

ARTICLES (STUDIES, DISCUSSIONS, COMMENTS)

GENERAL ASPECTS IN THE FIELD OF COMPETITION PROCEDURE

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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 aspects

Article 101 TFEU considers incompatible with the single market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member, having as their object or effect the prevention, restriction or distortion of competition within the single market.¹

European competition law seeks to ensure as a priority the horizontal restraints of trade inside the European Union, which means the prohibition of agreements of cartelization (implicit or explicit) between existing businesses or likely to be present in a market, agreements aimed at satisfying the interests of those undertakings, to the detriment of community general interest.

In case of an agreement, decision or concerted practice (which means coordination of activities between undertakings which have the result that it affects trade between Member States) whose object or effect is the prevention, restriction

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¹ See O. Manolache - *Regimul juridic al concurenței în dreptul comunitar*, Ed. All, București, 1997, p. 28.

or distortion of competition means that we are dealing with a violation (failure) 101, par 1, TFEU, declaring them incompatible with the common market and prohibited.²

It is established the principle of immediate applicability of Articles 101 and 102 TFEU, provided that imposed bans take effect without the existence of subordination to the decision of the community institutions, national courts being thus competent to apply those prohibitions.

The Court of First Instance held that art. 101, par 1, TFEU provides for a fundamental prohibition of anticompetitive agreements by their nature.

This legal provision (considered a matter of public policy) is mandatory for the undertakings concerned, irrespective of any decision addressed by the Commission with the same character.

This principle does not apply when the Commission adopts a decision.

The agreements and decisions contrary to Article 101, par 1 TFEU, are automatically considered void, according to article 101, par 2 TFEU, as long as they were not exempt under Article 101 par 3 TFEU.³

In this regard, the Court stated that where an agreement prior to the implementation of Article 101 TFEU, was notified, the general principle of contractual certainty determines that a court may declare the agreement null only after Commission made the decision.

Using a *per a contrario* argument, we conclude that despite its provisional validity of an agreement for the term of its present full effectiveness, both between parties and against third parties.

2. Commission referral

Till now, the Commission is the main institution enforcing the competition legislation.⁴

Commission must act in case of violations of Articles 101 and 102 TFEU.

There are entitled to submit a complaint in this regard the member states, and natural or legal persons who claim a legitimate interest.

This provided the opportunity for the Commission to sense the default, which is a very common situation. Self-appraisals are based on information from the natural or legal person does not necessarily, not implying any time the existence of a legitimate interest, often the identity being unacknowledged to the public. The legitimate interest is excluded, the applicant is more profitable considering that the information is carried out by the Commission, which will act *ex officio*.⁵

² See O. Manolache - *Op. cit.*, p. 29.

³ See A. Fuerea - *Drept comunitar al afacerilor*, Ed. Universul Juridic, București, 2003, p. 276.

⁴ See D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins - *European Union Law. Text and materials*, Ed. Cambridge University Press, Cambridge, 2007, p. 940.

⁵ See D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins - *Op. cit.*, p. 941.

Considering the emergence of a complaint, regardless of the existence of a legitimate interest the Commission may intervene in a discretionary manner, if it finds an infringement. Since the legal provision makes no distinction regarding the legal status of the applicant, nor contains any prohibition, there is still the possibility that a party to the agreement, decision or practice to file a complaint. This time, the question has a legitimate interest certain and decisive, leading the Commission to continue the proceedings, taking into account that the complainant himself wants termination of participation in them, to remove the violation for which there is no option to remove them.

The scope of the term "legitimate interest" is considered to be unclear. It was considered that a union concerned about the impact of anticompetitive practices on jobs has a legitimate interest.

The applicant wishes to not persist in violation of the right, which could attract even financially unpredictable consequences, such as are found in a state of legal certainty in the legal relations to be clearly defined and legally.³

A company entering into an agreement, decision or concerted practice can not claim that it was pressured by the other participants. The company in question could advertise the competent authority about pressure and could have brought a complaint before the Commission.

In this regard, the Court noted that an association of undertakings has a legitimate interest in the introduction of a complaint even if it is not directly concerned (such as a company operating in a relevant market versus a commercial behavior), provided that, in the main, be entitled to represent the interests of its members and, secondly, the conduct complained to represent spring (source) negative influence of those interests.

