

Introduction to Article 81 EC

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Outline of talk

The plan of the talk is as follows. The talk will examine the prohibition in Article 81 EC in detail, considering what is meant by key expressions in it such as “undertakings”, “agreements”, “concerted practices” and the concept of restricting, preventing or distorting competition by object or effect. It will also consider how the prohibition has been applied in practice to date.

1. Preliminary points

- Structure of Article 81 EC: Article 81(1) contains a prohibition; Article 81(3) allows the prohibition to be disapplied if certain conditions are met
- Objective of Article 81 EC: see para 13 of Article 81(3) Guidelines
- Burden of proof: see Article 2 of Regulation No 1/2003
- Standard of proof: a question of national law. The civil standard is applied in the UK, that is to say the balance of probabilities; however, given the seriousness of the consequences of being found to have infringed the prohibition, the quality and weight of the evidence must be sufficiently strong before an infringement is established: see CAT in *JJB Sports v Office of Fair Trading* [2004] CAT 17, para 199

2. Concept of undertaking

- Determines which entities fall within the jurisdictional scope of Article 81(1)
- Basic definition of undertaking: “encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed”: see ECJ in Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, para 21
- Need for a *functional* approach to the concept of undertaking
- EC case law has established 3 situations in which legal entities will not be regarded as acting economically with the consequence that they are not, in that situation, subject to control under Article 81

- i. Exercise of public powers: see ECJ in *SELEX Sistemi Integrati SpA v Commission*, judgment of 26 March 2009
 - ii. Solidarity: e.g. social security, pension provision or health care
 - iii. Purchase of goods or services for purpose of carrying out non-economic activity: see ECJ in Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295, para 26
 - o The single economic entity doctrine: two legal entities within the same economic unit are to be regarded as a single undertaking: see ECJ in *Akzo v Commission*, judgment of 10 September 2009
3. Agreements, decisions by association of undertakings and/or concerted practices

Agreement

- o The term “agreement” has a wide meaning and includes both legally enforceable and non-enforceable agreements, whether written or oral: all that is required is that the parties arrive at a consensus on the actions that each party will or will not take: see ECJ in Case C-2/01 P *Bayer v Commission* [2004] ECR I-23, para 101
- o Concept of a “single overall agreement”: undertakings may bear responsibility for a long-running cartel, even if though they were not involved in its day-to-day operation: see ECJ in Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paras 78-85

Concerted practices

- o Concerted practice is a form of coordination between undertakings by which, without reaching an agreement, practical cooperation between them is knowingly substituted for competition
- o A concerted practice can come about by direct or indirect contact between the parties
- o Attendance by a competitor at meetings involving anti-competitive activities (without publicly distancing itself from what was discussed) proves its participation in those activities: see ECJ in Case C-204/00 P *Aalborg Portland v Commission* [2004] ECR I-123, para 81
- o A meeting on a single occasion between competitors may, in principle, constitute a sufficient basis for the participating undertakings to concert their conduct: see ECJ in *T-Mobile Netherlands BV & Ors v NMA*, judgment of 4 June 2009

4. Object or effect of preventing, restricting or distorting competition

- Object or effect are alternative, and not cumulative, requirements for a finding of infringement

Object

- Object means not the subjective intention of the parties, but the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied: see ECJ in *Beef Industry Development Society*, judgment of 20 November 2008, para 17
- It is not necessary to show that an agreement entails disadvantages for final consumers in order to establish anti-competitive object: see ECJ in *GlaxoSmithKline v Commission*, judgment of 6 October 2009, para 64

Effect

- Where an agreement does not have as its object the restriction of competition, it is necessary to consider whether it has an appreciable restrictive effect
- The effect of the agreement has to be compared with the competitive landscape which would have prevailed had it not been entered into: see para 17 of *Article 81(3) Guidelines*
- There is no presumption that an agreement has any actual or potential anti-competition effect: see para 24 of *Article 81(3) Guidelines*
- There is, for example, unlikely to be such an effect where the parties have a small market share; or where, by way of further example, two competitors, each with a large market share, form a joint venture to develop a new product which neither has the resources to develop on its own

