ANTICOMPETIVE PRACTICES

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Abstract

Competition rules applicable to undertakings are the most important rules of the Community competition law. They present a direct effect and apply primarily to enterprises. But even the Member States must take into account these rules and should not favor prohibited behaviors. Prohibition of agreements restricting competition, abuse of dominant position, merger control and state aid are the pillars of European law (EU) competition.

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1. General problems

Article 81 (ex 85) EC (now art. 101 TFEU) include within its scope of activity any agreement, decision or practice which constitute barriers or restrictions on Community trade.[2]

These three concepts have received wide interpretation from both the Commission and the Court. Consequently, it is difficult to make a clear distinction between the three types of practices contrary to competition.[3]

It may be mentioned and other acts in this category (trade agreements collected solely between domestic producers and purchasers, agreements adjusting import prices to the price level, national agreements to share markets and sources of supply, reduction practices collective turnover of producers in the state, simultaneously increasing prices, restrictions on imports, bans or restrictions on exports, price rebates, promises not to challenge the validity of patents, etc.).

As an example, Commission Decision 94/601 of 13 July 1994 shows that a number of 19 undertakings providing carton of the EC resorted to an agreement and concerted practice consisting in the following actions:

- they proceed in secret in regular and institutionalized meetings in order to regroup, to negotiate and adopt a common plan to restrict competition sector;
- have unanimously agreed to increase regular prices for each quality product in each national currency;
- planned and implemented simultaneous and uniform price increases within the EU;
- frequently resorted to concerted supply control measures Community market in order to implement those concerted price increases;
- Proceeded to commercial production sharing information about deliveries, prices, production decisions, orders and indexes to use machines, in support of the above measures.

2. Agreements between undertakings

In this area there is no limitation of contractual arrangements and incidents competitive acts has no significance as those agreements which can be verbal.[4]

Interpreting Article 81 (ex 85) EC par 1 conclude that excluded individual behavior of an undertaking, if it is associated with other conduct of an undertaking to be converging. Also, arrangements can be and intelligence.

As regards such agreements, the Court held that, although a company acquires shares of competing companies, it is not an act of restriction of competition, but can be still considered a

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[2] Octavian Manolache, *Regimul juridic al concurenţei în dreptul comunitar*, Ed. All, Bucharest, 1997, p. 11.
[3] Walter Cairns, *Introducere în legislaţia Uniunii Europene*, Ed. Universal Dalsi, 2001, p. 234.
[4] Octavian Manolache, *op.cit.*, p. 12.

means of influencing the commercial conduct of those companies, thereby restricting or distorting competition in the market where these companies operate.

We are dealing with a situation where, following the purchase of a shareholding or through subsidiary clauses in the agreement, the investor gets to have control or actual legal commercial behavior of other companies. Similar situations exist when the agreement establishes trade cooperation between companies or creates a structure that can serve this cooperation, or where the agreement enables investors to strengthen its position in a subsequent period and gain effective control of other companies.

Simply businesses to express their will in a way that led to the inference that there is an agreement. [5]

In the same opinion, the Court has shown that it is sufficient expression of common intention businesses to behave on the market in that way, such as the situation of a "gentlemen's agreement" between a number of businesses, which means expressing true intention Parties in shaping the agreement restricting competition. [6]

Also an agreement within the meaning of Article 81 (ex 85) EC par 1 and behaviors that are continuing agreement after it was repealed.

It is possible mutual provision of detailed information between traders operating on a national market, information on transactions executed on the market. We can say that the mutual supply of information requires at least a tacit agreement between the operators concerned, in order to agree in respect of those areas and to define the institutional framework for information exchange.

Article 81 (ex. 85) EC apply in other situations. An example is when a regional distributor of electricity, which has an exclusive concession to distribute electricity in the territory of operation of the concession prohibits local distributors of electricity using a term exclusive purchase (including the general conditions of sale) to import electricity for the supply of public. This situation, taking into account the economic and legal context in which the (other similar exclusive agreements and their cumulative effects) may affect trade between Member States.[7]

It could be argued that the contracts in question were not signed by the public authorities and the regional distributor but between the local and regional distributors. Those contracts determine the conditions governing the supply of electricity and not have the effect of transferring to the local distributors service concession given to the undertaking regional since those conditions, especially clause of exclusive purchase, contrary contracts between distributors and may not be considered as inherent concession granted by local authorities.

