The commissions guidelines on vertical agreements law european essay

Law

Competition Law has always been of central importance to the European Union. It covers anti-competitive agreements between firms, abuse of a dominant position, and mergers. Article 101 of the TFEU is the principal vehicle for the control of anti-competitive agreements. Having such agreements, that can be Horizontal while others may be Vertical. The difference is that; horizontal agreements are between firms of the same level of the production cycle, such as agreements between soft drinks manufacturers, while vertical agreements, are agreements between firms at different levels of production such as an agreement between a producer of equipment and a retailer. At first sight horizontal agreements may seem to be less likely to create unfair competition as by nature the agreeing parties are in direct competition. Although horizontal agreements may lead to economic benefits such as enhancing product quality, pooling know-how and launching innovative products in a shorter period of time, they may lead to un-competitive issues through fixing of prices, fixing of output, increasing market power, etc…The Commission, in its guidelines on the applicability of Article 101 to horizontal co-operation agreements sets an extensive list of horizontal co-operation agreements which on the other hand is not exhaustive due to the complexity of agreements which may be made between undertakings. The main areas analyzed by the Commission include information exchange, research and development agreements, production agreements, purchasing agreements, agreements on commerecialisation and standardisation agreements. The Commission’s guidelines on Vertical Agreements is set out in 5 sections which are the main factors applied to assessing vertical agreements. These main issues concern examples of vertical agreements which are not outlined in article 101 (1), the conditions in applying the " Block Exemption Regulation", conditions of withdrawing block exemptions, guidance on how to define the relevant market and calculate market share and the general framework of analyzing and enforcing against vertical agreements. As vertical agreements are more complex than horizontal agreements due to the fact that these agreements are made between undertakings from different sectors, it is of relevant importance that each and every case is taken on its own merits and consideration for specific circumstances must be taken. The " Block Exemption Regulation" mentioned refers to a condition whereby if through vertical agreements, no hardcore restrictions of competition are evident, it is presumed that such verbal agreement is legal depending on the market share of the parts in the agreement. In order for the block exemption to apply, the parties signing the vertical agreement shall not have 30% or more of the market share. The Commission also holds the view that an agreement reached by undertakings which in one way or another affects trade between Member States shall not limit fair competition as per article 101 (1) if: the undertakings in agreement do not hold 10% or more of the relevant market share affected by such agreement, being that the undertakings are actual or potential competitors or if the market share held by the agreeing parties does not exceed 15% if the contract being signed does not involve actual or potential competitors. In such cases no action shall be taken against the undertakings concerned. Agreements entered into by SMEs, i. e. small and medium enterprises whose annual turnover and balance-sheet total do not exceed EUR 40 million and 27 million respectively and which have a maximum of 250 employees are rarely capable of appreciably affecting trade between Member States and are not, in principle, investigated by the Commission. However, there exists a " blacklist of hardcore restrictions" - such as price-fixing, market-sharing or territorial protection - which, because of their nature are regarded as typically incompatible with Article 101(1) of the TFEU and hence liable to be caught by the ban on agreements, even if the parties' market shares are below the above-mentioned thresholds. [1]Nevertheless, there will also be additional agreements not listed which are prohibited because of their particular conditions or restrictions on competition. Competition law has different objectives. Its primary objective is to enhance efficiency meaning that its purpose is to maximize consumer welfare and achieve the optimal allocation of resources. Traditional economic theory indicates that goods and services are produced most efficiently where there is perfect competition or, more realistically, workable competition. [2]Another aim of the competition policy would be to protect consumers and smaller firms from large aggregations of economic power, whether in the form of monopolies, or through agreements in which rival firms coordinate their activity so as to act as one unit. A third objective is to facilitate the creation of a single European market, and to prevent this from being disturbed by private undertakings. EU law prohibits tariffs, quotas, and the like that impede attainment of this goal. The effectiveness of such norms would be undermined if private undertakings could partition the EU market along national lines. Article 101 of the Treaty of the Functioning of the European Union (ex Article 81 EC) is the principal weapon to control anti-competitive behavior such as cartels, (a formal agreement among competing firms). 