MALTA

TRIBUNAL TAL-APPELL GHALL-KOMPETIZZJONI U GHALL-KONSUMATUR

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tad-19 ta' Mejju, 2015

Rikors Numru. 1/2015

Malta Bargains Limited (UK)

vs

Awtorita tat-Turizmu ta' Malta u
d-Direttur Generali, Ufficju tal-Kompetizzjoni

It-Tribunal

Ra l-appell ta' Malta Bargains Limited (UK) tat-28 ta' Jannar 2015 ("l-Appell") li permezz tieghu s-socjeta appellanti talbet lit-Tribunal jirrevoka d-decizjoni tad-Direttur Generali, Ufficju tal-Kompetizzjoni ("l-Ufficju") tas-6 ta' Jannar 2015 ("id-Decizjoni");

Ra l-atti kollha inkluz in-noti ta' sottomissjonijiet tal-partijiet;

Ra l-verbal tal-24 ta’ Frar 2015 fejn l-Appell thalla ghad-decizjoni tat-Tribunal.

Ikkunsidra

Illi permezz ta’ ittra datata l-31 ta’ Lulju 2012 is-socjeta appellanti ressqet ilment mal-Ufficcju (“l-Ilment”) fil-konfront tal-Awtorita tat-Turizmu ta’ Malta (“l-Awtorita”) li permezz tieghu s-socjeta appellanti allegat li l-Awtorita agixxiet bi ksur tal-artikoli 5 u 9 tal-Kap. 379 tal-Ligijiet ta’ Malta in kwantu iddiskriminat fil-konfront taghha meta fir-rigward ta’ tour operators ohra li huma kompetituri tas-socjeta appellanti applikat sussidju ta’ ghaxar liri sterlini ghal kull passiggier li jingieb f’Malta minn tali tour operator, minghajr limitazzjoni fin-numru ta’ passiggieri sabiex jinghata tali sussidju, filwaqt li fil-konfront tas-socjeta appellanti l-Awtorita applikat limitu fl-ghoti tas-sussidju in kwantu dan gie moghti fir-rigward ta’ massimu ta’ hamest elef passiggier li ngiebu Malta mis-socjeta appellanti.

Illi permezz tad-Decizjoni l-Ufficju kkonkluda li l-Awtorita m’hix ‘intrapriza’ kif definita fil-ligi in kwantu din bl-ebda mod ma qed toffri servizz fis-suq u kwindi mhix qed taghmel attivita’ ekonomika. Minn dan isegwi ghalhekk li ghall-Ufficju l-artikoli 5 u 9 tal-Kap. 379 ma japplikawx fil-konfront tal-Awtorita in kwantu tali artikoli japplikaw fir-rigward ta’ intraprizi kif definiti fl-istess ligi tal-Kompetizzjoni u cioe, “kull persuna sew jekk tkun individwu, korp magħqud jew mhux magħqud jew kull enti oħra, bi skop ta’ xi attività ekonomika, u tinkludi grupp ta’ intrapriżi.”

Illi permezz tal-Appell is-socjeta appellanti qed titlob ir-revoka tad-Decizjoni in kwantu skont hi l-Ufficju ghandu d-dritt li jindaga fir-rigward tal-agir tal-Awtorita in kwantu tali agir jikkostitwixxi attivita’ ekonomika li tista’ tirrizulta fi ksur tal-artikoli 5 u 9 tal-Att dwar il-Kompetizzjoni.

