶ Act No. 21/1996, on Competition Law, as amended ('RCA'). An English version is available at the official website of the Competition Council of Romania

<http://www.consiliulconcurentei.ro/uploads/docs/concurenta/LEGEA_CONCURENTEI_Nr_21_eng_rev_1.pdf>.

⁷⁷ Ibid art. 2 (2).

decision requirements, the case can be referred onto a competent court.⁷⁸ Further, the council shall propose to Government or another competent authority to take disciplinary measures against their staff responsible for not observing its decision.⁷⁹ In the course of an investigation, public bodies are obliged to submit requested information and to give access to all documents and data relevant to the investigation; a fine can be imposed for a breach of these duties.⁸⁰ The council is further vested with traditional consultation powers.⁸¹

In 2014, the Council concluded an administrative proceeding into the national audio-visual regulator's decision which allegedly established discriminatory conditions for audio-visual operators.⁸² The Council did not declare a breach of Article 9 RCA in this case; nevertheless, it recommended the revision of current legislation so that must-carry obligation to be applied on technological neutrality principle, i.e. regardless of the way the channels were broadcasting.⁸³ Relevant competition law provisions have been applied in recent years also in the healthcare sector and the energy supply market.⁸⁴ Overall, in the period 2011 – 2013, one decision concerning a public body's anticompetitive action was issued each year.⁸⁵

3. Ex post advocacy and consultation powers

a) Italy

Italian competition law⁸⁶ deals with public restrictions of competition predominantly by using classical consultation and advocacy powers.⁸⁷ Additionally, Section 21-bis ICA empowers the Italian Competition Authority to take legal action against any conduct distorting competition except for situations

⁷⁸ Ibid art. 9 (3).

⁷⁹ Ibid art. 27 (m).

⁸⁰ OECD, 'OECD report: Competition Issues in Television and Broadcasting' (2013).

⁸¹ RCA (n 76) art. 27.

⁸² It imposed a must-carry obligation on administrators of electronic communication network retransmitting audio-visual programmes via cables while on those who retransmitted these programmes via satellite not.

⁸³ See the Council's recommendation addressed to National Audio-visual Council of Romania

<http://www.consiliulconcurentei.ro/uploads/docs/items/id9084/recomandari_cna_2014_english.pdf>.

⁸⁴ Carmen Peli, 'Romania: An Introduction' (Chambers & Partners 2014)

<<http://webcache.googleusercontent.com/search?q=cache:jwK5zEmgaHsJ:www.chambersandpartners.com/179/26/editorial/7/1+&cd=1&hl=cs&ct=clnk&gl=cz>> accessed on 15 August 2014.

⁸⁵ See The Competition Council of Romania, 'Annual report 2013' (2014).

⁸⁶ Act No. 287/2009, on Competition and Fair Trading, as amended ('ICA'). An English version is available at the official website of the Italian Competition Authority <<http://www.agcm.it/en/comp/1727-law-no-287-of-october-10th-1990.html>>.

⁸⁷ Ibid ss. 21-bis and 22.

when it is justified by the requirements of the general public interest. The authority may address to a public body concerned its reasoned opinion clarifying the nature of an infringement and its requirements which should be met. If a transgressor fails to comply with them within sixty days, the authority can lodge an appeal through the competent prosecuting attorney.⁸⁸ The authority can also notify Parliament and Government of any problematic provisions.⁸⁹ In 2012, the competition authority issued approximately 20 reasoned opinions on anticompetitive administrative actions and filed three appeals.⁹⁰

b) Slovenia

Specific competition rules in Slovenia relating to public bodies are enshrined in Article 64 SnCA.⁹¹ It states that ‘The Government, state authorities, local community authorities and holders of public authority may not restrict the free performance of undertakings on the market.’ Articles 65 and 66 SnCA include a demonstrative list of most common prohibited practices; they apply either to regulatory or individual legal instruments and actions of public administration bodies.⁹² In some specific situations, public bodies can acquire exemption from competition law, e.g. if they pursue the general public interest or if restriction is a result of natural disaster, epidemics or state of emergency.⁹³

If a public body infringes competition and the infringement is not in the general public interest, the Slovenian Competition Protection Agency sends its opinion along with a proposal on taking appropriate measures to lessen the restriction of competition. Further, depending on the nature and severity of the infringement the opinion can be published. Consultation powers on draft acts and decrees are also at the agency’s disposal.⁹⁴

⁸⁸ Ibid s. 21-bis 2.

