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Pecuniary penalties imposed on undertakings within the EU competition policy

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Abstract

The European internal market allows people and businesses to circulate freely in the 28 member states. The possibility of companies to compete equally and fairly is guaranteed by European Union (EU) competition policy. These rules encourage companies to be more efficient. The present study provides an overview of the discussion of relevant issues with these objectives: describing the creation and development of EU's competition policy and characterise the importance of the role played by the European Commission in this area in addition to examining the imposition of pecuniary sanctions on companies. Is at issue the application of the rules in the Treaty on the functioning of the EU and Regulation No 1/2003? In conclusion, it was verified that the system adopted by the EU shows some fragility in the defence of the fundamental rights of companies.

Keywords: Competition policy, European Union.

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1. Introduction

The European Union (EU) competition policy ensures that companies compete equally and fairly in Europe's internal market. Competition policy is about applying rules to make sure companies compete fairly with each other. This encourages enterprise and efficiency, creates a wider choice for consumers and helps to reduce prices and improve quality. The present study provides an overview about the discussion of relevant issues with these objectives: to describe the creation and evolution of EU competition policy, characterise the importance of the role played by the European Commission in this area. To analyse the European Commission's action on the application of sanctions to companies, check the nature of the sanctions in question: administrative or criminal. The European Commission promotes, especially under competition law, an action research that may lead to the imposition of financial penalties for companies. We conclude that in the system adopted by the EU there is some fragility in the defence of the fundamental rights of companies.

2. The evolution of EU competition policy

The High Authority for the European Coal and Steel Community (1952) had a role that was essentially that of a regulator because it had powers of intervention at the level of prices and quantities, which gave it a more direct influence than that of a real competition authority.

The EU's competition policy has been an important part of the EU's work ever since it was implemented in the Treaty of Rome in 1957. The treaty instituted 'a system ensuring that competition in the common market is not distorted'. The aim was to create a set of well-developed and effective competition rules, to help ensure that the European market functions properly and to provide consumers with the benefits of a free market system.

The Council Regulation No. 17 of 6 February 1962 was the first regulation implementing Articles 85 and 86 of the Treaty of Rome, now Articles 101 and 102 of the Treaty on the Functioning of the EU. This regulation provided the tools for a procedure of inquiry for the purposes of Community competition law, by attributing specific powers to the Commission and establishing a system of notifications and penalties for infractions while also creating exceptions to the application of these prohibitions. After being adopted by the Council in 1962, it established a control system and application procedures which the Commission applied for almost 40 years without significant changes.

Over the years, and due to an accelerated internationalisation of the European economy, the competition policy has become part of a globalising framework. Adjustments were made over time to the legal framework, mainly due to accessions, which had an automatic effect on expanding the scope of the Commission's actions. The objective has now been the decentralised application of the Community competition law.

The largest enlargement in the EU's history added urgency to the reform process, but 'underlying this regime change was a sense that the competition culture of the member states after nearly 50 years of antitrust policy had reached a sufficiently advanced state to justify a significant degree of decentralisation in its enforcement'

Wigger (2009) describes that Regulation 1/2003, applicable since 1 May 2004, has been one of the most far-reaching EU competition policy reforms in the history of European integration. The long-standing centralised administrative ex ante notification regime for commercial intercompany agreements was replaced by a decentralised ex post private enforcement regime. This essentially altered the way in which anticompetitive conduct, such as cartels and other restrictive business practices, are prosecuted. Companies can no longer rely on the official Commission decision prior to concluding contractual agreements with other companies but are increasingly exposed to the risk of being litigated by other market actors in civil disputes, a jeopardy that, so far, has constituted a relatively alien feature in the EU. The 2004 reform reflects a major step of legal convergence towards

the US antitrust regime, which has private enforcement as one of its most characteristic features. Regulation 1/2003, however, formed only the prelude of further reform proposals. Further reform steps appear on the horizon. The Green and White Paper of 2005 and 2008 aim at further institutionalising, and thus, consolidating a pan-European system of private enforcement. The article examines the underlying interest constellation that has shaped this reform process and demonstrates and explains the important role played by a community of transnational legal and economic competition experts.