1999/60 Pre-Insulated Pipes, OJ 1999 L24/1; [1999] 4 CMLR 402 refers to a case where a cartel started off in Denmark and extended to a number of EU Member States. This producer of pre-insulated pipes for district heating not only agreed in fixing prices but made a number of uncompetitive agreements with more than 12 different undertakings around the European Union. Article 101(1) requires that the agreement, decision, or concerted practice has the object or effect of preventing, restricting or distorting competition in the internal market. If the agreement between two or more market operators restricts competition, the Article Treaty 101 prohibits this by imposing a restraint in which a situation is referred to for implying a manipulation of the market in a manner which is improper or unlawful. The Article mentioned above, provides a non-exhaustive list of agreements which will generally fall within a prohibition (subject to the de minimis rule +the legal exception in Article 101(3) TFEU). De minimis meaning for agreements of minor importance, the CION quantifies with the help of market share thresholds, what is not a considerable restriction of competition under Article 101 TFEU. Article 101 (1) of the TFEU imposes three main areas of incompatibilities to fair competition which are agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between EU Member States. It is clear that formal agreements between undertakings which have as their scope anti-competitiveness are highly improbable and therefore it is of essence that the Commission bases its regulations around decisions and concerted practices. Cases 41, 44 and 45/69 ACF Chemiefarma NV v Commission [1970] ECR 661 is a good example of how the ECJ treats informal agreements in the same manner as signed agreements. In fact this particular case resulted from a gentlemen's agreement on sales of quinine and quinidine within the common market which although was ended by all parties in 1962 still the ECJ decided that the gentlemen's agreement still stood and action had to be taken. On a higher note, even if there is no agreement at all, two undertakings or more may be deemed to have acted in an uncompetitive manner through concerted practice/s. This may result through undertakings deciding on their own steam to control prices in a manner that the market is stabilized to certain price ranges. Although this issue is criticized, the ECJ has decided cases to this effect and has a firm grasp of this notion when analysing cases. The leading ECJ decision with regards to concerted practice is Case 48/69 ICI v Commission [1972] ECR619 were the Court considered allegations that concerted practices had taken place within the dyestuffs industry where it found that 80% of dyestuffs within the EU were produced by 10 companies which on their own initiative and through different price structures were taking part in an oblivious cartel created by their concerted practices. Article 101 (1) provides a list of prohibitions related to agreements which when taken into account may be incompatible to trade between Member States and which have as an object or either effect the prevention, distortion or restriction of competition within the internal market. The five points outlined in Article 101 (1) are: It is prohibited that any number of undertakings agree to fix selling or purchasing prices or any other trading condition. No company or undertaking shall limit or control production, markets, investment in products/companies or technical developmentUndertakings shall be prohibited in agreeing to share markets or sources of supply in a dominant wayCreate a competitive disadvantage by agreeing to apply conditions which are less favorable towards one or more companies or undertakingsTie into contracts, obligatory clauses which pertain to additional obligations which in no means have connection to the subject of such contractArticle 101 (2) outlines a very simple clause which indicates that all agreements and decisions taken, which are found to be in breach of fair competition as indicated in 101 (1) shall be automatically void. Article 101 (3) on the other hand offers a channel which outlines exemptions allowed in relation to all clauses set out in 101 (1). This article provides a basic guideline, whereas agreements, decisions or concerted practices taken by an undertaking or a number of undertakings which contribute to the improvement of producing or distributing goods or the promotion of technical or economic progress in a fashion which allows consumers to gain fairly from the resulting benefits are allowed to take place and therefore are not prohibited under 101 (1). The Commission gives an extensive path to all interested parties in Member States by providing a set of guidelines concentrated on the effect on fair competition by both horizontal and vertical agreements taking into consideration both restrictions and exemptions. Article 101 is intended to create fair competition between Member States mainly in the best interest of all persons in all positions being consumer, producer or undertaking. In assessing Article 101, the two main criteria which are individuated as being anti-competitive may be either an object or else an actual or potential effect on competition outlined in an agreement. Agreements which by their very nature restrict competition