⁸⁹ Ibid s. 21.

⁹⁰ Eleanor M. Fox and Deborah Healey, ‘When the State Harms Competition - the Role for Competition Law’ (2013) New York University Law and Economics, paper 336, p. 34.

⁹¹ Act. No. 36/2008 Coll., on the Prevention of the Restriction of Competition, as amended (‘SnCA’). See s. ‘Restriction of the market by regulatory instruments’. An English version is available at the official website of the Slovenian Competition Protection Agency <http://www.varstvo-konkurence.si/fileadmin/varstvo-konkurence.si/pageuploads/ZPOMK-1-EN_consolidated_2013.pdf>.

⁹² Ibid art. 64 (2).

⁹³ Ibid arts. 67-70.

⁹⁴ Ibid arts. 71-72.

c) Bulgaria

Bulgarian competition law⁹⁵ presumes its application to public administration bodies in Article 2 (1) BCA. The Bulgarian Commission on Protection of Competition may consult⁹⁶ and also assess, within its competition advocacy powers, the compatibility of effective or draft administrative acts with competition rules. It can further propose its revocation or amendment if it poses a threat to competition (*ex post*).⁹⁷

4. Reflections

As indicated above, selected national competition law systems are more far-reaching than EU competition law. The competition authorities of these countries may scrutinise regulatory activities and find them anticompetitive in themselves. Specific competition law provisions of these EU Member States have in common that they are applicable to all situations where a public body favours a particular undertaking or harm competition by any other means.⁹⁸ Accordingly, the relevant provisions cover virtually all activities concerning exercising regulatory and purely administrative tasks.

The discussed countries generally enshrine prohibition on restrictive practises of public bodies in their competition laws; as apparent, the number of them is not insignificant. Some of them are vested with *ex ante* consultation and advocacy powers (Bulgaria, Slovenia) or their modifications (Italy). Others can commence an administrative proceeding and declare a breach of competition rules (the Czech Republic, Slovakia, Lithuania, and Romania).⁹⁹ Czech and Slovakian competition authorities can even impose a fine for a violation of competition law.

As surveyed, the conduct of public bodies may affect a variety of sectors. The competition authorities dealt predominantly with ‘public’ restrictions affecting economic sectors of waste and heat management systems, public transportation, parking services, health-care services, housing and utility services, and land allocation and property lease services. A great deal of cases concerned decisions and regulatory measures of municipalities which granted a particular undertaking with exclusive rights.

⁹⁵ Law on Protection of Competition (State Gazette, Issue 102, 2008), as amended (‘BCA’). An English version is available at the official website of the Bulgarian Commission on Protection of Competition

<http://www.cpc.bg/storage/file/ZZK_eng.doc>.

⁹⁶ Ibid art. 28.

⁹⁷ Ibid art. 8. Since 2 December 2008, the commission has been deprived of its authority to refer a case concerning a public body’s anticompetitive act onto a competent authority.

⁹⁸ See Article 106 TFEU.

⁹⁹ A condemning decision may be considered a legal basis for adjudicating damages in private lawsuits (so called ‘*follow-on actions*’).

Some EU member states have further established justifications under which public bodies might be exempted from competition law liability, e.g. legal compliance (Lithuania, Romania) or the general (major) public interest (Romania, Slovenia, Italy). Equivalent justifications were applied also in the Czech Republic and Slovakia, despite the fact that there is no legal basis for them.