Ikkunsidra

Illi l-Ilment gie mressaq quddiem l-Ufficju sabiex dan jigi investigat a bazi tal-artikoli 5 u 9 tal-Kap. 379 tal-ligijiet ta’ Malta. Illi tali artikoli japplikaw fir-rigward tal-agir ta’ intrapriza jew grupp ta’ intraprizi. Kemm l-Ufficju u l-Awtorita jargumentaw li l-

Awtorita mhix intrapriza ai termini tal-ligi u kwindi l-imsemmija artikoli 5 u 9 tal-Kap. 379 ma japplikawx fil-konfront taghha. F'dan ir-rigward inghad li,

> "The term 'undertaking' is not defined in the Treaty but has been widely construed by the European Court. It has the same meaning for the purposes of both Articles 81 and 82. In Polypropylene the Commission stated that, 'the subjects of EC Competition rules are undertakings, a concept which is not identical to the question of legal personality for the purposes of company law and fiscal law … It may, however, refer to any entity engaged in commercial activities.' The ECJ has confirmed this broad interpretation. In Hofner and Elser vs Macroton it stated that **'the concept of an undertaking, encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.'** It is irrelevant that the body is not profit-making, or that it is not set up for an economic purpose. **'The basic test is therefore whether the entity in question is engaged in an activity that is an economic one, involving the offering of goods or services on the market,** which could, at least in principle, be carried on by a private undertaking in order to make profits."[1] (Enfasi tat-Tribunal).

Illi f'dan il-kuntest l-Ufficju u l-Awtorita jsostnu li l-Awtorita mhix intrapriza in kwantu qed taqdi funzjonijiet pubblici ai termini tal-artikolu 5 tal-Kap. 409 tal-Ligijiet ta' Malta, ossia l-Att Dwar Servizzi tal-Ivvjaggar u tat-Turizmu ghal Malta, u kwindi l-attivitajiet taghha huma maghmula fl-ezercizzju tal-poteri moghtija lilha qua Awtorita pubblika li ma humiex attivitajiet ekonomici peress li l-Awtorita ma toffrix prodotti jew servizzi fis-suq. Ghalhekk, isostnu li l-artikoli 5 u 9 ma humiex applikabbli fil-konfront tal-Awtorita. F'dan ir-rigward jinghad li,

> "an entity acts in the exercise of an official authority where the activity in question is a task in the public interest which forms part of the essential functions of the State … and where that activity is connected by its nature, its aim and the rules to which it is subject with the exercise of powers … which are typically those of a public authority."[2]

Kwindi, kif intqal f'Wouters, l-artikoli 81 u 82 tat-Trattat,

> "do not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity or which is connected with the exercise of the powers of a public authority."[3]

Bl-istess mod intqal li,

> "An entity may be an undertaking even where it does not have an independent legal personality but forms part of a State's general

[1] Jones & Sufrin, *EC Competition Law*, 2nd Ed., (2004) pg. 107
[2] *Corinne Bodson vs Pompes Funebres des Regiones Liberees SA* (Kaz 30/87)
[3] *Wouters vs Algemen Raad van de Nederlandsche Orde van Advocaten* (Kaz C309/99)

> administration if it is engaged in 'economic' activities. However, the case law draws a sharp distinction between activities classified as 'economic' in character, and those **where the entity 'acts in the exercise of official authority' (the latter activities being outside the scope of the competition rules). An entity, public or private, which performs tasks of a public nature, connected with the exercise of public powers or in the exercise of official authority will not be an undertaking, and so will be immune from the application of the rules**."[4] (Enfasi tat-Tribunal).

Illi min-naha taghha s-socjeta appellanti ssostni li, ghalkemm il-fatti huma differenti, l-principju trattat f'dan l-appell hu identiku ghal dak trattat fil-kaz deciz mill-Kummissjoni ghall-Kummerc Gust ("Il-Kummissjoni") fis-17 ta' Ottubru 2005 fl-ismijiet Bargain Holidays Limited et vs Awtorita tat-Turizmu ta' Malta (ilment numru 1/2004), liema kaz kien jikkoncerna lment fil-konfront tal-Awtorita in kwantu,