The Commission's investigative powers have been broadened by the Regulation 1/2003 and, as time goes on, it will be necessary to extend such research as well as to monitor the capabilities of the legal system, particularly as companies resort to progressively more sophisticated forms of infringement, making it increasingly difficult to detect anti-competitive behaviour.

Currently, the main rules are. Under EU rules, businesses:

- may not agree to fix prices or divide up markets amongst themselves (Article 101 of the Treaty on the Functioning of the European Union (TFEU));
- may not abuse a dominant position in a particular market to squeeze out smaller competitors (Article 102 TFEU);
- are not allowed to merge if that would put them in a position to control the market. Larger companies that do a lot of business in the EU cannot merge without prior approval from the European Commission—even if they are based outside the EU (the merger regulation).

EU rules also cover government assistance to businesses (state aid), which is monitored by the Commission (Article 107 TFEU). The following, for example, are forbidden unless they comply with certain criteria:

- loans and grants;
- tax breaks;
- goods and services provided at preferential rates;
- government guarantees which enhance the credit rating of a company compared to its competitors.

Also, no state aid in any form may be given to ailing businesses that have no hope of becoming economically viable.

3. The role of European Commission

In the beginning, each Community had its own executive body: the High Authority for the European Coal and Steel Community (1952) and a Commission for each of the two communities set up by the Treaty of Rome in 1957, the EEC and Euratom. These were merged into a single European Commission on 8 April 1965 by the Merger Treaty.

The European Commission promotes the interest of the EU in its action, with an inspection body whose procedures do not benefit from the granting of a new concept of international law. In the latter case, the Commission may impose pecuniary penalties on undertakings. The Regulation states that sanctions are not criminal in character but begin to question how all guarantees are observed.

The European Commission has one of the areas of greatest interest in competition policy, although its control power is here (and today) shared by national courts and national competition authorities, with the aim of maintaining and developing effective competition in the internal market, the structure of markets and the behaviour of economic agents. There are some cases in which the Commission has sole control by express legislative indication (control of mergers of Community size and state aid) and is certainly shared when it is a rule of general application covering the Union as a whole.

The European Commission, which has a broad discretionary power, but with limited resources, is itself taking the priority of focusing on the most serious cases and acting only when it considers necessary and appropriate, 'particularly those that have a European or global dimension'. The European Commission is obliged not to proceed with the investigation of all the cases of which it has the knowledge and to define priorities. Priorities shall be established by taking into account the special interest of the Community from a political, economic and political point of view.

In defending competition from the EU, the Commission functions as a public body which investigates and decides to exercise administrative power, under the full control of the General Court and subject to appeal to the Court of Justice. Regarding the application of Articles 101 and 102 of the TFEU, the Commission's powers of investigation and the decisions it adopts, including the imposition of fines, are subject to judicial protection in all aspects of law and fact, since the court can annul, rise or diminish the amount of fines if unlimited jurisdiction applies.

Still, it is sometimes difficult to guarantee access to the effective judicial protection of private individuals, especially if they are not directly targeted by the measures adopted.

Generally, the EU's investigative powers, may they be information gathering, investigation or inspection, do not result from a general authorisation. They will have to depend on specific and textual attribution, and although the Treaty encompasses a general inspection power (Article 337 of the TFEU), it refers to the specific legal texts to define those attributions, following which the exercise of the specific powers of investigation is considered for each case. Also, Regulation No. 1/2003 is not the only legal text which confers specific investigation powers, but by being a diverse source, they all follow a group of common principles on the basis of the European administrative law, such as the respect for its fundamental rights.

The Commission's investigative function seeks to ensure the legal fulfilment and thus protecting the general interests and legal goods subject to administrative protection, but it also fulfils several objectives, such as: a preventive intention of effectiveness of the administrative action in which it is intended to avoid the application of the penalty; a corrective intention and reimbursement of the disturbed order through the exercise of the sanctioning power; a pedagogical or instructive function to correct the conducts of the economic agents through education; a general information function, which covers the previous one, to bring to the attention of the economic agents the best compliance with the legal system in question.

