Current developments under Article 102 TFEU and ECJ Decision no. C-439/08 Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW

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Abstract

Under EU Cartel law it is not prohibited the existence of a dominant market position, but the ECJ determines that an enterprise that has a dominant position in the market bears responsibility if through its conduct it does not reduce competition.
While the existence of a dominant position in itself is not forbidden, abuse of its position under Article 102 TFEU constitutes a violation of EU competition law.
In this sense, Article 102 TFEU contains a list of behaviors, which define an abuse of a dominant position. It's about:

a. Direct or indirect liability of unreasonable purchase and sale prices or other business conditions;
b. Restriction of production, taxation or technical development to the detriment of consumers;
c. Using different terms for the same services versus trading partners, reducing competition;
d. The condition included in the signing of the Contract, that the parties undertake additional services, which are not related to the purpose of concluding the contract.

In order to understand more clearly which ECJ conduct is not in accordance with Article 102 TFEU, several decisions should be mentioned: In the *Hoffman-La Roche* case, the ECJ defined the agreements as anti-competitive, which provide price reductions for regular customers, who bought all their vitamin needs from this firm with a dominant position in the market.[1]
The *Michelin* pricing system was also judged by the ECJ as a violation of Article 102 TFEU, because traders bought at annual price reductions, which was dependent on achieving the sales goals and was profitable to force traders not to buy products from other competitors. [2] In the *Irish Sugar* case, the ECJ determined that price reduction agreements for regular customers are classified as a violation of Article 102 TFEU.[3]
In the *Microsoft* case certain behaviors of the dominant position of the enterprise were qualified as violation of Article 102 TFEU. This was on the one hand *Windows Media Player*, which *Microsoft* sold along with its *Windows* software, forcing and at the same time restricting the competition of other software in the field of Media and software.
In this context, the main objective of this article will be the analysis of the current jurisprudence of the ECJ under Article 102 TFEU.

Keywords: Competition, economy, law, Article 102 TFEU, ECJ.

Introduction

Article 102 The TFEU sets out the second most important rule under EU Cartel law. Article 102 TFEU prohibits the abuse of a dominant position in the common market. Under EU cartel law, abuse of a dominant position in the market will be judged very rigorously. Group exemptions as well as special exemptions are valid according to

[1] ECJ Decision 85/76, Hoffman-La Roche, 1979,461.
[2] ECJ Decision 322/81, Michelin, 1983, 3461.
[3] ECJ Decision 228/97, Irish Sugar, 1999, 2969.

article 101 point 3 TFEU, only for the prohibition of the Cartel according to article 101 point 1 TFEU and not for abuse of a dominant position under Article 102 TFEU. To determine the applicability of Article 102 TFEU, the relevant market must be defined. It should also be analyzed whether the enterprise, which is at the center of the investigation, has a dominant position in the relevant market. In this case, it must be tested whether the venture has used this dominant position in an abusive manner within the meaning of Article 102 TFEU. Finally, justifiable causes must also be considered.

In 2005 the Commission published a Memorandum on the use of Article 102 TFEU for exceptional abuses, which sets out the legal framework for abuses of dominant position and brought suggestions for renewals. Based on this Commission document, the Commission published in February 2009 a Recommendation on the application of Article 102 TFEU in cases of prohibition of abuse through undertakings in a dominant position. One of the most important current decisions of Article 102 TFEU is the decision of the ECJ no. C-439/08 Flemish Federation of Brooklyn Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW. This issue represents an important contribution to the creation of national competition rules, which guarantees an effective implementation of EU competition law by competition authorities.

The ECJ determined that Article 35 of Regulation 1/2003 provides for national rules, which prohibit national competition authorities from being a party to a proceeding, as part of an appeal against decisions taken by the authority itself. The decision addresses important issues, in the context of the balance between autonomy of the national procedure and the effectiveness of the decentralized implementation of Articles 101 and 102 TFEU. In case no. C-439/08 concerns the Belgian Competition Council, who on 25 January 2008, implemented a decision, in which it found that VEBIC had violated the Belgian law, of protection of competition. VEBIC, a Flemish trade association of artisanal bakers, was sanctioned for distributing an indexed price for bread along with cost structures for its members.

As part of the appeal, VEBIC appealed to the Court of Appeal in Brussels. The relevant national procedure did not allow the Competition Council to participate in legal proceedings and also the Belgian Ministry of Economy departed from the exercise of its right to bring written arguments. For this reason, VEBIC was the only party within the appeal procedure. The Belgian court raised the question in the context of compliance with Belgian procedural law, which prohibited the participation of the Belgian Competition Authority in the appeal procedure. In the view of the Belgian Court, this harmed not only the effective enforcement of competition rules, but also the right of the National Competition Authority to defend itself. For this reason, they referred the case to the ECJ for trial.

