



The State & EU Competition rules

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State vs undertakings' liability

- State liability
 - State Action doctrine: Combination of Protocol 27 TEU, TEU Article 4(3) & 101/102
 - Article 106(1)
- Undertakings
 - "State compulsion" as a defence?



State Action Doctrine 1

- Case 267/86 van Eycke:

“Articles 81 and 82 of the Treaty per se are concerned only with the conduct of undertakings and not with national legislation . The Court has consistently held, however, that Articles 81 and 82 of the Treaty, in conjunction with Article 10, require the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings. Such would be the case, the Court has held, if a Member State were to **require or favour** the adoption of agreements, decisions or concerted practices contrary to Article 81 or to **reinforce their effects**, or to deprive its own legislation of its official character by **delegating** to private traders responsibility for taking decisions affecting the economic sphere .



State Action Doctrine 2

- State liability requires infringement of undertakings
 - Price regulations – adhered to by all undertakings in an independent manner is not prohibited
 - Requirement of an "agreement"
 - But Article 102: Price level might constitute an abuse
- Examples
 - Industry councils (CIF)
 - Tariff boards (with approval) (Arduino)
 - Extension of agreements (BNIC Claire)
 - Approval of tariffs (Ahmeed Saed)



Article 106

- Article 106(1): Public undertakings & undertakings granted special or exclusive rights
 - State liability (lex specialis with regard to state action doctrine)
 - Mostly used in conjunction with Article 102
 - Requirement of causal link between granting of right & abuse
 - Inability to meet demand (Höfner)
 - Reservation of ancillary activity
 - Conflict of interest (MOTOE C-49/07)
- Article 106(2)
 - Exemption / disapplication of competition rules for e.g. SGEI



Greek Lignite Case (C-552/12)

17 July 2014

- DEI had been granted an exclusive licence to explore and exploit lignite in Greece
- Created a situation of "inequality of opportunities"
- "infringement of Article 106(1) in conjunction with Article 102 may be established irrespective of whether any abuse actually exists. ... an infringement may thus be established where the State measures at issue affect the structure of the market by creating unequal conditions of competition between companies..., without it being necessary to prove the existence of actual abuse" (para. 46)



State compulsion as defence

- C-359/95 P Ladbroke:

“Articles 81 and 82 of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 81 and 82 do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings. Articles 81 and 82 may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition”



State compulsion as defence 2

1. Conduct must be compulsory, mere persuasion is insufficient
2. Legal basis for requirements (but threats of e.g. withdrawing permissions will suffice)
3. Not latitude at all for individual choice



The duties of national authorities

- C-198/01 CIF:

”Since a national competition authority such as the Authority is responsible for ensuring, *inter alia*, that Article 81 EC is observed and that provision, in conjunction with Article 10 EC, imposes a duty on Member States to refrain from introducing measures contrary to the Community competition rules, those rules would be rendered less effective if, in the course of an investigation under Article 81 EC into the conduct of undertakings, the authority were not able to declare a national measure contrary to the combined provisions of Articles 10 EC and 81 EC and if, consequently, it failed to disapply it.”
- Step one: Disapplication of national measure contrary to state action doctrine



The duties of national authorities

”As regards penalising the future conduct of undertakings which, prior to that time, were required by a national law to engage in anti-competitive conduct, it should be pointed out that, once the national competition authority's decision finding an infringement of Article 81 EC and disapplying such an anti-competitive national law becomes definitive in their regard, the decision becomes binding on the undertakings concerned. From that time onwards the undertakings can no longer claim that they are obliged by that law to act in breach of the Community competition rules. Their future conduct is therefore liable to be penalised.”

- Step 2: Full application of 101/102 post disapplication of national measure