It can make a classification of horizontal and vertical agreements.[8]

Horizontal agreements are those agreements that are in the same stage of the economic process, involving firms competing in the same markets (agreements between producers to limit production, or agreements between retailers).

Vertical agreements involving firms in different markets, given the different stages of the economic process (agreements between producers and wholesale democrats, exclusive trade agreements, maintaining resale prices, long-term sales contracts).

"Agreements" between undertakings (*vereinbarungen* or *kartel* in german, *agreements* in english) are agreements whereby two or more undertakings or adjust their economic behavior organizes the market.

It usually results from a contract, whose legal (sale, rental product, license ...) or form (written or oral) has no importance.

Two unsigned documents, interested persons qualified as "gentlemen's agreement" were considered as parts of a cartel. They propose an agreement Member States to third countries by the

[5] Ibidem, p. 13
[6] Ibidem, p. 13
[7] Ibidem, p. 13
[8] Ibidem, p. 13

main producers of quinine in the Community (Commission Decision of 16 July 1969). Court classified the same time such an industry agreement to set a minimum purchase price for cognac concluded by economic operators within the National Interprofessional Office of Cognac (judgment of 30 January 1985).[9]

3. Decisions by associations of undertakings

These decisions are acts (events) of intent issued by the body (authority) of a competent professional group (committee decisions freight river in Germany, consisting of representatives of the respective professions and representatives of shippers).

Due to these decisions, trade between Member States is affected and can not avoid judicial decisions in line with European competition law.

There is a difference between the decision and initial act by which the undertakings were united in a society, and all acts adopted by the company after this act shall be considered as decisions, regardless of the name given to those acts by members.[10]

Sometimes, even a recommendation may be considered to be a decision or at least a concerted practice if it is the express wish of the association coordinating the conduct of its members on the market.

In this context, the Court (in the settlement of a case) ruled that a recommendation (regardless of legal status), which is the faithful expression of the will of an association to coordinate the conduct of its members on the German market insurance is a decision of an association of undertakings (within the meaning of Article 85 par 1 shown). Although it was regarded as "non-binding recommendation" recommendation provides in mandatory terms a collective increase, lump and linear premiums.[11]

The applicant was an association whose aim is above all to represent, promote and protect the professional interests of the insurers practicing insurance against industrial fire risks and interruption of operation, insurers are allowed to operate in Germany.

A short time after the communication Recommendation association members, German businesses reinsurance decided to insert in their contracts of reinsurance on the same risks a special clause that the application of tariffs inconsistent recommendation will be treated in distress, assurance insufficient undercoating clause.

Practically statutes shows that the applicant association is empowered to coordinate the activities of its members especially in competition matters and that a specialized technical committee has the task of coordinating the pricing policy of its members.

At the same time, decisions or recommendations of the Committee are considered to be definitive as far as their confirmation by the association's office is required by one of the bodies specially designated for this purpose.

Analyzing all these factors, it was concluded that the recommendation was to restrict competition in the insurance market against industrial risks and termination of the operation.

In this issue, there is a Commission Communication on concentration and cooperative operations made pursuant to Council Regulation no. 4064/1989 relative to the control of concentrations of undertakings (J. L. 395/1 of 30 December 1989). This Regulation was amended by Council Regulation no. 1310-1397 of 30 June 297 (J.Of. L 180/1 of 10 July 1997).

Under Regulation are portrayed two types of "joint ventures".

The first kind are those which have as their object or effect the coordination of competitive behavior of undertakings that remain independent.[12]

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[9] G. Druesne, G Kremlis – op.cit p. 12.
[10] Octavian Manolache, op.cit, p. 14.
[11] Ibidem, p. 14.
[12] Code Europeen de la Concurrence, Ed, Dalloz, 1993, p. 300.

The second are those which satisfy in a sustainable manner all the functions of an autonomous economic entity and which does not involve coordination of competitive behavior of the parties or between the parties and the joint undertaking.

