# Implementation of Competition in the EU based on ECJ Decision No. 161 of 28.1.1986, Pronuptia de Paris vs. Schillgalis

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## Abstract

Article 3 of Regulation No 1/2003, within the framework of the Treaty's competition rules, regulates the parallel application of the internal and European cartel rules within the general area of competition, such as the agreements and established conduct of enterprises "which reduce trade between states". If the competition authorities of the member states and their courts apply the national rules in the context of judicial proceedings with interstate elements, then at the same time they must apply Articles 101 and 102 of the TFEU. It is therefore worth noting that the prohibition of cartel based on Article 101 TFEU has priority as a right of the Union against the national law of the Member States. The application of national law does not lead to the prohibition of agreements which do not qualify as restrictive of competition under Article 101 of the TFEU or the exemptions of Article 101 paragraph 3 of TFEU. The field of application of EU competition rules is mainly covered by the material scope of the Lisbon Treaty. Exceptional areas for sectors that are state-level competence are not covered by the Treaty. A restrictive exemption exists in the area of agriculture under Article 42 TFEU, especially for agreements, which are necessary and are an important part of market rules or which lead to the implementation of the purposes of Article 39 of the TFEU. Article 102 TFEU is applicable in the field of non-limiting agriculture. Competition rules apply mainly to the field of transport. The modalities for the implementation of transport rules within the area of transport are regulated in particular through a series of secondary rules (the so-called Union secondary law: the Regulation and the Directive).

**Keywords:** ECJ Decision, Competition Law, EU.

## Introduction

Competition rules are applied to the whole territory of EU Member States. On the other hand, it is not excluded that these rules also apply to enterprises that have their headquarters in a third country as well as within economic and commercial transactions in third countries. The commission was particularly driven by the principle of action. According to this principle, the application of domestic state law to issues of foreign elements is applicable to matters of foreign origin if the issues taken have effects in that country. The ECJ has tried to avoid the principle of implementation, based on the principle of territoriality of the country where the cartel agreement was concluded.
Cartel rules apply to enterprises and commercial companies. According to the EU's right to define an enterprise, it is necessary to exercise an economic activity, this

includes the provision and performance of economic activities in the market. For the existence of an economic activity is not a prerequisite the purpose of earning a profit, but the performance assessment. In the absence of an economic activity, enterprises that follow social effects can not be classified as genuine enterprises. This was defined in jurisprudence especially for specific rules of social security. Since legal form is not necessary, especially within the legal capacity under commercial and financial law, natural persons who carry out independent activities such as doctors, lawyers, professional athletes may be classified as a venture. Public enterprises and independent institutions of public law societies are also the main addressees of article 101, point 1, as long as they exercise an economic activity. State bodies are not classified as enterprises, as long as they do not act as holders of public power.

The use of competition rules is dependent on the fact that ventures are dependent on the established measure of market power. The market power of ventures is simply determined based on market shares. They can be determined if the relevant market is defined. The market power of an enterprise will be determined through the power of competition, which is defined in the market. So it is about identifying those providers who limit the scope of entrepreneurship. Two factors need to be considered for this: First, changing the current supply with the enterprises to be judged and secondly the ability to determine production in a short time in the market.

The most direct and effective power is to replace the products of the enterprise through competitor products on the other side of the market; this is implied in the view of the direct recipient. If these service recipients can be avoided by the bidders' offer, then the enterprise in question must be careful in determining the prices. This kind of exchange is evaluated within the product and territory. The exchange of products is determined based on physical elements and changes in their use, market prices as well play an important role in the exchange. In more limited cases the relevant market is based on price elasticity. Thus in this case, it will be monitored whether and to what extent product price increases for the question of another product. Within the scope of application this is done through the help of the so-called SSNIP test ("Small but Significant Non-Transitional Increase in Price"). In this way, the effect of the change of relevant prices will be determined.

Within the definition of a relevant market, consideration should be given to the determination of the strength and distribution of competition to which a relevant enterprise is subject and to the identification of the territorial scope. The main question implies how the price rise in the determining enterprise affects.

The pressure exercised in the relevant competition may also be determined by producers that include non-replaceable products if these enterprises are able to change production and enter for a short time in the designated market. For markets in which incoming investments are too high, the possibility to enter the market in a short time is not possible.

## Article 101 of the Lisbon Treaty

An agreement falls under the scope of application of the ban on the cartel under Article 101 paragraph 1 TFEU, if all its elements are met. Also in the case-law of the

ECJ and the European Court of First Instance, the Commission's Decisions, Guidelines and Directives developed other criteria to be met to determine a violation of Article 101 paragraph 1 TFEU.

According to Article 101, paragraph 1 of the TFEU, an agreement violates this rule if a series of elements are to be met: in the first place there must be a certain pattern of conduct which affects two different trading companies. In addition, it must be determined whether these companies have entered into an agreement or have coordinated behavior with one another. This coordinated behavior should have a significant effect on intra-state trade and competition itself. These behaviors are prohibited if they are intended to restrict competition. If the doctrine of ancillary restraints is usable, then this agreement does not fall within the scope of Article 101 paragraph 1 of the TFEU. In the context of this important article for competition, it should also be noted that the definition of procedures and practices that restrict competition is not easy to judge. An agreement contains elements that at the same time may include and limit competition. Let's take an example by referring to Craig, de Burca (2013): A supplier wants to enter a market and decides to use *Brown* as its distributor in a particular area. *Brown* for its part requires it to act with certainty and may ask the supplier to distribute the product only to this firm and no other in this area. In this example it is obvious that there is a restriction of competition, but on the other hand this agreement can also expand and improve competition, as a new product enters the market.