> "(f)l-istruttura li giet imwaqqfa u stabbilita mill-Awtorita tat-Turizmu ta' Malta a tenur ta' l-artikolu 3 tal-Kapitolu 409, il-membri li kienu jikkostitwixxu din l-Awtorita fil-perjodu meta s-socjetajiet lanjanti issottomettew l-ilment taghhom kienu jirrizultaw li huma membri li ghandhom interessi kummercjali specifici f'setturi partikolari tas-suq turistiku li kienu qed jirregolaw; Illi allura kienu f'posizzjoni li setghu facilment jinfluwenzaw is-suq de quo favur taghhom, kemm individwalment, kif ukoll bhala grupp.[5] … Illi allura ma ghandux ikun tollerat li struttura legislattiva minnha nnifisha sservi biex effettivament jinholoq cartel' fejn intraprizi li suppost qed jikkompetu b'mod gust fis-suq, ikunu minflok qed jikkooperaw flimkien kontra l-interessi tal-kompetituri taghhom u tal-konsumatur."[6]

Illi f'dak il-kaz il-Kummissjoni hassret id-decizjoni tal-Ufficju (li bhal ma ghamel fil-kaz in ezami kien iddecieda li l-Kap. 379 ma japplikax fil-konfront tal-Awtorita in kwantu din ma tikkwalifikax bhala intrapriza skont il-ligi) u ordna lill-Ufficju sabiex ikompli jinvestiga l-ilment tal-lanjanti. Is-socjeta appellanti qed targumenta li dak mitlub fl-Ilment in ezami u cioe li l-Ufficju jinvestiga l-agir tal-Awtorita fuq il-bazi ta' diskriminazzjoni bejn operaturi differenti, hu identiku ghal dak mitlub fil-kaz hawn citat u ghalhekk dak deciz fl-istess kaz, ossia li l-Awtorita hi intrapriza ghall-finijiet tal-Kap. 379, hu applikabbli ghall-Appell odjern.

Illi f'dan ir-rigward fid-Decizjoni l-Ufficju sostna li,

> "The case you quote does not apply to the facts in question. In case 1/2004, the complaint referred to the composition of the Board of the Malta Transport (sic) Authority (henceforth 'MTA'), which included another private

[4] Jones & Sufrin, *EC Competition Law*, 2nd Ed., (2004) pg. 110 - 111
[5] Kummissjoni ghall-Kummerc Gust, *Bargain Holidays Limited et vs Awtorita tat-Turizmu ta' Malta* (ilment nru. 1/2004), pg. 9
[6] Ibid. pg. 10

> undertaking. This is why MTA could be considered an undertaking – for that particular matter only – on the market, allegedly by placing at an advantage the undertaking that was a Board Member. This certainly is not what is being alleged or complained of in this matter, and the facts are no analogous."

Illi fil-fatt it-Tribunal jinnota li fil-kaz 1/2004 il-Kummissjoni qalet:

> "Illi minn analizi tal-fatti kif fuq sintetikament esposti, is-socjetajiet lanjanti **ma jirrizultax li qed jilmentaw rigward dawk l-azzjonijiet ta' l-istruttura appozitament imwaqqfa mill-Awtorita in dizamina fil-kapacita' taghha ta' Awtorita pubblika**;
>
> Illi l-ilment in dizamina **hu limitat ghal dawk l-azzjonijiet li fihom il-membri nominati fl-istruttura in dizamina jidhru palezament li qed johduhom fl-interess ekonomiku esklussiv taghhom** jew tal-kategoriji li qed jirraprezentaw, u allura kontra l-interessi tal-kompetituri taghhom;
>
> Illi la **l-azzjoni in dizamina** ghandha l-effett ta' "attivita ekonomika" kif delineata fil-kaz ta' Hofner fuq riferit, u dan, nonostante l-fatt li tali azzjoni gejja minn Awtorita pubblika, anke regolatorja, **tali azzjoni** hi soggetta ghat-test ta' kompetizzjoni gusta kif fuq stabbilit."[7] (Enfasi tat-Tribunal).

Illi fil-kaz Ambulanz Glockner vs Landkreis Sudwestpflaz inghad li,

> "The notion of undertaking is a relative concept in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules."[8] F'dan ir-rigward Jones & Sufrin ikkummentaw li, "**in each case therefore it is necessary to identify the particular 'activity' in question**, since an entity may be an undertaking for the purposes of some activities but not others." (Enfasi tat-Tribunal).