A joint undertaking is an organized grouping of material and human resources grouped together in order to achieve a specific economic aim.

In the opinion of the Regulation, the joint undertaking is controlled by other companies. By "control" means the possibility of exercising, directly or indirectly, a decisive influence on the work of the joint undertaking.

Control of an enterprise implies the existence of rights, contracts or other means, including the most important are:[13]

- roperty rights;
- influence over the deliberations or decisions of the bodies of direction and control of the enterprise;
- the right to vote in the above-mentioned bodies;
- agreements on the management of its activities.

Under the Regulation, a joint venture is controlled jointly.[14]

It is joint control since the founding companies must decide on its activities. This joint control resulting from contracts or other means. Joint control may result in constitutive act of the Joint Undertaking. It is not necessary to have at the beginning of joint control, the control may be acquired later by acquiring a participation in an existing business.

We can not talk about joint control when only one founding firms decide only on the economic activity of the Joint Undertaking. This is basically when a company owns at least half of the capital or assets of an undertaking, has the right to appoint at least half the members of the leadership and control, control at least half of the votes in one of those bodies, or has the right to manage one business enterprise. Even if other companies founding minority shareholding purely passive, allowing them to exercise some influence over the company, they do not have the capacity (power) to determine (separately or together) behavior Joint Undertaking, which means that a relative majority of capital or votes of the governing bodies are sufficient to control the joint venture.

In many cases, joint control of a joint venture is based on agreements between undertakings or concerted founding.

It happens very often that a firm majority in a joint enterprise to pay more minority businesses a contractual right to participate in the control of the Joint Undertaking. If two undertakings each hold half of a joint enterprise, they must cooperate in order to avoid blocking each other in the decision-making concerning its activities. In the case of joint ventures including founding three or more undertakings, each of which has a veto. An enterprise can be controlled equally by several other undertakings which are able to meet most of the capital, votes or seats in decision-making bodies of the Joint Undertaking.

If the participation of an undertaking in another undertaking is by nature or importance, insufficient to confer sole control and if there is joint control with other companies, we can not talk about concentration.

Further, under this Regulation (mentioned before), mentions the two conditions (positive and negative) that must be met for a joint venture to be regarded as the concentration.

The condition is positive that the joint undertaking meet sustainable manner all the functions of an autonomous economic entity.[15]

To meet this requirement, a joint venture must intervene as an independent supplier and buyer on the market. Joint undertakings not take over from the founding companies than some

[13] Idem, p. 301
[14] Idem, p. 301
[15] Idem, p. 302

partial functions can not be regarded as concentration, because not only aids economic activity of enterprises founding.

The company has an existence only if they exercise activities indefinitely or over a long period of time.

A crucial problem in the assessment of the autonomy of the Joint Undertaking is its ability to lead their commercial policy.

Economic autonomy of the joint undertaking is not jeopardized by the mere fact that the companies founding reserves the right to make certain decisions essential for the development of the Joint Undertaking (such as changing the scope of business, increase or decrease capital and benefit-sharing).

Negative condition is the absence of coordinating anti-competitive behavior.[16]

In assessing the likelihood of coordination of competitive behavior, to consider some different situations:

- joint ventures that have the same activities as the founding companies;
- joint ventures that undertake new activities in founding companies account;
- joint ventures founding businesses entering the markets;
- joint ventures that enter upstream, downstream or neighboring markets.

"The decision by an association of undertakings" is the manifestation of a collective desire that tries to produce an anti-competitive effect. These are generally the decision by a competent body of a trade union or professional groups with legal personality. Such a recommendation of an association, although not binding, may be prohibited because of its acceptance by the member undertakings of this combination exerts a strong influence on the rules of competition in that market.

4. Concerted practices

In this area, the Commission stated that concerted practices are a form of coordination between undertakings, replacing intentionally risks of competition practical cooperation between them which leads to conditions of competition inconsistent with normal market conditions.