IV. US development: A lesson for Europe?

Unlike some European countries, the US developed its approach to potential anticompetitive conduct of public bodies, in particular of municipalities¹⁰⁰, in the second half of the 20th century.¹⁰¹ The state action doctrine (so-called the *Parker* doctrine) goes back to 1943 when the US Supreme Court ruled in *Parker v Brown*¹⁰² that ‘*there is nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.*’¹⁰³ Thus, the state action doctrine exempted anticompetitive conduct of the states (automatically) and their state administrative agencies and other entities (derivatively) when they engaged in exercises of their sovereign regulatory powers from the reach of US antitrust law.¹⁰⁴

The applicability of the *Parker* doctrine to municipalities continued to remain open. Nevertheless, in *City of Lafayette v Louisiana Power & Light Co.*¹⁰⁵, the US Supreme Court held that municipalities do not benefit from the *Parker* doctrine to the same extent as states and that the status of ‘municipality’ itself is not sufficient to acquire immunity.¹⁰⁶ It further stated that immunity may be acquired only when the conditions are met.¹⁰⁷ The following decision in *Community communications Co. v City of Boulder*¹⁰⁸ exerted a significant impact upon municipal self-

¹⁰⁰ Concerning the US, the term ‘municipalities’ refers to counties, cities and towns.

¹⁰¹ Although the doctrine was originally applied by the US Supreme court to the specific relationship between the US and the states, reflecting American federalism, some justifications and their grounds might be utilized also for the purposes of this article.

¹⁰² *Parker v Brown* [1943] 317 U.S. 341 (‘*Parker*’).

¹⁰³ *Ibid* 344-352.

¹⁰⁴ Their restrictive activities might be assessed under the ‘*Commerce Clause*’ enshrined in Article 1 of the U.S. Constitution.

¹⁰⁵ *City of Lafayette v Louisiana Power & Light Co.* [1978] 435 U.S. 389 (‘*Lafayette*’); In *Lafayette*, the court dealt with two municipalities operating electrical utilities which required their customers to accept tying arrangements; both entities were held accountable for a breach of antitrust rules.

¹⁰⁶ *Ibid* 391-392. See Gregory M. Shaw, ‘The Application of Antitrust Laws to Municipal Activities’ [1979] 79 Columbia Law Review 3, p. 518-550; Robert Eisig Bienstock, ‘Municipal Antitrust Liability: Beyond Immunity’ [1985] 73 California Law Review 6.

¹⁰⁷ Entities seeking an exemption (i) must pursue a clearly articulated and affirmatively expressed state policy, and (ii) this should be actively supervised by a state. See *California Retail Liquor Dealers Ass’n v Midcal Aluminum, Inc.* [1980] 445 U.S. 97.

¹⁰⁸ *Community communications Co. v City of Boulder* [1982] 455 U.S. 40 (‘*Boulder*’).

government activities.¹⁰⁹ The US Supreme Court in this case declared that the state general grant of power assigned to the municipality does not clearly articulate and affirmatively express state policy; it concluded that the municipality engaged in its governmental conduct (i.e. an issuance of an ordinance) breached US antitrust rules. Therefore, antitrust immunity of municipalities engaged in local and municipal affairs could not be automatically granted.¹¹⁰

It should be mentioned at this point, that municipalities responsible for their anticompetitive activities were originally even exposed to treble damages claims,¹¹¹ but only to the extent that they would not substantially interfere with the municipality's conventional governmental functions.¹¹² In particular, there was a concern that treble damages paid by a municipality would cause great harm to its citizens as its tax-payers. However, the *Local Government Antitrust Act*¹¹³ completely shielded municipalities from paying treble damages.¹¹⁴

A more tolerable attitude to municipalities was articulated in *Town of Hallie v City of Eau Claire*,¹¹⁵ where the US Supreme Court ruled that the involvement of a municipality itself automatically lessens the likelihood of anticompetitive action.¹¹⁶ It further admitted that the state authorization need not clearly indicate that the city can displace competition and abandoned the requirement of *active state supervision* to be eligible for exemption.¹¹⁷ The broad concept of immunity was already

¹⁰⁹ In *Boulder*, the city issued an ordinance governing conditions for operation of a cable system and refused an access to it for other private parties. The city was found responsible for a breach of antitrust rules despite the fact that state law (the general enabling act) authorized to decide on each aspect of a city's cable system and the measures governed in the city's ordinance were undertaken within the scope of the authorization. See *Boulder* (n 108) 52-54.

