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Competition and Abuse of Association Membership

By Prof. Ivo Telec *

I. Introduction

Association law is a diverse type of law. This becomes apparent when we take into consideration all possible legal relations and implications.[1] The relatively neglected aspects of this type of law include questions of membership competition that are often linked with the possible abuse of membership at the expense of an association. One of the important questions concerns the relationship between the constitutionally guaranteed political right to associate and the competition created by the membership of an individual in several associations with identical or similar purpose or activities.

There have been cases in the Czech Republic where some associations have begun to react to an ever-increasing competition of membership by issuing bans on double or multiple membership in associations with similar or identical purpose or activities. It is necessary to point out that there is no law banning competition of membership or membership in more than one association. However, banning decisions or other provisions of the statutory bodies of associations have been made, and these are considered to be binding on any member of an association on the basis of its articles. In practice, such decisions are made after the association has come into existence. I do not know of any case of association articles including such a provision. If there were such a provision, the Ministry of Interior would have to react when registering the association, and this issue seems not to have come up.

There may be various reasons for associations to have felt it necessary to issue a ban on competitive membership. It may be the result of a mechanical, or even thoughtless, application of the prohibition of competition taken over from commercial law into the civil law and association law. In my view, such a prohibition has no place in those two fields, or, if it has application, it must be in a different sense than in commercial law. Despite the corporate nature of these two legal frameworks, they have completely different purposes, and this is what matters most when one considers the issue of competitive membership. While the purpose of commercial associations is to apply their constitutional economic right to carry out business activity or to be engaged in any other commercial activity, the field of association law is an application of the constitutional political right to associate.

In fact, however, it may be necessary for an association to carry out business or other economic activities and most associations in the Czech Republic do so. This then brings into question whether the commercial law doctrine of competition should apply to such associations without regard to their inherently different nature from commercial entities.

II. The political right to associate

Let us consider first the political right to associate (Article 20, Section 1 of the Bill of Rights). This public subjective right guaranteed by the Constitution is the basis of association activities. Economic activities of associations are only auxiliary to this right, and they usually follow from the nature of the activities of a particular association. There can theoretically be an association that has no property, does not collect membership fees and is only engaged in an activity the expenses of which are paid out-of-pocket by individual members. It may be, for example, engaged in activities which are limited to organising outdoors trips or discussions of members and which bring incur expenses or which are paid out-of-pocket by individual members.

The exercise of the political right to associate may be constrained under Article 20, Section 3 of the Bill of Rights only in cases determined by the law, if it is necessary in a democratic society for state security, protection of public security and order, the prevention of crime or the protection of rights and liberties of other persons. From the constitutional nature of the right to associate it follows that this right may be exercised simultaneously in several associations including those which have similar or identical purposes or activities. Were this not the case, it would be a restriction of a political right

guaranteed by the Constitution. The law could impose such a restriction only on the basis of a reason allowed by the Bill of Rights (see above), and none of those would appear to be applicable.

In my opinion, no law constrains the right to freedom of association in the sense that it would prohibit simultaneous membership in more than one association with identical or similar objects. Such a law could not be passed by Parliament, because it would in violation of the constitutional framework of possible constraints. In other words, such a limitation would not be in keeping with the Constitution.

Let us consider again the practical life of an association. If it happened that an association adopted a decision or any other provision of its body prohibiting its members to become members in another association with identical or similar objects, then given the reasoning advanced above, such a decision or a provision would be unconstitutional, because it would be in violation of Article 20, Sections 1 and 3 of the Bill or Rights.[2]

Under Czech law, such a banning decision or another provision of an association body to similar effect has the legal nature of private expression of will. From the viewpoint of private law, it is an invalid legal act because of its violation of the Bill of Rights. Czech law goes further to provide that a private legal act is invalid if its content or purpose is in violation of the law or if it evades the law (§ 39 of the Civil Code). By extending this rule by interpretation*a minori as maius* a private legal act is also invalid when it is in violation of, or evades, a constitutional law. If invalidity applies for a violation of an ordinary law (weak concept) the more it applies for a violation of a constitutional law (strong concept). This is one of the arguments of formal legal logic whose application is not excluded by any other legal logical argument.

In the case mentioned above, there would be absolute legal invalidity from the very inception, due to power of the law (*ex tunc*). This result would binding for everyone, which means also for the court called upon to deal with such a banning decision. If damages were to arise from its invalid act, an association would be responsible for it under the Civil Code. It seems clear then that a member must not observe such decisions or other provisions made by associations, because otherwise he/she would be acting inconsistently with the Czech legal order. It also seems that an association must not pass any legal or other sanctions against its members who would not respect a banning decision in compliance with the rules of the Czech legal order. Such a sanction would be invalid from the very beginning and the member would have the right to compensation for any damages suffered.

III. Abuse of membership and the question of unfair competition

The rationale for some associations having attempted to constrain simultaneous membership of their members in other associations may be due to economic and competition issues. The associations are trying in this way to protect themselves against possible abuse of membership. Abuse of membership may consist in various types of behavior. It may be, for example, that there was an intentional establishment of a new association aimed at a gradual ousting of the existing association from competition for public grants or access to private sponsors. Another reason may be, for example, enticing members, especially those with good experience or qualifications, etc. to join a new association to the detriment of an older one. However, it need not be only the case of enticing qualified members. Members can be enticed away from an association because another association tries to increase its membership in order to claim larger public grants or private sponsorship donations.

These and other cases show that unfair competition practices can be met found in all competition fields, including the field of associations, where organizations may be competitors against one another. Frequently, it is the case of an economic competition for "source clientele"[3]. In such cases the affected association has a number of claims at its disposal for protection against unfair competition (§ 53 and the following ones of the Commercial Code). In such circumstances those infringing the unfair competition rules may be not only the competing associations but also the members themselves.

In general, abuse of membership can also be sanctioned in other ways. According to § 3, Para 1 of the Commercial Code the exercise of members' rights must be in compliance with good manners and lawful claims of others. Otherwise, the exercise of members' rights is absolutely legally invalid. Any legal act against good manners is also invalid; including, for example, a contract of sale against good manners or an association membership against good manners.

These sanctions on their own do not conflict with the right of association. They merely sanction conduct that violates other principles of Czech law.

IV. Conclusion

The question of anti-competition provisions is considered in association law rather differently in comparison with commercial law. The reason is that in association law it is primarily the application of the political right to associate and not of the economic rights which is in question. However, this does not exclude the possibility of economic competition among individual associations. Therefore we cannot ignore the possibility of abuse or unfair competition at the expense of another competitor nor possible abuse of membership outside a competition relationship.

In order to confront such situations associations can undoubtedly take precautionary measures. However, it is not possible to mechanically apply anti-competition rules from commercial law in association law. Association law has a completely different legal nature, especially as far as its constitutional nature is concerned. Prevention of abuse consists primarily in lifelong moral education. In my view, the Czech private law, namely civil law and unfair competition law, includes enough legal sanctions that may be applied in cases of abuse of association membership or abuse of association competition. Nearly all such cases are also moral not merely legal matters and morality and legality overlap and support each other in their application to such situations.

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[1] In general, compare e.g. *Telec, I . : Spolkové právo (Association Law). 1. vyd. Praha: C. H. Beck 1998.*

[2] Editor's Note – This article does not address the issue of when an association may in its bylaws have provisions for expulsion of members and under what circumstances such provisions are appropriate. The Author will consider such issues in a subsequent paper.

[3] Compare *Hajn, P.*: Competition behaviour and right against unfair competition. 1 vyd. Brno: Masarykova univerzita 2000, p. 75.