The procedure employed by the Commission is not likely to oppose each other is the applicant and considered culpable person that infringed Community law. The procedure is initiated and led by the Commission. The Commission will represent EU interests, even of particular interests, legitimate the applicant.

In relation to Member States, it is imperative that they demonstrate a legitimate interest, because the legal text does not impose such a condition that the natural persons or legal entities.

The complaint may be withdrawn by the applicant if it is redundant or when the applicant did not make any comments within the time limit, but these obstacles are not obstacles for the Commission to conduct further proceedings.

3. The phases of the procedure

This procedure has two stages, the preliminary stage and the administrative stage.

During the first phase, preliminary investigation procedure recognizes certain individual rights of enterprises, excluding therefore any adversarial procedures.

Some rights have to be respected, such as those relating to legal representation and the privileged nature of correspondence between the defender (lawyer) and client, in order to not reach irreparable damage to the rights of the defense at this stage. This phase also involves investigations which may be decisive for proving the illegal nature of the conduct in which the company was involved.⁶

During the second phase, the right to defense is totally sure of when communicate the reasons, which means engaging (starting) procedure.

3.1. Preliminary proceedings

In this phase will take place activities involving request for providing information, inquiries of economic sectors, investigations (checks) undertaken by Member States and the Commission.

The Commission has the power to receive information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings.

If the Commission makes a request for information to an undertaking or association of undertakings, it will send a copy to the competent authority of the Member State in whose territory the undertaking or association. The Commission may require in a request for information to be communicated documents whose copies she could not take in a previous investigation. Thus, it may ask at any time request additional information.⁷

The Commission will mention in its demand application purpose, the legal grounds (rationale) and the penalties specified where information was inaccurate. The Commission's duty to indicate the object and purpose of a decision to obtain information is a basic requirement, both for purposes of proof that the information required by the undertaking in question are motivated, and to enable undertakings to assess the magnitude of their duty of cooperation. In this way, enterprises safeguard their rights of defense, hence the justification for the Commission to require only the disclosure of information that would allow alleged violations research, which justify the investigation and which are set out in the request for information.

Commission can not be required to communicate to the addressee of the decision all available information on alleged violations or to make a precise legal analysis, although the Commission must clearly indicate the presumed facts which it intends to investigate (investigate).

The obligation to provide information requested is incumbent to the owners of the undertakings or their representatives and, in the case of legal persons, companies or associations having no legal personality, to the persons entrusted to represent them according to the laws or statutes.

⁶ See O. Manolache - *Op. cit*, p. 31.

⁷ See O. Manolache - *Op. cit*, p. 31.

Where an undertaking or association of undertakings does not provide the information requested within the period prescribed by the Commission or provides incomplete, the Commission will ask the decision. The decision shall specify the information required, will set an appropriate time limit within which the information is provided and indicate the penalties provided and the actions that can be submitted to the Court of Justice against the decision (currently, the power belongs Court of First Instance).

The Commission has a number of responsibilities in matters of investigation, being able to use any necessary investigations into undertakings or associations of undertakings. The agents, authorized by the Commission have the following powers: ⁸

- To examine the books and other business records;
- To make copies or extracts from those documents and records;
- To request oral explanations on the spot;
- To enter in the buildings, land and means of transport of undertakings.

The agents authorized by the Commission to rely on investigations shall exercise the powers conferred on the basis of a written authority showing the subject matter and purpose of the investigation, as well as sanction, if the registers and other commercial documents required to be submitted are incomplete.

In a useful period of time, the Commission will inform the competent authority of the Member State in which the investigation will be made about the identity of investigative and authorized agents.

Decisions taken by the Commission in investigations may be attacked by an action for annulment before the Court of First Instance (art. 263 TFEU). ⁹

Enforcement of decisions may be suspended by order of the latter instances (such. 265 TFEU), in the situation of emergency and threat of irreparable damage. The latter condition is unlikely to be achieved in practice because, where an investigation was made in violation of the relevant laws, this would lead to the annulment of the infringement, based on evidence unknown to the Commission, respecting procedural provisions.

3.2. Administrative phase of the procedure

The Commission must emit a formal communication to the undertakings concerned in a Statement of Objections. ¹⁰

It may call on communication through publication in the Official Journal, where the facts justify it, especially the absence of common representative, if there are many enterprises involved. Publication shall take into account the legitimate interests of enterprises involved, linked to protection of their business. If an

⁸ See O. Manolache - *Op. cit*, p. 34.