¹¹⁰ The US Supreme Court concluded that the first condition of the Parker doctrine was not met; whether the city also satisfied the requirement of state active supervision was left open. See *Boulder* (n 108) 55.

¹¹¹ S. 4 Clayton Act, 15 U.S.C. (1976) § 15. See *Lafayette* (n 105) 401-402.

¹¹² See *National League of Cities v Usery* [1976] 426 U.S.

¹¹³ The Local Government Antitrust Act 1984 (Pub L. No. 98-544, 98 Stat. 2750). See John E. Lopatka, 'State Action and Municipal Antitrust Immunity: An Economic Approach' [1984] 53 *Fordham Law Review* 23, p. 23-81.

¹¹⁴ The act, however, does not immunize municipalities from injunctive or any other equitable relief.

¹¹⁵ *Town of Hallie v City of Eau Claire* [1985] 471 U.S. 34 ('*Town of Hallie*'). In this case, the city rejected to share its sewage treatment facility with four surrounding towns unless they agreed on annexation. The general enabling act allowed the city to delineate the area of sewage system usage and provide the service beyond such borders upon its consideration.

¹¹⁶ *Ibid* 36-43.

¹¹⁷ Municipalities do not usually act pursuant to specific state regulatory acts. However, they are often authorized to take an action by general enabling acts, home rule charters, or the implied powers doctrine. *Town of Hallie* (n 115) 45-47. The court further states that it would 'embody[y] an unrealistic view of how legislatures work and of how statutes are

outlined two years earlier in *Westborough Mall, Inc. v City of Cape Girardeau*¹¹⁸; according to this decision, immunity did not apply only in cases concerning conspiracy between a municipality or its government officials and private entities.¹¹⁹

Regulatory activities of municipalities were completely exempted from US antitrust law, even in cases of intentional conspiracy, in *City of Columbia v Omni outdoor advertising, Inc.*¹²⁰ An automatic exemption was granted for exercising their both delegated and self-government powers.¹²¹ The clear articulation test was automatically met because the restriction of competition was the *foreseeable* result of legislation authorizing municipalities to adopt zoning ordinances regulating the billboard construction.¹²²

The ratio of granting immunity was that antitrust supervision of municipalities' conventional powers might hamper the exercising of their core public functions. The US Supreme Court indicated that the requirements laid down on municipalities to satisfy all affected interests would be unreasonable since it is a common result of regulations and ordinances that they benefit some interests (e.g. group, society) more than others.¹²³ Therefore, the assessment of municipalities' conduct under antitrust law proved to be impracticable. In addition, activities falling beyond the scope of municipal authorization (e.g. conspiracy) can be scrutinised under other laws (e.g. constitutional) which provide adequate remedies without necessity to take further steps under antitrust laws.¹²⁴

written' to require state legislatures to explicitly authorize specific anticompetitive effects before state action immunity could apply. *Town of Hallie* (n 115) 43.

¹¹⁸ *Westborough Mall, Inc. v City of Cape Girardeau* [1983] 461 U.S. 945.

¹¹⁹ *Ibid.*

¹²⁰ *City of Columbia v Omni outdoor advertising, Inc.* [1991] 111 S. Ct. 344 ('*Omni*). In this case, the city and a dominant billboard company allegedly infringed competition rules by conspiring together on the scope of the new ordinance which subsequently aimed at preventing market participants from new billboard constructions (e.g. by setting limits on size or location) and favoured the well-established company, 347 – 353.

¹²¹ *Omni* (n 120) 373. '[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition' and that a zoning ordinance regulating the size, location, and spacing of billboards 'necessarily protects existing billboards against some competition from newcomers.'

¹²² Municipalities, however, have remained further exposed to antitrust liability only if they participate in the market as *private entities*. Thus, it should always be determined at the earliest whether a particular activity is 'governmental' or 'proprietary'.

¹²³ See David A. Korn, 'Municipal Antitrust Liability: A Question of Immunity', 42 Wash. U. J. Urb. & Contemp. L. 418 (1992), p. 413-431.

