Enterprises (companies) and their associations – subjects of anticompetitive practices

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Abstract

The competition rules applicable to enterprises (companies) are the most important rules of European Union competition law. They have a direct effect and are primarily applicable to companies. Prohibition of agreements restricting competition, abusive exploitation of dominant positions, control of concentrations and state aid are the pillars of European Union competition law.

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JEL Classification: K21, K33

1. Introduction

All prohibited agreements, decisions or concerted practices are agreed and applied by undertakings or associations of undertakings.[2]

The legislative text does not define the notion of "enterprise", although this notion is used in different contexts.[3]

The jurisprudence of the Court of Justice has shown that article 81 (ex 85) EC (today article 101 TFEU) has as recipients economic entities, each consisting in a unitary organization of personal, material and immaterial elements, having an economic purpose to produce and sell, in order maximizing profits.

As a follow-up, the Commission, in a Communication of 14 August 1990, defined the enterprise as an organized set of human and material means, pursuing a determined economic goal.

2. The notion of enterprise

By analyzing these definitions, it is concluded that the enterprise is an organized resource set (not necessarily a definite legal form), being a natural person, a legal entity or a group of at least two of them, operating as an

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[2] Manolache, O., *Regimul juridic al concurenței în dreptul comunitar,* All Beck Publishing House, 1997, p. 6

[3] Manolache, O., *Drept comunitar*, All Beck Publishing House, 2003, p. 299.

independent economic unit autonomous) and performing an ecomomic activity on a sustainable basis.[4]

In the Poucet judgment of 17 February 1993, the Court of Justice pointed out that a social security house with an exclusively social function could not be regarded as an undertaking. In its judgment, the Court relied principally on the principle of solidarity, principally involving redistribution of income between policyholders and compulsory affiliation to that social security house.[5]

The judgment of 19 January 1994 (SAT Fluggellschaft v. Eurocontrol) states that bodies exercising prerogatives belonging to the essence of states do not carry out an economic activity. The Court, after examining Eurocontrol's activities, concluded that these activities (by nature, object and rules governing them) refer to the exercise of airspace control and police prerogatives, typical powers (powers) and public powers.

An opposite optic emerges from a judgment of the Court of Justice of 12 September 2000 (Pavel Pavlov and Et Stichting Pensionenfonds Medische Specialisten) that under Community competition law the notion of an undertaking includes any entity carrying on an economic activity, irrespective of the legal status and financing of this entity.[6]

With regard to liberal professions and assimilated professions, for the first time in a decision of 18 June 1998 (Commission v Italy), the Court of Justice argued that the activity of consignors in customs is an economic activity, requiring it to be classified as an undertaking.[7]

With regard to professional organizations, the judgment of the Court of First Instance of 22 October 1997, in the case of 'certification of cranes', must be given first.[8]

This is about two Dutch organizations (foundations), SCK and FNK. They grouped crane location companies to disseminate recommended rates and banned their affiliates (members) from taking such cranes from non-affiliated enterprises.

In the light of all these, the two organizations were condemned by the Commission, which brought an action for annulment of that decision.

The Court of First Instance pointed out that SCK and FNK were bodies governed by private law which established a certification system for crane-based undertakings. Affiliation to this system was optional. The criteria required for this purpose were determined autonomously and the certificate in question was released only after a contribution had been paid.

The Court of First Instance considered that those characteristics were sufficient to show that the two organizations were engaged in economic activities and were therefore undertakings.

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[4] Dubouis, L., Blumann C, *Droit communautoire materiel*, Montchrestien Publishing House, 1999, p. 344.

[5] Cosmovici, M., Munteanu, R., *Înţelegerile între întreprinderi*, Romanian Academy Publishing House, 2001, p. 178.

[6] *Ibid.*, p. 179.

[7] *Ibid.*, p. 190.

[8] *Ibid.*, p. 190.

There is no definition either for business associations.

What characterizes these business associations is the free creation, the absence of a subordinate relationship, the formal and operational autonomy of members and the maintenance of their initial position. As such, each member of the association retains its legal personality. [9]

Collective decisions do not affect the legal personality, which is preserved even if the forums of the associated enterprises express a collective will.