5. Effect on trade between Member States

- Historically, both the Commission and the Community Courts have adopted a rather expansive interpretation of the concept of effect on trade between Member States; see now the Commission's *Guidelines on the effect on trade concept*
- It is not necessary to prove an actual effect; a potential effect is sufficient
- The effect in issue must be appreciable and not just insignificant
- Non-appreciable affectation of trade rule: para 52 of *Effect on Trade Guidelines*

- As a practical matter, it determines when Member States must apply the Community competition rules: Article 3(1) of Regulation 1/2003
 - i. Article 3(1): must apply Article 81 to agreements that affect inter-state trade if also applying national competition law to those agreements
 - ii. Article 3(1): must apply Article 82 to abuse that affects inter-state trade if also applying national competition law to that abuse
 - iii. Article 3(2): cannot apply stricter national competition law to agreements than Article 81 would be
 - iv. Article 3(2): national courts and competition authorities can apply ‘on their territory’ stricter national laws which prohibit or sanction unilateral conduct

6. Article 81(3)

- Article 81(1) prohibits anticompetitive agreements, while Article 81(3) permits an assessment of the economic benefits of such agreements and weighs them against the restrictions it contains
- There are no anti-competitive agreements which, as a matter of law, could never benefit from the exception conferred by Article 81(3)
- It is necessary to satisfy *all* of the conditions contained in Article 81(3)
- The conditions in Article 81(3) may be satisfied in two ways:
 - i. either by applying the provision to individual agreements; or
 - ii. by drafting an agreement whose terms satisfy one of the so-called “block exemptions” typically issued by the Commission under powers conferred on it by the Council of Ministers
- The Commission’s *Article 81(3) Guidelines* set out the efficiency gains that may be invoked by the parties to an agreement
- Evidence matters: in *GlaxoSmithKline* the ECJ upheld the CFI’s judgment setting aside the Commission’s refusal to apply Article 81(3) to its dual pricing system because it had failed to give sufficient weight to GSK’s pro-competitive justification and to explain why it rejected the argument that parallel trade in pharmaceuticals was apt to lead to a loss in efficiency

KEY POINTS ON THE COMMISSION'S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 TO ABUSIVE EXCLUSIONARY CONDUCT

1. It is 'only' a Commission Communication: the *Guidance* is not binding on national competition authorities or courts
2. The Communication contains guidance on how the Commission:
 - Intends to decide which cases are a priority for the exercise of its investigatory powers this relates to the Commission's selection of cases having regard to its resources and is therefore of less interest to national courts; and
 - Understands the general framework of analysis under Article 82: this is the part of the *Guidance* that is potentially relevant to domestic litigation.
3. The Communication says nothing explicitly about the relevance of the *Guidance* to the national courts (cf. the Article 81(3) Guidelines).
4. It is important to be aware of the content and status of the *Guidance* since:
 - Parties and counsel are increasingly likely to cite and rely on passages from the Commission's *Guidance*.
 - The *Guidance* describes the economic issues likely to arise in relation to particular kinds of anti-competitive conduct; and how to approach them.
 - English decisions have recognised the primary responsibility of the Commission and its specialist expertise in determining competition law questions: *Iberian UK Ltd v BPB Industries plc* [1997] EuLR 1, at 16.
5. The *Guidance* provides the court with a helpful, conceptual framework for determining the seriousness in economic terms of alleged infringements of Article 82 (and its domestic equivalent). This is likely to be relevant, e.g. to issues of relief to be granted (especially at an interim stage)
6. The Commission does not undertake, in the *Guidance*, to use one particular method in its approach to Article 82. The approach which it will take has to vary depending on the circumstances of each individual case.
7. It is important not to overstate any differences between the case-law of the Community Courts and the *Guidance*: in many respects, they are similar.
8. If there is an incontrovertible conflict between the jurisprudence of the Community Courts and the *Guidance*, it is clear that the former prevails (subject, of course, to the court making an Article 234 reference).