¹²⁴ *Omni* (n 120) 355-56.

V. State action defence and objective justifications

1. Regulatory activities of public bodies and (quasi-) state action defence

At the EU and national levels, *undertakings* can traditionally claim the state action defence to escape from competition law liability.¹²⁵ Undertakings can raise the objection that their ‘anticompetitive’ conduct was backed by national legislation; then, they are not responsible for an infringement of Articles 101 and 102 TFEU.¹²⁶ It is not clear whether this defence (or its modifications) and other justifications can be successfully claimed by *public administration bodies* and *municipalities* engaged in anticompetitive regulatory actions. This question is of increasing importance particularly for those EU Member States where regulatory and other administrative actions of public bodies and municipalities (i.e. subdivisions of the state) are exposed to the ambit of national competition laws.

As discussed above, EU competition law has never covered public bodies’ regulatory activities in themselves (those are governed by internal market rules). On the contrary, the US Supreme Court had to struggle with the question of whether state action (including its public bodies) is subject to general antitrust rules since the Sherman Act¹²⁷ did not provide an unambiguous answer.¹²⁸ The court has developed state action doctrine in order to allow states and its public bodies (and later also municipalities) to claim antitrust immunity. Therefore, the decision making practice of the US Supreme Court might be more suitable in seeking an answer to the question concerned.

Once US antitrust law applied to municipalities’ conventional (i.e. regulatory) powers,¹²⁹ they could claim the *state action defence*. To do it successfully two requirements had to be met: (i) a conduct was exercised in furtherance with a clearly defined state policy, and (ii) the state actively supervised such behaviour;¹³⁰ this second criterion was later relinquished by the US Supreme Court.¹³¹ In *Town of Hallie v City of Eau Claire*, the US Supreme court expressed that the displacement of competition by public bodies must be foreseeable in order to meet

¹²⁵ At the EU level, entities bound by competition rules, i.e. *undertakings*, can seek an exemption from the operation of EU competition law under virtually identical conditions as *private parties* in the US. See also Case C-83/98 *France v Ladbroke Racing and Commission* [2000] ECR I-03271; Case C-280/08 *Deutsche Telekom v Commission* [2010] ECR I-09555; *CIF* (n 22).

¹²⁶ *CIF* (n 22).

¹²⁷ 26 Stat. 209, 15 U.S.C. §§ 1–7 (*‘Sherman Act’*).

¹²⁸ *Ibid.* § 1 of the Sherman Act states that ‘Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. [...]’.

¹²⁹ See s. IV above.

¹³⁰ *Rf.* (n 107).

¹³¹ *Rf.* (n 117).

‘clear articulation’ test, i.e. ‘*inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature*’ and that a state should ‘*foresee and implicitly endorse the anticompetitive effect as consistent with its policy goals*’.¹³² It would be advisable to allow public bodies and municipalities exposed to specific competition law provisions in the discussed European countries to receive state action immunity once meeting the test.

On these grounds, immunity could be automatically granted to state administration bodies and municipalities if it is foreseeable that their regulatory action (a measure, an ordinance etc.) will likely have ‘anticompetitive’ consequences (often as a side effect), e.g. where municipalities are empowered to set conditions (and even restrictions) for operating gambling and betting sites, to set a particular area for holding fairgrounds, or to designate areas where the sale of alcoholic beverages is allowed.

It has been illustrated that some EU member states (Lithuania and Romania) have enacted the criteria based on ‘*a legal compliance*’ defence. Lithuanian competition law is applicable except ‘*[...] where the difference in the conditions of competition may not be avoided when meeting the requirements of the laws of the Republic of Lithuania*’.¹³³ Likewise, the Romanian Competition Council does not call public bodies to responsibility ‘*[...] when such measures are taken to enforce other laws [...]*’.¹³⁴ The concept of *legal compliance* resembles to some extent so-called *state action defence*, at least with regard to the articulation of its first condition. Since the difference between acting ‘*in furtherance with clearly articulated and affirmatively expressed state policy*’ and acting ‘*when meeting the requirements of the laws*’ or ‘*to enforce other laws*’ have significant commonalities, the expression of ‘*quasi-state action defence*’ for a legal compliance might be more suitable.