The concept of "concerted practice" has its source in a regulatory law (US Sherman Antitrust Act) act in the forms of cooperation which includes not based on traditional conventions and other forms that may affect competition ("conspiracy"). There is also another term having a similar meaning ("Arrangements") in British law (UK Restrictive Trade Practices Act).[17]

This concept of concerted practice is clarified by the Court of Justice. Case law has shown first that Article 81 (ex 85) creates a distinction between this concept and the concepts of "agreements between undertakings" and "decisions by associations of undertakings". The Court also stated that "concerted practice does not have all the elements of a contract but may inter alia result from coordination which becomes apparent through behavior" and that "parallel conduct, although it can not be by himself identified with a concerted practice may be regarded, however, as serious evidence of such a practice if it leads to conditions of competition which do not correspond to normal market conditions, given the nature of the products, the size and number of undertakings and the volume of that market".

This was deemed to be an act contrary to the competition rules where the manufacturer cooperates with its competitors in every way, in order to determine a line of coordinated action on the change in prices, and to ensure its success by prior removal any uncertainty about the behavior of others with ties to the elements and place change.

Concerted practices as a necessary element of enterprises through direct contact convergence behaviors that lead to risks of competition by replacing close their market positions in

[16] Idem, p. 303
[17] Octavian Manolache, op.cit, p. 15

products covered by the beneficiaries of offers and requests, capacity and territorial areas of business.

Are considered and simple information sharing or occasional contacts without hiding intentions, but the reality is equal to concerted implied.

Also falls within the scope of art. 81 (ex 85) EC exchange of information between enterprises or disclosure of information by an undertaking to its competitors, in order to achieve a cartel in their supplies, covering not only deliveries already made but facilitating and constant supervision of normal deliveries, with to ensure that that is quite effective cartel.

They can be considered as evidence in identifying a concerted practice even simple behaviors parallel, if they lead to conditions of competition which is not consistent with the normal market rate, depending on the nature of the goods, the size and number of enterprises and the market size in question. Of course more needs to be portrayed and other arguments (reasons) to characterize the issue as a concerted practice.[18]

Parallel conduct can not be regarded as evidence of concertation, only if this consultation is the only plausible explanation for this behavior. For example, an exclusive distribution contract did not provide any export ban may not benefit from a block group, when the undertakings concerned are engaged in a concerted practice-oriented restricting parallel imports. What matters is the existence of cooperation among competitors, cooperation incompatible with competition rules contained in the Treaty.

The existence of concerted practice is proved by documentary indicative of abnormality testimony and assumptions based on corporate behavior with respect to market characteristics. The value is not absolute proof by presumption, is enough to prove the circumstances that allow businesses to substitute another explanation for the facts against them.[19]

The concept of "prepared practice" means that more companies agree on their behavior in some way in their relations, mutually. In the case of "coloring matter" (judgment of 14 July 1972), the undertakings have proceeded simultaneously in several occasions to price increases identical, the Court stated that "Article 85 distinguishes the concept of" practice ready " that of "agreements between undertakings" or "association of undertakings" in terms of understanding the prohibitions of that article a form of coordination between undertakings which, without being pushed until an agreement themselves, replaced by better science practical cooperation between the two with the threat of competition ".

It considered that "a parallel behavior in charging a banking commission uniform on transfers of amounts of a Member State to another made by banks through customer funds, constitute a practice ready prohibited by Article 81 (ex 85) EC if established by the national jurisdiction as this parallelism of behavior bringing together elements of coordination and cooperation characteristic of such practices, and that it is liable to affect the conditions of competition in the market of supplies relating to these transfers" (judgment of 14 July 1981 Züchner).

5. Conclusion

Because EU Member States have the competences to apply Articles 101 and 102 TFEU directly (previously Articles 81 and 82 TEC), that had as effect the improvement of Community competition law enforcement.

The possibility to have direct referral to the extensive EU jurisprudence and the decisions of the European Commission contribute to the quality of domestic antitrust enforcement, even if national competition authorities have new rights and competencies,

They were also obliged to observe the general principles of Community law.

[18] Ibidem, p. 16
[19] Ibidem, p. 17

These principles are binding on national authorities in Community proceedings regardless of whether or not they are part of domestic legal orders.

In this context, the best solution is to create explicit legal reasons for their application in national legislation on antitrust procedure.

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