

ZÁKLADNÍ CÍLE EVROPSKÉHO SOUTĚŽNÍHO PRÁVA A JEJICH POUŽITÍ PŘI FORMOVÁNÍ EVROPSKÉ SOUTĚŽNÍ LEGISLATIVY A PRAXE

APPLICATION OF THE E.C. COMPETITION LAW GOALS IN THE SHAPING OF THE E.C. COMPETITION LAW AND PRACTICE

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Abstrakt

Soutěžní právo ES sleduje dva základní cíle: sjednocování trhu a ekonomickou efektivitu. Starší rozhodnutí Komise a Evropského soudního dvora (ESD) však ukazují, že přednost zpravidla dostával první cíl (tedy integrace trhu) na úkor cíle druhého. Cílem tohoto příspěvku je poskytnout náhled do aplikace těchto cílů při tvorbě soutěžní legislativy ES a v praxi soutěžních orgánů. Příspěvek srovnává rigidní přístup soutěžních orgánů v letech šedesátých s liberálnějším přístupem, který se objevil v letech devadesátých.

Klíčová slova

Soutěžní právo ES, jednotný vnitřní trh, ekonomická efektivita, soutěžní politika ES, vyloučení, omezení a narušení soutěže, intervencionismus, rigidní přístup, ekonomický přístup, vliv na soutěž

Abstract

The EC Competition law pursues two fundamental objectives: single market integration and economic efficiency. The older decisions of the European Court of Justice show, that it was usually the market integration goal which took priority over the goal of economic efficiency. The purpose of this essay is to provide an insight into the application of these goals in the shaping the EC competition legislation and practice of the competition authorities. The essay compares the rigid approach of these authorities in the 1960s with the more liberal approach in the 1990s.

Key words

EC competition law, single market integration, economic efficiency, EC competition policy, prevention, restriction or distortion of competition, interventionism, rigid approach, economic approach, effect on competition

Introduction

As most commentators agree, the EC competition law, pursues two fundamental objectives: single market integration and economic efficiency. The purpose of this essay is to provide a concise insight into the application of these goals in the shaping the EC competition legislation and practice of the competition authorities. In first part of this essay I address the fundamental goals in general. The second part addresses the Commissions' policy based on its high interventionism. The third part illustrates the enforcement of the above mentioned objectives on decisions of the European Commission and the European Court of Justice, it concentrates on pursuing the market integration goal as it was supposed to be the primary objective in the years the decisions were issued. The final part then provides an insight into the new competition policy of the Commission and the new EC competition legislation which followed to pursue this policy.

I. Objectives of EC Competition Law

The competition law does not have any single exhaustive objective. The Chicago school, on one hand, asserts that the only aim of competition should be prevention of inefficient allocation of resources and the competition law should therefore pursue only the economic efficiency.¹ The EC competition policy, on the other hand does not have only one objective. Pursuing only the efficiency goal could be directly contrary² to the Community primary goal which was to create a common market by eliminating all barriers between member states, and ensuring their economic and social progress. Notwithstanding, the EC legislation does not provide any comprehensive list of its goals, the Preamble of the EC Treaty and its Article 2 provide a set of goals, the Community seeks to achieve. Article 3 of the Treaty then speaks about activities the Community is to undertake to facilitate achieving these objectives. It

¹ Sonya Margaret Willimsky points out in this context that the Chicago model, for example, views practices such as predatory pricing, tie-ins or resale price maintenance not as anti-competitive but as beneficial to the consumer. "The Concept of Competition", (1997) 1 ECRL 54"

² Despite it is still one of the most important goals

mentions as well in its paragraph 1(g) as one of its activities, the inclusion of system ensuring that competition in the internal market is not distorted. This leads us to Article 81 listing, in its first paragraph activities prohibited as incompatible with the common market because they have, as their object or effect the prevention, restriction or distortion of competition. The primary task of the EC competition policy is therefore the single market integration. As can be implied from all of the above, the EC competition law is not pursued for its own sake³ conversely; it is one of the means by which the internal market and other Community objectives⁴ are achieved. The fact that the competition policy's task is not only „efficiency maximisation“ but also pursuing other objectives was upheld by the European Court of Justice in *Metro v. Commission*⁵. However, it is necessary to realize the fact that even though the market integration was supposed to be the „priority“ (especially in the Community's early years), the efficiency objective remains to be one of the most important goal, and could no be left far behind.