Doubtless, such an approach should be accepted more positively since the clear statutory articulation of conditions for *state action immunity* would help to clarify the ambit of their material scope and might back legal certainty. Indeed, national competition authorities or courts may address this issue to some extent in the decision-making practise, however, it would be advisable, especially in Continental European law, to enact grounds and clear conditions under which public entities can be blamed for a breach of competition rules on the one hand, and exempted from these rules on the other.

¹³² See *Hallie* (n 115); *Omni* (n 120); *FTC v. Phoebe Putney Health System, Inc.* [2013]. U.S. 568.

¹³³ *LCA* (n 67) art. 4 (1).

¹³⁴ *RCA* (n 76) art. 2 (1) b.

2. Regulatory activities of public bodies and other objective justifications

EU competition laws provide undertakings, besides the *state action defence*, with other objective justifications for their potential anticompetitive conduct, e.g. facilitating technological advances, innovation etc. Grounds for these justifications are usually based on *efficiency* or *meeting competition* standards.¹³⁵ In some exceptional circumstances the grounds for public policy considerations might be recognized as an objective justification. However, justification claimed by public administration bodies will hardly be of economic nature since they do not generally offer goods or services on a commercial basis as undertakings; they primarily pursue other and broader objectives than competition law, such as consumer protection, sustainable development of society, ensuring health and safety, protection of the environment etc.

While seeking an answer on whether a public body or a municipality can justify its anticompetitive regulatory action, the exception established in Article 106 (2) TFEU might be used as a good starting point. Although this provision is addressed primarily to undertakings, EU Member States themselves can also rely on it.¹³⁶ In *Corbeau*, the CJEU concluded that exclusive rights and cross-subsidies between various activities could be acceptable as part of a services of general economic interest in the context of ensuring the financial stability of a universal service system for postal services. In *Albany*, the CJEU ruled that Articles 102 and 106 TFEU do not preclude public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme in a given sector.¹³⁷ National law which extended exclusive right for providers of public emergency ambulance service was said to be justified as long as it was necessary to carry out their tasks on economically acceptable conditions (*Ambulanz Glöckner*).¹³⁸

The exception under Article 106 (2) TFEU is addressed to EU Member State's restrictive measures concerning public undertakings and undertakings granted with special or exclusive rights. Its equivalent might be applied as a justification for public restraints under specific competition laws of examined EU Member States only to the limited extent.¹³⁹ Therefore, it does not further clear the conditions under which other restrictive regulatory (or even individual) actions of public

¹³⁵ Ekaterina Rousseva, 'The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it help to modernise the Analysis under Article 82 EC?' [2006] 2 Competition Law Review 2, p. 27-72.

¹³⁶ Whish, Bailey (n 20) p. 235-241.

¹³⁷ Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds* [1999] ECR I-05751 ('*Albany*'). See Tamara K. Herve, 'Social Solidarity: A Buttress against Internal Market Law?' In Shaw, J. (ed), *Social Law and Policy in an Evolving EU* (Oxford: Hart Publishing, 2000) 31-47.

¹³⁸ *Ambulanz Glöckner* (n 35) para. 51-65.

¹³⁹ See s. II. 3 above.

bodies could be justified. It should be reiterated at this point that *the general public interest* as an objective justification for potential abuse of administrative power by public bodies has already been established in the competition laws of Romania, Slovenia, and Italy.