3. Non-obligativity of a determined legal form

Since commercial activity requires the ability to hold resources and conclude contracts, it implies the need for at least part of an enterprise to have legal personality. An enterprise can change its legal form throughout its existence (division or merger).

It does not matter whether companies are civil, commercial, cooperative or legal. The option of a legal form does not influence the economic nature of the business carried out.

Some opinions argue that 'if the organization of a cooperative society does not in itself constitute a restrictive competitive behavior, such an organization may, in the light of the context in which the cooperative operates, still constitute a suitable means to influence the commercial conduct of the member undertaking of the cooperative in order to restrict competition on the market in which those undertakings carry out their commercial activities'.

Similarly, legal entities that do not have the form of a company, such as economic interest groups, associations and foundations, can also be taken into account.

4. The enterprise as an independent, autonomous economic unit

The Commission's communication of 14 August 1990 states that, in the case of concentrations, a decisive problem for the assessment of the autonomy of the undertaking is whether it is capable of conducting its own commercial policy, that is, drawing up plans, making decisions and acting independently (autonomously).

The enterprise must be free to compile its competitive behavior independently (autonomously) and according to its own economic interests.

The enterprise must have economic freedom (the freedom to contract, to enter or leave the market at the desired moment).

In the view of the Court of Justice, article 81 (ex 85) EC (today article 101 TFEU) does not refer to agreements or concerted practices between undertakings belonging to the same concern and which have the status of parent and subsidiary, if the undertakings form an economic unit within which the subsidiary has no

[9] Manolache, O., *op. cit. (Drept comunitar)*, p. 300.

effective economic freedom to determine the direction of its action on the market and if the agreements or practices concern only an internal division of tasks between undertakings.

Thus, in the application of the ECSC Treaty, it has been shown that in competition law the term "undertaking" must be understood as indicating an economic unit, even if that economic unit consists of several natural or legal persons.

It has also been considered that the behavior unilaterally adopted on the market can not fall within the scope of art. 81 (ex 85) EC, (today article 101 TFEU) even if that conduct consists of prohibiting subsidiaries from supplying products to customers established in the Member States.

What is decisive for the application of article 81 (ex 85) EC (today article 101 TFEU) is the criterion of the independence of the subjects of the agreements concerned or of the absence of such subordination relationships, whereby one party determines the conduct of the other party through effective exercise of control.

The criterion of legal personality is irrelevant from this point of view, as long as the conduct (s) of a party is attributed to another party.

The unit of conduct (s) of the subjects (parent and subsidiary) on the market is more important than their distinct separation. [10]

In that regard, the Court held that, when a company established in a third country exercises control over subsidiaries set up in the Community and decides that they (the subsidiaries) will put in place a decision to increase prices, conduct (the shares) of the subsidiaries must be put into the parent company's account. As a follow-up, the Court has also pointed out that, for the purpose of determining whether an undertaking has infringed article 81 (ex 85) (1) EC (today article 101 TFEU), reference criteria are the participation, together with other undertakings, of an agreement restricting competition; if that agreement could affect trade between Member States. It is irrelevant whether the individual participation of the undertaking in that agreement could have restricted or affected trade between Member States.

Concerning this second issue at stake in defining an enterprise, the legal literature analyzed the circumstances in which two or more distinct (independent) legal entities can be considered as constituting a single economic unit (enterprise):

- groups of companies (corporate or "group economic units"), in which the constituent elements (which may have their own legal identity) do not have the economic one too, because ownership requires control;
- the mere existence of majority shares held in subsidiaries does not automatically entail a degree of control and the members of the independent group may be regarded as distinct undertakings (to that effect, the case-law of the Court has held that article 85 (today article 101 TFEU) applies where an undertaking does not exercise to a company other than that control deriving from participation in its capital which is not undeniably of major interest);

[10] Manolache, O., op. cit. (*Regimul juridic al concurenței în dreptul comunitar)*, p. 9.