In the procedural aspects of the institutional framework for effective enforcement of EU competition law, the Commission pledges to further improve its investigative means and to increase transparency, because in times of economic crisis such as those we are experiencing, the defence and compliance with the competition rules cannot be reduced.

4. The nature of sanctions to companies

The Regulation 1/2003 equipped the Commission with a renewed set of enforcement powers which are geared towards its principal objectives of effective and coherent enforcement. The Commission has used its new or revised powers actively, and overall successfully, for effective enforcement. The Commission's action would be ineffective if its checks were not accompanied by decisions and sanctions. Fines with sufficient deterrent effect, coupled with an effective leniency programme, constitute the most efficient weapon in the Commission's armoury to fight cartels, in particular. The legal basis for the Commission's power to impose fines for breaches of substantive competition law under Regulation 1/2003 was essentially taken over from Regulation 17.

The Commission may, by decision, impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 81 or Article 82 of the Treaty or when

they infringe the Regulation 1/2003. These decisions taken pursuant shall not be of a criminal law nature.

The effectiveness of the Commission in fines policy has been such that judicial interference in its application has been relatively rare, perhaps too rare, allowing the Commission to maintain a large margin of discretion and confirming very severe sanctions. The policy on fines is an important instrument of prevention and deterrence, although it should be borne in mind that behaviour is motivated not only by sanctions but also by incitement to compliance. The fines have been increasing, increasing every decade in the name of detention, which has been affirmed in the Commission's Reports and confirmed by the Court of Justice (Forrester, 2011).

European Union law, contrary to the reality of the United States and even some member states, does not provide for criminal sanctions for such offenses (Porto & Anastacio, 2012). This administrative penalty of the Commission represents a dual function: a repressive aspect of anti-competitive practices, but another preventive and dissuasive one because of the serious consequences that the violation of the rules protecting free competition can bring to the market.

In any procedure which may result in the imposition of a sanction for breach of competition law, fine or penalty, even if it is not of a criminal nature, the Commission will have to ensure compliance with the general principles of law. Since they form part of their fundamental rights, there is respect for companies' rights of defence (Thouvenin, 2005).

If infringements of European competition rules are not of a criminal nature, they are not defined by the principle of guilt in criminal matters. They may be classified as faults in the European economic public order, in a purely material structure (Bouscant, 2000). However, some dissenting voices are beginning to arise, which consider that, in addition to the excessive aspect of the Commission's already concentrated powers, these sanctions will have a quasi-criminal (Silva, 2014) nature, whether in the European sphere or even in the national sphere by the competition authorities.

However, this characterisation can be considered irrelevant to the parallel with the complexity factors of the criminal type of procedure that is easy to display. There, an application of the Charter of Fundamental Rights of the European Union may find application, challenging not to be a Commission of a body with jurisdiction to apply criminal sanctions, lacking the impartiality and independence of a court such as the question of the application. Therefore, with powers that conflict with the defence of the fundamental rights. (Forrester, 2011). The subject has been increasingly debated in doctrine and jurisprudence, including by the European Court of Human Rights.

5. Conclusions

Regulation 1/2003 has brought about a landmark change in the way the European competition law is enforced. The Commission has been able to become more proactive, tackling weaknesses in the competitiveness of key sectors of the economy in a focused way.

The European Commission is the great driver of the Union's interest and effectively promotes compliance with European Union law. In the framework of competition law applicable to companies, the procedures have remained fairly stable since 1962, and after 2003 their renewal has accompanied the broadening of the internal market. The Court has always supported its action and developed the inherent guarantee of fundamental rights. The non-criminal nature of the pecuniary sanctions which may be applied to undertakings is expressed. However, as we find facets of fragility in the defence of fundamental rights that may indicate that there is a criminal nature in these sanctions, are all the guarantees of the legal subjects to be respected? The subject has deserved attention from jurisprudence and doctrine but is still under development. It was our intention to raise the problem and the doubts that arise in the sense of sensitising the reader interested in these subjects to the problem that is not completely finished yet.

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