are called object agreements as these agreements are prone to create a negative effect on competition, therefore it is presumed by design that they limit competition. The Commission clearly points out that object agreements are anti-competitive from inception and therefore are in clear breach of Article 101, with the consequence that the actual effect deriving from such agreements may not need to be considered. The harsh approach taken by the European Court of Justice to such object agreements is clearly illustrated in the ruling given in the Consten and Grundig vs the Commission case which had the object of Grundig preferring Consten to other distributors regarding the wholesale of their products. Thus, the actual effects were not even assessed as the agreement automatically infringed Article 101 (1). Another case referring to an object agreement is GlaxoSmithKline and Others against the Commission which concerned disparity in pricing, whereby GlaxoSmithKline made an agreement with Spanish wholesalers, which agreement made a clear distinction between the prices charged by the wholesaler to local pharmacies and hospitals and those charged on exporting medicines to other Member States. Cases C-501, 513, 515 and 519/06 apply. It can be said therefore that where agreements fall within the examples provided by the Treaty and the case law, it is well established that they will infringe Art 101(1). These types of agreements will be presumed to be restrictive on competition and this cannot be rebutted by proving that it did not have such effect. To this extent, businesses can plan their affairs with sufficient certainty. Any such agreement is automatically prohibited and it will not be open for them to argue that the effects of their agreement might in fact have pro-competitive effects and thus should be allowed. Effect agreements are on the other hand open to interpretation and result from case law. In fact, agreements which do not include clear cut restrictions as an object must nonetheless be analysed as to the effect produced on competition. The main criteria of assessment must be that of the effect taken in a market context and with a light on the economic relevance. This line of thought was pointed out after the European Court ruling of Case 56/65 -1966 between STM and Maschinebau Ulm. In fact this line of thought is referred to as post STM. These criteria of assessment raise an important issue as to what factors are to be considered when assessments of cases on effect agreements take place. In fact the ECJ, with regards to case C-234/89 [1991] ECR I-935 (Delimitis vs Henninger Brau) focused on the impacts on inter-brand competition. This means that any agreement must be first taken into consideration in view of the relevant market and assessed in a way to establish that through the agreement access to that market was not impeded and whether new competitors are able to penetrate such market or existing ones are able to expand their businesses. If the ECJ finds that any of the above were present, thus impeding the market, it must then consider if such agreement contributed positively to the market. This approach is referred to in the case T-374/94 [1998] ECR II-3141 (European Night Services vs Commission). Furthermore, the STM case enlightened the thought that regard must also be taken with regards to the restraints on intra-brand competition. This was illustrated in STM which involved an exclusive distribution agreement. The European Court of Justice pointed out that the effects of such agreement must analysed in the light of the competition which would occur if the agreement in question had not been made. By taking this approach, the Court concluded that an exclusive distribution agreement would not infringe Art

101(1) if it can be shown that it was necessary for the manufacturer to penetrate the market. The Commission states that in circumstances where the main transaction does not impinge on inter- or intra-brand competition, the individual restraints in the agreement will be taken in a secondary nature. This means that if restrictions are directly related and vital to the main non-restrictive articles in an agreement, Article 101(1) shall not be infringed in any way. Although this principle of ancillary restrictions is accepted, it is broadly criticized. Therefore, it can be said that when taking into consideration object agreements, businesses can plan their affairs with sufficient certainty as the law is well-established where hardcore restraints are clearly prohibited. On the other hand, when it comes to effect agreements the law is rather complex, however arguably sufficient guideline is provided to enable business to determine whether their agreement would be compatible with Art 101(1). The Commission has broad powers in competition law and has the main responsibility to ensure that the application of Article 101 is enforced in order to maintain " an open market economy with free competition" as is enshrined in the Treaty which has as its main objective the welfare of the costumer, encouraging the optimal allocation of resources and creating economic tools in order to assist economic partners in bettering productive efficiency, quality and innovative products. As highlighted throughout, Article 101 is an extensive tool which defeats anti-competitive behavior thus resulting in a competitive Europe.

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