2. Interventionism

To facilitate achieving the market integration goal, the competition authorities in the EC have to pursue much more interventionistic policy than the authorities for example in the United States, where the sole competition goal is the economic efficiency. The Commission had believed for decades that market integration guarantees more competition in the market, and therefore kept fighting any agreement, decision or practice which seemed to prevent, restrict or distort the competition within the common market. It seemed to be a correct thing to do, since it would have been contrary to the internal market objective, to allow private actors to create new barriers to trade between member states, once these barriers were finally erased by these states.⁶ However, this approach had its flaws as well. The Commission (and subsequently the Court, at least most of the time), only strictly applied Article 81, and did not take into account the concrete circumstances of a particular agreement, decision or practice, in which the undertakings were involved. This too formalistic application of the competition rules meant in fact, that sometimes even undertakings with no real impact on the trade

³ As Sir Leon Brittan stated: “indeed, it can be said that a positive competition policy should not be determined in isolation, it must be related to and integrated with economic, industrial and also social policy.”

⁴ Objective such: employment, industrial, environmental, regional or social policy

⁵ „The requirement contained in Article 3 and 85 of the Treaty that competition shall not be distorted implies the existence on the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and attainment of the objectives of the Treaty; in particular the creation of a single market achieving conditions similar to those of a domestic market....“, therefore the competition policy is only assisting the other policy objectives.

⁶ *Consten Grundig v. Commission*, 1966, ECR 299

between Member States were caught by Article 81 and as paragraph two of this article states: “their agreement or decision was automatically void”. The undertaking could, of course, seek an exemption under the Article 81(3), however in many cases even if particular agreement, decision or practice of undertakings did not, *de facto*, affect the trade between Member States, it still did not satisfy the requirements provided for by paragraph (3) and therefore remained prohibited by the first paragraph of Article 81. The Commission kept failing to take more economic look at the particular issue. Changing this point of view would help the Commission to determine more correctly the real effect on the competition. Even though the Commission may still decide, after the deliberation of the economic elements, that the agreement, decision or practice remains unlawful, it shall not fail going through this deliberation, because ignoring them could be much worse than the effect of the actual undertakings actions.⁷ It is truth that the goals of integration and economic efficiency can be, and sometimes are at odds with each other. However it is the Commission who shall after forethought reconcile with them.

The Commission restrictive approach can be well illustrated on Consten and Grundig Case, and the United Distillers Decision, which will be discussed below.

Consten and Grundig -v- Commission (1966) ECR 299

In this case German manufacturer of electronic appliances concluded, among other things, an exclusive distributorship agreement with French company Consten. Under this agreement, Grundig was to sell its product in France, Swaziland and Corsica only to Consten, and not to anybody else. Consten was allowed to register Grundig trademark under its own name for the time it stays Grundig’s distributor. However, on the other hand, it was prohibited to sell electronic appliances of another manufacturer, which competed with Grundig and neither could sell Grundig’s goods into territories protected by similar kind of agreements with different distributors. Nevertheless, later on French company Unef began selling in France Grundig appliances (cheaper than Consten’s), which it had bought in Germany. By this conduct it actually infringed the Consten’s exclusive distributorship and its trademark rights. Consten decided to sue Unef (before French court) for unfair competition and infringement of trademark.