⁹ See O. Manolache - *Op. cit*, p. 40.

¹⁰ See D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins - *Op. cit*, p. 947.

association of undertakings, it was decided that it can claim to have been informed by its members when the complaints refer to the actions of this association.

The content of the communication is made by the Commissioner responsible for competition, but may be signed by the Director General for competition, as approved by the Commissioner that the exercise on which the Commission has delegated.

The Statement of Objections is a measure establishing the final attitude of the Commission concerning undertakings against which proceedings have been initiated for breach of competition rules.

The Statement of Objections must show the essential facts on which the Commission relies, in a concise, clear and acceptable form. In a specific case it has been shown to be reported as facts, those facts contained in a decision of national authorities.

At the same time, the Commission will submit undertakings documents and elements taken into consideration, but if enterprises possess sufficient information necessary for their defense, the Commission is not obliged to communicate all the elements and documents. Annexes to the statement of objections that the Commission did not come to be regarded as supporting documentation on which the Commission relies. Consequently, these annexes must be brought to the attention of the addressee in the language of the case, so that it can assess him alone their interpretation by the Commission, the interpretation which the Commission has adopted and on which it based its statement of objections (and after that, the final decision).

The Statement of Objections, documents and elements to support it are creating opportunities for access to the case file.

Also present were deemed confidential and the following documents: ¹¹

- Purely internal documents of the Commission services;
- Disclosed documents provided confidential nature;
- The documents or parts of documents containing business secrets of other undertakings;
- The confidential information, such as not disclosing identity of applicants;
- Reports on inspections carried out in third undertakings as are documents likely to provide evidence of violations from these undertakings.

The Statement of Objections results in circumscribing the procedure engaged against an undertaking or association of undertakings.

After the Statement of Objections the Commission will give the party concerned the opportunity to have access to the case file, to examine the evidence contained on which to express its views effectively.

The hearings are organized and conducted by a hearing officer, who belongs to the General Directorate of competition administratively. As a general rule, the

¹¹ See O. Manolache - *Op. cit*, p. 40.

hearing will be to ensure the conduct of hearings properly, thus contributing to the objectivity of the hearing. All he would consider to be sure that in the preparation of draft Commission decisions in competition matters, are taken into account all relevant facts, even if favorable or not the parties concerned.¹²

People will be heard convened personally or be represented by legal or statutory representatives. Businesses and associations of undertakings may be represented by an authorized agent appointed under their permanent staff.

Persons heard by the Commission may be assisted by their legal advisers or other qualified persons whose presence is accepted by the hearing officer.

Hearing does not have a public character. Those involved are heard separately or in the presence of other persons summoned to appear. If the latter, it will be considered legitimate interest of undertakings to protect their interests through non-disclosure of business secrets or confidential information.

Statements by each person heard shall be recorded. Copies of the statements recorded shall be issued to any person requesting them. Copies will not include business secrets and confidential information.

3.3. Commission decisions

The Commission may impose procedural fines and main fines.

Procedural fines may be imposed (by a decision of the Commission) to undertakings and associations of undertakings in an amount not to exceed 1% of total turnover achieved during the previous social year.¹³

These fines may be imposed in cases where those undertakings or associations of undertakings (intentional or negligent) commit the following offenses:

- Providing incorrect or misleading answers to requests;
- Providing incorrect, incomplete or misleading information in response to requests made by decision or exceeding the deadline fixed for providing information;
- Incomplete making available books and records during inspections or inspections disobedience;
- answers to the questions formulated by incorrect or misleading, is omitted rectification by the deadline set by the Commission an incorrect answer, incomplete or misleading by a member of staff, or refuses to provide a response;

- Breaking the seals;

Main Fines may be ordered by the Commission by decision require the undertakings and associations of undertakings where (intentional or negligent) commit the following:

- Violates art. 101 and 102 TFEU;
- Violates a decision imposing interim measures;
- Implement a commitment not considered binding by a decision;

¹² See D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins - *Op. cit.*, p. 948.

¹³ See D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins - *Op. cit.*, p. 949.

The size of these fines can be of maximum 10% of the turnover of the undertaking or association of undertakings, the turnover achieved in the previous social year.¹⁴

If the breach came from an association relates to the activities of its members, the fine can jump to the threshold of 10% of the total turnover achieved by each member active in the market affected by the infringement committed by the association.

