An overview of the eu competition rules

Life

Introduction

It will be critically discussed how EU law identifies anti-competitive conduct between undertakings. In doing so, the extent to which such conduct is considered illegal will also be assessed by reviewing the case law andacademicopinion within this area. Applicable textbooks, journal articles and online legal databases will be utilised by adopting a secondary research approach. This will enable a wider range of information to be collected that is considered suitable for this study.

Main Body

It is provided for under Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU) that; " all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States" shall be prohibited. This advances free competition within the EU's economic market by prohibiting conduct that could disrupt free competition. Therefore, any behaviour involving the restriction of free trade will be sanctioned (Castendyk et al, 2008, p. 41).

Much concern is thus placed upon " horizontal agreements and concreted practices because of the detriment to consumer welfare that results from co-ordination between competitors" (Colston and Galloway, 2010, p. 25). Despite this, vertical agreements are also cause for concern since they often contain clauses which provide for the exclusive distribution of trade as well as single branding. This can have a significant impact upon free trade and competition within the common market is ultimately stifled.

InConsten & Grundig v Commission [1966] ECR 299; it was made clear that an agreement which aims to artificially maintain separate national markets so that the free flow of particular products can be restrained would violate Article 101. Therefore, undertakings which attempt to affect the free flow of products in any way will generally be deemed illegal (Wesseling, 1999, p. 427). In addition, as demonstrated inProcureur du Roi v DassonvilleCase C-8/74, [1974] ECR 837, trading rules enacted by Member States must not contain any prohibitions on the free flow of products which are capable of " hindering directly or indirectly, actually or potentially, intra-Community trade." Therefore, Member States must also ensure that their practices comply with the provisions in Article 101, yet as noted inSociete Technique MiniereCase C-56/65, [1966] ECR 235; " the competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute." Since not all anti-competitive conduct between undertakings will be considered illegal.

This is because; there are certain agreements which will be permitted under Article 101 (3) and section 9 of the Competition Act 1998. This is provided that they can fulfil certain conditions under Commission Regulation No's 2790/1999 and 1400/2002. In effect, it is manifest that anti-competitive conduct between undertakings is largely considered an illegal practice within the EU. However, because there are certain exceptions to this rule, it is likely that anti-competitive undertakings will still be adopted in certain instances. An example of this can be seen in theWouters, Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van AdvocatenCase C-309/99, [2002] 4 C. M. L. R. 27case when a Regulation

which was created through an association of undertakings within the meaning of Article 101 (1) was deemed necessary even though it prohibited partnerships. The Regulation in this decision clearly effected competition within the common market and thus violated Article 101, yet because it use could be justified the Regulation was permitted.

Consequently, it will depend entirely upon the circumstances as to whether anti-competitive conduct between undertakings will be permitted or not and " where the restriction is ancillary to some desirable, pro-competitive agreement it is likely to qualify for exemption" (Woods and Watson, 2012, p. 594). This may consist of either a research and development agreement or a specialisation agreement between small and medium sized firms and such agreements will thus qualify for either automatic exemption or block exemption under Article 101 (3). InRe Vacuum Interrupters Ltd [1977] 1 CMLR D67the parties were provided with individual exemption on the basis that the agreement was for research and development. Regardless of this, however, it is often very difficult to determine whether anti-competitive conduct between undertakings will be considered illegal or not since the term ' undertaking' remains ill-defined (Craig and de Burca, 2011, p. 961). Still, it was held inHofner and Elser v Macroton GmbH Case C-41/90 [1991] ECRI – 1979that the term undertaking will generally cover " any entity engage in economic activity."

Therefore, any organisation found to have entered into an anti-competitive agreement will be capable of being subjected to the provisions contained in Article 101. Nevertheless, it will depend entirely upon the way in which the undertaking operates in order to decide whether it can be rendered

permissible; Kattner Stahibau GmbH v Maschinenbau – und Metall – Berufsgenossenschaft [2009] ECR – I 1513. Bailey (2012, p. 559) believes, nonetheless, that there are four different ways an anti-competitive agreement will be exempted from the provisions contained under Article 101 which are; 1) that the context of an agreement can exclude a prima facie finding of restrictive object; 2) that the undertakings can plead an objective justification for a prima facie object restriction. 3) where the restriction does not have an appreciable effect on competition between Member States; and 4) that a restriction should be permitted under article 101(3). Therefore, rather than merely relying on the provisions under Article 101 (3) it is believed by Bailey that there are other situations which may give rise to an exemption under Article 101 (1). Again, this will require close inspection of the undertaking in question in order to decide whether or not it can be justified.

Conclusion

Overall, whilst it is provided for under Article 101 (1) that anti-competitive conduct between undertakings is illegal, it is clear after reviewing the case law that there are many available exceptions to this provision. Consequently, it will thus depend upon the particular facts of the case as to whether an undertaking is considered reasonable or not and although conduct which affects the free flow of trade should always be prohibited, this is not always the case in reality. Hence, there will often be times when a restriction of competition is required which illustrates that anti-competitive conduct between undertakings is not always rendered illegal.

References

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