⁷ As stated by Simon Bishop and Mike Walker: „By ignoring the impact on economic welfare, decisions taken solely with regard to the market integration objective can have perverse outcomes“; The Economics of EC Competition Law, The Goals of E.C. Competition Policy

Nevertheless, the Commission, after investigating the issue, decided that this agreement was contrary to Article 81 of the EC Treaty, because it prevented any other distributor to import Grundig's goods to France, and therefore restricted the competition. Consten and Grundig appealed to European Court of Justice, but it only upheld the Commission's decision. It was stated that this agreement is contrary to the most fundamental goal of the European Community (market integration), because it is in fact, restoring the trade barriers, which were to be abolished.

Grundig however argued in this context that the reason for granting the exclusive distributorship was to open up a new geographical market for its products. Therefore, there was a need to protect the distributor who invested considerable amount of money into marketing a new product, so this distributor would not need to fear that after spending big amounts of money on promotion and other costs in order to enter this new market, a free rider would enter the competition and enjoy the advantages of the distributor's work. Moreover, even though the agreement restricted intra-brand competition of Grundig products, it was in fact to promote and strengthen the overall inter-brand competition, by bringing another player into French electronic appliances market to compete with another domestic and foreign manufacturers. As already mentioned above, without this kind of protection, no distributor would ever decide to sink costs into a new market, if somebody else could later simply enter the market with no need to spend any considerable amount of money as the first distributor had to.

Notwithstanding the Consten and Grundig arguments, the Court decided that there was no need to wait to see if trade was, in fact, affected by this agreement. The Court stated: „there is no need to take into account the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition“. The Court pronounced that this approach is not applicable only to horizontal agreements but to vertical agreements as well in case it has as its object to exclude competitors from the market. While ignoring the factual effects of such agreements, even those agreements which in fact did not affect trade between Member States, the Commission maintained they were prohibited by Article 81.

As can be seen above, the Commission and the ECJ insisted in this case on the market integration goal at the expense of economic efficiency, it also refused to take into account the

free rider effect. In their decision therefore, the Commission and subsequently the ECJ unambiguously favored the market integration goal.

However, after passing the Guidelines on Vertical Restraints, the Commission began to be more willing to take into account concrete circumstance of particular agreement, rather than rigidly applying Article 81 prohibition. It also admitted the above mentioned arguments (including free-riding) in the context of opening a new geographical market. Therefore, if the Consten Grundig case was considered three decades later, it would be probably allowed to grant the territorial protection to its distributor at least for a period of one year, which would give this distributor the time to establish the product in question on the new territorial market. This approach is very important as well because of admitting that short run restriction of market integration can actually promote better long run efficiency. The Commission therefore pronounced that not all territorial restraints cause inefficiency (but on the other hand nor all of them are promoting it). Thus, even an agreement which seems to be „distortive“ can be legitimized because it in fact enhances the economic efficiency.⁸

United Distillers Decision

In this case while promoting the internal market objective, the Commission paradoxically contributed to its prevention, because as in the above-mentioned case, it refused to take into account the economic elements of the particular situation.

Distillers was a U.K. company producing spirits including whisky. The U.K. spirit market was recognized as “mature and highly competitive”. On the other hand the spirit market on the Continent (and especially the whisky market) was considered to be still at the “expansive stage, when high spending on promotion is normal”. In order to protect its distributors on the Continent from parallel imports, Distillers refused discounts of five pounds per case of whisky to British distributors who intended to be exporting it to the common market. When Commission found out about this practice, it ordered Distillers to promptly cease it because the Commission understood it as discrimination between whisky selling in the U.K. and on the other Member State’s markets. However, the purpose of Distillers was, of course not to discriminate the exporters, but to protect the distributors on the Continent, who needed to spend considerable amount of money to promote these products. Thus as in Consten Grundig decision, the Commission refused to take into account the concrete circumstances, especially