Acceptance of questions referred by the ECJ

According to the Belgian Competition Authority, VEBIC practices were affected by national competition law. VEBIC, for its part, argued that there was no connection between the basic procedure and EU legal rules make the questions asked unacceptable.

The ECJ rejects the complaint of VEBIC and accepts the reference, providing that the Belgian Court of Appeal has the right to review the decisions of the Competition Authority. In particular, the premise that the practices in question do not affect trade between Member States and therefore only national competition rules apply can be challenged by the Court of Appeal. Finally, in the Court's view, it is illogical to accept a reference to a preliminary ruling were the subject of a final decision on an issue that forms the content of that reference.

Does Regulation 1/2003 entitle the National Competition Authority, to participate in an appeal proceeding against their decision?

In other words, the Belgian court asked whether Regulation 1/2003 gives it the opportunity or requires one National Competition Authority to formulate its arguments, being a party to the appeal procedure. The reasoning of the court is based on the teleological argumentation of article 35 point 1 of Regulation 1/2003, which is read based on the light of the principle of effectiveness. In continuation of this rule:

"Member States should designate the Competition Authority or the responsible authorities for the implementation of Articles 82 and 83 of the EU Treaty in such a way that the norms of the regulation are in accordance with this regulation".

Following the argument that neither Article 2 nor Article 15 point 3 of Regulation 1/2003 is relevant, within the issues considered, since they do not confer a right, standing as a party to litigation, within the National Competition Authority, the court focuses on article 35 point 1.

GJBE begins by stipulating that Article 35 point 1 allows the domestic legal rules of each Member State to lay down procedural rules, relating to proceedings against decisions of the National Competition Authority. However, the court determines that such autonomy has its limits and that:

"Such rules should not affect the objectives of Regulation 1/2003, which must ensure that Articles 101 TFEU and Article 102 TFEU effectively enforced by the National Competition Authorities".

In the ECJ's view, if the National Competition Authority is not granted the right to participate in the process as a party, national courts may be entirely enslaved to the defense and legal arguments presented by the complainant and that such a risk may compromise the obligation of the National Competition Authority to effectively implement Articles 101 and 102 TFEU.

The ECJ also argues that an effective exercise of the obligations of the National Competition Authority is intended to give the authority the right to participate, as a respondent, in proceedings before a national court, against a decision taken by the authority itself. For this reason, article 35 point 1 "should be interpreted as including national rules, which do not allow a National Competition Authority to participate in these processes. The ECJ considers that Regulation 1/2003 does not go so far as to require the National Competition Authority to be a party to any matter, but only in those cases where his intervention is effective and necessary. However, given that the action of the National Competition Authority must maintain the effectiveness of EU competition law, the ECJ concludes its argument determining that a constant inability to appear on appeal would jeopardize effectiveness which is followed by Regulation 1/2003 and would lead to a breach of obligations which are assigned to

the National Competition Authority by the Regulation itself.

Conclusions

The VEBIC case showed the ECJ's willingness to intervene in those cases where legal procedural rules could impair the effective execution of Articles 101 and 102 TFEU. Although the ECJ determined the importance of national preconditions (e.g. involvement of an institution of the National Competition Authority, which may participate… in processes), he intervened directly to ban a national rule restricting the effective application of EU competition law.

It is worth mentioning three main aspects of this ECJ decision. First, the ECJ did not seek a final court decision from a national court, whether EU competition law is applicable to the matter under discussion within the framework of the acceptance of this rule. Such an argument is in accordance with the principle of legal cooperation of Article 267 TFEU, especially with competition law issues where the application of EU law is unclear due to the definition of the economic aspect.

Secondly, the specific procedural requirements imposed on Member States, to allow the participation of the National Competition Authority in litigation, have been issued by the court, in the framework of a broad interpretation of Article 35 point 1 of Regulation 1/2003. It is worth noting that the ECJ did not clarify because of the capacity of the National Competition Authority to provide written and oral arguments, set out in writing in Article 15 point of Regulation 1/2003, does not provide alternative means of enforcing the effective application of EU competition law by the National Competition Authority under the appellate procedure.

Thirdly, the ECJ determined that the discretion of the National Competition Authority, to be a party to appeal proceedings, is part of the legal obligation of the National Competition Authority to ensure the effectiveness of Regulation 1/2003.

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