- the exclusive representation, where a representative and a representative for an exclusive area will be considered as one enterprise;
- secondary contracting where an intermediary supplier acting on the instructions of the contracting party is under his control to a sufficient extent;
- the sole trader, where the natural person concerned is not an employee but engages in independent trade;
- public undertakings (article 86, ex 90 EC) (today article 107 TFEU);
- state bodies involved in commercial import or export activities in states with centralized economy;
- a state or any of its central or local bodies, where they act not as a public authority but as an enterprise;
- the professional association in which the members are reciprocal representatives, and this group of individuals form an enterprise even if it does not have legal personality;
- a charity organization when involved in commercial activities, even if it may be non-profit-making;
- a nonprofit organization managing an old-age insurance plan established as an optional plan and operating in accordance with the capitalization principle, following the rules established by the authorities and performing an economic activity in competition with life insurance companies.

5. Coordination of the activity on a sustainable basis

For individuals, we can not talk about commercial activities if products are bought or sold to meet personal needs.[11]

If state bodies carry out an economic activity (other than exercising their functions of authority), they may be considered to be engaged in a commercial activity. Other non-profit entities may engage in activities considered commercial.

This kind of activity, like all the commercial activities carried out by the entities defined above, must be exercised for a longer, even unlimited and not accidental period. In fact, in a Commission Communication of 14 August 1990, it is clear that an undertaking is sustainable when it is capable of carrying on its activities for an unlimited duration or at least for a certain period of time.

This Commission Communication of 1990 refers to the constraints attached to merger operations. The communication does not, however, oppose the interpretations of the Court of Justice.

The "restrictions" mentioned in the Communication are those established between the parties in the context of merger operations and which limit their freedom of action on the market. There are no restrictions to the detriment of third parties.

If the restrictions are the unavoidable consequence of the concentration, they are analyzed according to Article 2 of the Council Regulation no. 4064/89 of

[11] *Ibid.*, p. 11.

21 December 1989. If the restrictions can be dissociated from the concentration, they may be examined in accordance with Articles 85 and 86.[12]

The "directly related" restrictions (the first of the above) must be ancillary restrictions to the implementation of the concentration operation, ie subordinated restrictions as important to the main object of the operation. These are not substantial restrictions of a fundamentally different nature than those resulting from restrictions. At the same time, we can not even speak of contractual arrangements as one of the constituent elements of the merger. Also, the contractual arrangements relating to the stages prior to the establishment of control (in the field of progressively achieved concentrations) are not included here.

The notion of 'directly related restrictions' excludes from the application of the Regulation additional restrictions agreed on that occasion, which are not directly related to the operation. It is not sufficient that these additional agreements are in the same context as the concentration operation. Among the additional restrictions contained in the Regulation are the contractual prohibitions on competition imposed on the seller in the field of merger operations carried out by the transfer of a business or part of an undertaking.

Among the restrictions mentioned above are the contractual prohibitions imposed on the seller in the case of merger operations carried out by the transfer of an undertaking or part of an undertaking. These prohibitions aim to guarantee the transfer to the buyer of the full value of the ceded assets, which means both tangible and incorporeal assets. Before acquiring the full value of the assets that are assigned to it, the buyer (the acquirer) must be protected against the seller's competition.

As regards the acceptable duration of the prohibition on competition, it is considered that the most appropriate maximum duration would be 5 years.

The geographic scope of the non-competition commitment must be limited to the area where the transferor has carried out the goods and services before the assignment and the non-competition clause must be limited to the products and services which are the object of the business activity of the ceded enterprise or part of the business.

6. Conclusions

The existence of a functioning market economy requires, along with the free movement of goods, persons, services and capital, an undistorted competitive environment[13]. As a general rule, competition can be distorted not only by agreements that restrict it between the parties but also by agreements that prevent or restrict competition that might interfere between one party and third parties. It is irrelevant if the parties to an agreement are equal in terms of their position and

[12] Dubouis, L., Gueydan C, *Grand texts de droit de l'Union Europeene*, Dalloz Publishing House, 1999, p. 675.

[13] Dinu, V., *Competition's Policy – a Tool to Protect Consumer's Rights and Interests*, „Amfiteatru Economic", no. 19(45)/2017, p. 335.

function in the economy. This also applies if the parties seek to prevent or restrict third-party product competition, create or guarantee for their profits an undue advantage to the consumer or the beneficiary.

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