⁸ This approach actually overrules the Consten and Grundig decision

the fact that if the distributors would not be protected from parallel imports, a free rider could simply enter the market without sinking costs into the promotion, and therefore would benefit from the first distributor's efforts. As a response to the Commission decision the Distillers raised prices of some brands of spirits in the U.K. and withdrew from sale Johnny Walker Red Label whisky in the UK. Ultimately, as a result the Commission decision, different brands of spirit were sold in the U.K. and on the Continent. As can be implied from the above mentioned, this decision went actually contrary to the fundamental goals of EC competition law, including the market integration.⁹

New Commission Approach to Vertical Restraints

As Stephen Weatherill stated: „It seems that EC law may have suspicions about "vertical" deals which improve product distribution which would not be entertained by other competition law systems which are not designed to help market integration". In the end of 1990s, the Commission, however, decided to revalue its approach to vertical restraints, taking more into account the real effects of the undertakings' actions¹⁰. Commission therefore decided to move on from almost absolute market integration protection to finally adopt more economic approach, and therefore to incite more effective competition between undertakings.¹¹ However, it would be a mistake to think that after changing its policy to more "effect based one", the Commission would cease taking into account, while enforcing the competition rules, the goal of market integration. It still remains underlying principle of the EC competition law. The Commission thus, when considering an agreement, decision or practice, has to take into account both of these goals and decide which one should prevail in particular case.

In January 1997, the Commission published a Green Paper on Vertical Restraints in EC Competition Policy, followed by adoption of Regulation of 2790/1999 two years later. In White Paper on Modernization in 1999 it was pronounced that: "*At the beginning the focus of*

⁹ Simon Bishop and Mike Walker notes in this context the decision was actually a clear reduction in the welfare of consumers, in particular British consumers who could not for example purchase Johnny Walker Red Label on U.K. market.

¹⁰ This new approach should help to forstall perverse outcomes, which sometimes occurred by rigid application of Article 81

¹¹ Jones and Sufrin mentions: „At present the Commission very much favour the promotion of efficiency rather than other /non-market integration" objectives. Since the appointment of an economist, Mario Monti, as Commissioner responsible for competition in 1999, the promotion of efficiency has been declared to be the master value“.

the Commission's activity was on establishing rules on restrictive practices interfering directly with the goal of market integration... The Commission has now come to concentrate more on ensuring effective competition by detecting and stopping cross-border cartels and maintaining competitive market structures.

The above mentioned regulation took into account especially the share of the relevant market, and stated that it can be presumed that “if it does not exceed 30%, and does not contain certain anti-competitive restraints, it generally leads to an improvement in production and allow consumer a fair share of the resulting benefit”. If the market share is however above, the undertaking cannot generally enjoy the benefit of the Block exemption, because it cannot be presumed that this undertaking brings the above-mentioned improvement or benefit.

As already mentioned above the application of this new EC legislation should guarantee more effect-based approach, taking into account concrete circumstances of a specific issue. It should provide a means for distinguishing the agreements; decisions or practices, which have as its sole, object the “distortion of the market” from events when this restriction, distortion or prevention is actually outweighed by the resulting benefit. As illustrated in the above-mentioned cases, the Commission rigid approach was many times an impediment to pursuing economic benefits of consumers and in fact the market itself.

Conclusion

All the facts mentioned above leads us to a conclusion that the Commission's attitude to application of Article 81 is shifting from a very rigid and formalistic approach to a more relaxing effect based approach. After over thirty years of strictly pursuing the market integration goal and paying much less attention to the economic efficiency, the Commission finally realized that it is necessary to take into account the concrete circumstances of particular event. It realized as well, that not all vertical restraints should be automatically considered to be bad for the market and for the consumers' welfare. Not even absolute territorial protection of distributor has to be necessarily infringement of the competition law goals. In late 1990s new Regulation on Vertical Restraints was adopted, which grants the undertaking involved in certain agreements and practices to automatically avoid the application of Article 81(1) in case they fulfill the Regulations other requirements. This

should make their lives easier. This new approach should also help to guarantee more precise decision-making of the European Commission and the European Court of Justice.

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