When setting the amount of the fine, should be considered concurrently gravity and duration of the infringement.

In addition to fines, the Commission may impose a penalty payment, which will not exceed the limit by more than 5% of the annual average daily turnover achieved under the previous social year.

These penalties are calculated per day of delay from the date stated in the decision and is intended to compel undertakings and associations of undertakings commit the following:

- Remedy a breach of art. 101 and 102 TFEU;
- Carrying out a decision ordering interim measures;
- Compliance with a commitment made binding by a decision;
- Provide complete and correct information required by decision;
- submitting to an inspection ordered by decision;

4. New evolutions

Regulation no. 1/2003 brought new elements in terms of procedural issues.¹⁵

The powers of the Commission the field of investigation were extended, in five directions (ways).

In the first way, the Commission has jurisdiction on an investigation into sectors and about the types of agreements. The Commission may conduct inquiries in a given sector of the economy or in respect of a particular type of agreements across various sectors. In the investigation, the Commission may request information necessary undertakings and associations of undertakings and carry out the inspections necessary for that purpose.

In particular may require all businesses and associations concerned to communicate all agreements, decisions and concerted practices. Meanwhile, publish a report on its survey results specific sectors of the economy or on specific types of agreements in the various sectors and may invite interested parties to make observations.

In a second approach, the Commission may request the undertakings or associations of undertakings (a decision or an application) providing all necessary information.¹⁶

¹⁴ See D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins - *Op. cit.*, p. 949.

¹⁵ See Cosmovici, P. M., Munteanu, R - *Înțelegerile între întreprinderi*, Ed. Academiei Române, București, 2001. p. 343.

¹⁶ See Cosmovici, P. M., Munteanu, R - *Op. cit.*, p. 344.

A copy of the application or the decision will immediately be forwarded by the Commission competition authority of a Member State in whose territory is situated the undertaking or association of undertakings. Another copy will be notified to the competition authority of the State whose territory is affected.

Governments and competition authorities of the Member States shall communicate to the Commission (on request) all information necessary to perform the tasks entrusted regulation.

A third way provides for the right of the Commission to take statements of any natural or legal person accepting queries to gather information on the subject of investigations.¹⁷

The person may be questioned (with her consent) even at Commission headquarters.

If the meeting (interrogation) will be held in the premises of the company, this will be communicated by the Commission competition authorities of the respective state. At the request of those authorities, its officials may assist the Commission in the interrogation agents or others designated by the Commission.

In a fourth way, the Commission has the power to do (to accomplish the tasks entrusted) to all necessary inspections undertakings and associations of undertakings.

To achieve this, officials and other persons authorized by the Commission to carry out inspections have the following powers:¹⁸

- May enter any premises, land and means of transport of undertakings and associations of undertakings;
- May examine the books and other documents relating to business;
- Obtaining copies or extracts from documents or records;
- Application of seals (for more than 72 hours) on all business premises, books and records for the period and to the extent necessary inspections;
- Can ask any staff member or representative of the undertaking or association of undertakings for explanations on facts and documents relating to the object and purpose of the inspection and may record the answers;

The last two are new powers.

Necessarily it must be informed the competition authority of the member state involved. The agents and other accompanying persons must have a written mandate.

An active assistance in carrying out inspections will be carried out by the national competition authorities of the member state. If the agents or other persons accompanying conclude that undertaking opposes an inspection, the member state

¹⁷ See Cosmovici, P. M., Munteanu, R - *Op. cit.*, p. 344.

¹⁸ See Cosmovici, P. M., Munteanu, R - *Op. cit.*, p. 345.

concerned will provide the necessary assistance. This assistance will consist in the use of public power or authority having the power of coercion equivalent.

If national law requires authorization from a judicial authority, such authorization should be required (which can be done preventively).

Finally, through a fifth method (a novelty), there is the possibility of inspecting other places.¹⁹

This inspection can be arranged if there is a suspicion that the subject of inspection records or documents stored in other premises, land and means of transport, including the homes of directors, managers or staff members. Decision adopted by the Commission for this purpose does not require the prior authorization of the judicial authority of the state. The judicial authority that can be exercised only authenticity control over the decision and that the coercive measures included in the decision not to present an arbitrary or excessive.

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.

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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