Illi f'Diego Cali[9] gie konkluz li l-attivita' ta' entita' mwaqqfa sabiex thares u tipprotegi l-ambjent tal-Port ta' Genoa ma kienetx attivita ekonomika in kwantu tali attivita kienet qed issir fl-interess pubbliku:

> "The anti-pollution surveillance for which SEPG was responsible in the oil port of Genoa is a task in the public interest which forms part of the essential functions of the State as regards protection of the environment in maritime areas. Such surveillance is connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority. It is not of an economic nature justifying the application of the Treaty rules on competition (Case C-364/92 SAT Fluggesellschaft vs Eurocontrol (1994) ECR I-43, para 30). The levying of a charge by SEPG for preventive anti-pollution

[7] Ibid. pg. 11
[8] Kaz C-475/99 (2001) ECR 8089, (2002) 4 CMLR 726, Jacobs AG para. 72
[9] Kaz C-343/95, *Diego Cali vs SEPG* (1997) ECR I-1547, (1997) 5 CMLR 484

> surveillance is an integral part of its surveillance activity in the maritime area of the port and cannot affect the legal status of that activity (Case C-364/92 SAT Fluggesellschaft vs Eurocontrol (1994) ECR I-43, para 28).”[10]

Illi fil-kaz ta’ Poucet et Pistre[11] l-Qorti Ewropea rriteniet li,

> “Sickness funds, and the organisations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit making … Accordingly, that activity is not an economic activity and, therefore, the organisations to which it is entrusted are not undertakings within the meaning of Articles 81 and 82 of the Treaty.” [12]

Illi f’Bodson[13] il-Qorti Ewropea qalet li r-regoli tal-kompetizzjoni ma kienux applikabbli in kwantu l-Awtorita in kwistjoni kienet qed taqdi dmir amministrattiv fl-ghoti ta’ koncessjonijiet ghal servizzi funebri. Il-Qorti enfasizzat li l-artikolu 81 tat-Trattat ma japplikax meta l-enti qed tagixxi fil-kapacita taghha ta’ Awtorita pubblika fdata bil-gestjoni ta’ servizz pubbliku.

Illi fil-kaz in ezami, permezz tal-Ilment is-socjeta appellanta qed tallega li l-Awtorita agixxiet bi ksur tal-Att dwar il-Kompetizzjoni fl-ghoti ta’ sussidju partikolari lil diversi operaturi. It-Tribunal hu tal-fehma tenut kont tad-decizjonijiet li saret referenza ghalihom fil-paragrafi precedenti li l-ghoti ta’ sussidju da parte tal-Awtorita hi attivita in linea mad-dmirijiet u l-obbligi taghha ai termini tal-artikolu 5 tal-Kap. 409, primarjament u inter alia li tippromwovi lil Malta bhala destinazzjoni turistika u ghalhekk tali attivita mhix wahda ekonomika izda hi ezercizzju ta’ awtorita pubblika fl-interess pubbliku. In vista ta’ dan, it-Tribunal hu tal-fehma li l-Awtorita mhix intrapriza kif definita fil-Kap. 379 tal-ligijiet ta’ Malta relattivament ghall-attivita’ in ezami u kwindi l-artikoli 5 u 9 tal-istess Kap. 379 ma jappikawx fil-konfront taghha f’dan ir-rigward.

Decide

Dan it-Tribunal ghalhekk jichad l-Appell tas-socjeta Malta Bargains Limited (UK) u jikkonferma d-Decizjoni tal-Ufficju tal-Kompetizzjoni tas-6 ta’ Jannar 2015.

[10] Ibid. para. 22 - 24
[11] Kazijiet C-159-160/91, *Poucet et Pistre v. Assurances Generales de France* (1993) ECR I-637
[12] Ibid. para. 18 - 19
[13] Kaz 30/87, *Corinne Bodson vs Pompes Funebres des Regiones Liberees SA* (1988) ECR 2479, (1989) 4 CMLR 984

< Sentenza Finali >

----------TMIEM----------