**Agreement, decision or coordinated behavior between the two companies**

In order for a coordinated behavior to violate the ban on cartels under Article 101 paragraph 1 TFEU, it must be an agreement, decision or coordinated conduct between two trading companies. Courts interpret these opportunities widely.

An agreement in the sense of the cartel law of the EU exists if there is a consistency of purpose between at least two commercial companies. In the *Bayer* case, the Commission could not prove whether the *Bayer* pharmaceutical company with its business partners had made an agreement or carried out a coordinated conduct in order to reduce competition. For this reason *Bayer* could not be prosecuted for a violation of Article 101 paragraph 1 TFEU, even though the company had reduced competition, limiting the import of export goods from low-cost state in a high-cost country.[1] A two-party agreement can be accepted if at least one statement can be proved silently. This definition of Union law of an agreement is independent of national rules.

Trade union decisions, such as trade associations, fall under the scope of Article 101 paragraph 1 TFEU. In the past, trade associations are often used to establish cartels. Co-ordinated behavior between business organizations that fall within the scope of application of Article 101 (1) TFEU are conceived as a security networks if a conduct against competition cannot qualify either as a decision or agreement but brings the same effects. Under co-ordinated behavior among the trading companies is meant:

A form of coordination between two trading companies, which has not reached the

[1] ECJ decision 2&3/01, Bayer (2004) 23.

form of one contract, but it is a practical cooperation that reduces competition.[2]
In practice it is impossible to determine where an agreement no longer exists and where a coordinated behavior between two trading companies begins. In the implementation of the EU Cartel, the difference between the agreement, the decision or the coordinated behavior among the trade companies is very small, because the legal consequences they bring are the same.
The EU Cartel rules are applicable not only to vertical but also horizontal agreements. Vertical arrangements are undertaken between the two parties, who stand at different levels of production and distribution (especially distribution contracts).
Horizontal agreements are those signed between two competitors operating in the same market. In the area of vertical agreements, the Commission has published the Directive on vertical restraints, while for the horizontal ones in 2001 the Directives for the implementation of Article 81 of the EU Treaty (now Article 101 TFEU) have been published on horizontal cooperation agreements.

## ECJ Decision No. 161 of 28.1.1986, Pronuptia de Paris vs. Schillgalis

**Case:** It is about a civil suit of the Contractor Pronuptia against the Concessionaire Mrs. Schillgalis for a value of 160 000 DM, before the District Court in Frankfurt / Main, as well as the relevant decision of the appeal of the High Court of Justice of Frankfurt and submission to the ECJ by the Federal Supreme Court of Germany. The Concessionaire refused to pay 10% of turnover to the Contractor. Following a non-final decision by the German Land Court, the regional high court as an appellate court found due to EU anti-competitive clauses, annulment of the contract designated under Article 81 paragraph 2 of the TEU. The High Court brought the case to the ECJ, which came up with a ruling on the legal restriction of competition for price fixing and territorial restraint clauses, which later served on the Commission in preparing the Regulation on Concession Arrangements. [3] Higher Regional Court of Frankfurt (OLG) took the ECJ decision words for words and said that the concession agreement is invalid. Pronuptia has appealed again after which the German Federal Supreme Court instructed the Court of Appeals to re-examine the consequences of the invalidity of the anti-competitive clauses in the contract. 13 years after the first court decision was issued by the Land Court, the Frankfurt Supreme Court granted the Contractor the right to receive the sum of 160,000 DM. This decision came into force.

## Conclusions

The case *Pronuptia* is about a vertical cartel agreement. Price allegiance clauses and territorial restriction of EU law for violation of Article 81 (1) TEU were void. The Supreme German Regional Court initially did not perceive the possibility or the right to define the consequences of invalidity, according to the national law (in this case

[2] 3The EU Charter rules are applicable not only to vertical but also horizontal agreements. Vertical arrangements are such, which are undertaken between the two parties, who stand at different levels of production and distribution (especially distribution contracts). ECJ decision 48/69, ICI/Komision (1972) 619.

[3] Directive No. 4087/88 from 30. 11.1988 of EU Commission.

German law), despite the legal annulment of the EU. If the contract is completely invalid or only designated parts are prohibited under EU law, it should be determined according to German law (general business law). Similarly, payment claims and the right to compensation are determined by national law. This has two important consequences: (1) first, facing the objectives of the EU competition law, fairness and control provisions, together with the concept of a fair exchange description of national law in force. These national concepts of justice determine whether and in what way a contract contrary to the EU competition law may lead to an exchange and which contractual party is responsible and which is not. National contract law and impartiality, as well as EU competition law, which stand in tense relationships with one another, must be coordinated. The ECJ allows, as is clear from the Decision on the *Courage* case, to prevent the unfair enrichment of each of the parties through national law. (2) Secondly, the invalidity of the EU competition law, as defined in the *Courage* case,[4] leads to various consequences and decisions.

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[4] ECJ decision C-453/99 Courage Ltd vs Crehan.