The concept of objective justification in competition law is generally based on *efficiency* grounds. Therefore, competition law assessment of public restraints in discussed EU Member States will need to be adjusted in order to reflect properly the balance between the different objectives pursued. It would be preferable to take into account all affected public interests when scrutinising public bodies' actions from the competition law perspective. A potential anticompetitive conduct should as a consequence be subject to the test of proportionality, i.e. whether (i) a particular action was taken in pursuit of a recognized public interest, (ii) there is a reasonable proportionality between the means used and the interest pursued, and whether (iii) there are no other means available for its attainment.¹⁴⁰ Depending on the particular circumstances of individual cases, assessed public objective justifications may even outweigh pure competition concerns.¹⁴¹

VI. Concluding remarks

The application of Articles 101 and 102 TFEU in connection with Articles 106 TFEU or 4 (3) TEU to regulatory actions of public bodies is considerably limited. Because these provisions might be applied only under certain circumstances, this approach has recently faced some criticism. It is suggested that there is a need to move away from the application of Article 4(3) TEU in conjunction with Articles 101 and 102 TFEU in favour of assessing public restraints of competition under the EU internal market rules.¹⁴² On the other hand, an exclusive application of Articles 101 and 102 TFEU to exercising state powers seems to be even less suitable.¹⁴³

Yet, there are many Member States which enacted specific competition rules that apply to the very conventional powers of state administration bodies and municipalities and expose them to the scrutiny of national competition authorities. The scope of these provisions and the investigatory and enforcement powers of

¹⁴⁰ See Takis Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999).

¹⁴¹ See *Wouters* (n 16).

¹⁴² See Gerard (n 8). Compare Hervey (n 137) and Andrea Filippo Gagliardi, 'United States and European Union Antitrust Versus State Regulation of the Economy: Is There a Better Test?' [2000] 25 *European Law Review* 353-373.

¹⁴³ See 'A regulatory regime that does not pursue efficiency cannot be seen as anticompetitive since efficiency is not necessarily the criterion by which regulatory regimes should be assessed: the competition rules are simply inappropriate lens through which to view regulation.' Odudu (n 10) p. 31.

competition regulators differ from state to state. Some Member States apply this specific competence moderately (Czech Republic) when others regard it as an important part of their competition policy (Lithuania).

It is not clear in this respect whether public bodies in these Member States should be held responsible for the distortion of competition if they exceed their powers or even in cases when they do not. If the narrower approach is accepted, it is arguable whether antitrust supervision of their activities is necessary since conduct falling outside the scope of their jurisdiction can be scrutinised under other laws (administrative, criminal, constitutional etc.) which are adequate for this task. On the other hand, indicting public bodies for breaches of competition rules for their actions undertaken within the scope of their competence might have an adverse effect on the effective exercise of their conventional functions. The US approach developed by decisions of the US Supreme Court is sensible, according to which, the requirement on public bodies to satisfy all affected interests would be unreasonable because it is a common result of regulations and ordinances that some interests are benefited more than others. The reasons for immunity developed in the US make a strong case for their application to state administration bodies and municipalities in selected EU jurisdictions.

In these far-reaching competition law systems, public authorities should be allowed to claim the state action defence or its modification, particularly if they carry out state administration tasks (e.g. building authorities, trade licensing authorities, and sector regulators). Once meeting the test of foreseeability of ‘anticompetitive’ result, it would be preferable to let also municipalities, acting in their independent capacity, rely on immunity doctrine. Furthermore, it would be appropriate to set clear criteria for claiming objective justifications based on public interest pursuits, or extensively on public policy grounds, as they are already presumed in some EU jurisdictions (Romania, Italy, and Slovenia).

No doubt, consultation and advocacy powers (both *ex ante* and *ex post*) applied by competition authorities may mitigate the negative consequences of the conduct of public bodies. Member States which can commence administrative proceedings and even impose fines (Czech Republic, Slovakia) could be, however, better off rethinking the sanctioning of state administration bodies and municipalities.¹⁴⁴ Although harsh penalties might be considered an effective deterrent, it was demonstrated by the US Supreme Court that punitive mechanisms might not always be suitable in such cases. Scrutinising abuse of administrative power under competition laws is definitely burdensome to the analysed national competition

¹⁴⁴ The constitutional limitation of punitive (treble) damages on *municipalities* and its inappropriateness was addressed above. The effectiveness and reasonableness of high penalties in case of *state government bodies* is also doubtful since it presumes just moving a certain sum of money from one chapter of the state budget to the other.

authorities since they should always consider all affected public interests and weigh them against each other.