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GLOBAL DICTIONARY OF COMPETITION LAW

Individual Exemption – Article 101(3) TFEU

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Definition

Agreements that restrict competition by object or effect contrary to Article 101(1) TFEU may nevertheless be deemed compatible with EU competition law if they meet the cumulative requirements for individual exemption set out in Article 101(3) TFEU. Such exemption is given for otherwise prohibited agreements that produce an economic benefit of which consumers receive a fair share, but without resorting to unnecessary restrictions for achieving such a benefit and without substantially eliminating competition. Comparable two-step analysis of prohibition and then exemption of agreements is common in many competition regimes worldwide. In contrast, analysis pursuant to section 1 of the US Sherman Act does not share this bifurcated form.

Commentary

An agreement (or other coordination) that restricts competition by object or effect within the meaning of the Article 101(1) TFEU prohibition is not necessarily illegal. It is still possible that the Commission, EU Courts, or equivalent Member State authorities applying EU law will find the arrangement lawful through it meeting the conditions set out in Article 101(3) TFEU. The analytical logic of Article 101 TFEU is for a two-step review of agreements for restrictions under paragraph 1 and then exemption under paragraph 3. Similar bifurcation can be found in Member State equivalents to Article 101 TFEU and competition regimes beyond the EU (e.g. Pakistan, Turkey, UK).

Four conditions must be satisfied for a finding of legality pursuant to Article 101(3) TFEU. These conditions are cumulative (*Matra Hachette*, paragraph 104) and are explained in the Commission's 2004 guidelines on the application of Article 101(3) TFEU. The first condition is that the restriction of competition is counterbalanced by some improvement in production or distribution of the goods or promotion of technical or economic progress. Such benefits must be objective and sufficiently substantiated with evidence to be verifiable (Guidelines, paragraphs 49, 55-57). The guidelines reflect a narrow focus upon efficiencies as possible benefits, primarily through reduced costs (e.g. economies of scale and scope, new production methods, synergies from integration of assets), quality improvements, technological advancements, and new products (Guidelines, paragraphs 59, 64-72). The second requirement is that consumers receive a fair share of the claimed benefit. "Consumers" is interpreted broadly to include customers of the parties and any subsequent purchasers (including final consumers) (Guidelines, paragraph 84). A fair share requires that the claimed benefits of the restrictive agreement compensate consumers for any negative impact (Guidelines, paragraph 85). Third, the agreement itself and the restrictions therein must be indispensable for achieving the claimed benefit. The Commission will not find this to be met where it considers there to be realistic alternatives that are less restrictive of competition than the overall agreement and each individual restriction (Guidelines, paragraphs 75-76). Fourth and finally, the agreement should not eliminate competition for a substantial part of the products in question. This reflects caution about exempting agreements that leave competition in the relevant markets insufficiently robust, despite their potential benefits.

According to Article 2 of Regulation 1/2003, the burden of proof is on the parties wanting to benefit from such an exemption who must raise 'convincing arguments and evidence' (*GSK*, paragraph 235).

When the parties have raised proof, the Commission must subject it to a proper examination and adequately substantiate any disagreement (*GSK*, paragraph 303). In *MasterCard* the General Court rejected the common claim that the Commission has imposed an excessively high burden of proof on undertakings for satisfying the requirements of Article 101(3) TFEU (paragraphs 194-237).

Article 101(3) TFEU is an example of analytical divergence between EU competition law (and comparable regimes) and US antitrust pursuant to section 1 of the Sherman Act. First, it is possible for the parties to seek exemption pursuant to Article 101(3) TFEU for any restrictions of competition, including those by object (*Matra Hachette*, paragraph 85). As a result, EU competition law does not have practices prohibited *per se* as in US antitrust; conduct presumed illegal by object under Article 101(1) TFEU, including price-fixing cartels, is not legally prevented from being granted an Article 101(3) TFEU exemption, although highly unlikely that it will satisfy the conditions (Guidelines, paragraph 46). Second, the balancing of anticompetitive and procompetitive consequences of an agreement akin to the US rule of reason standard is only to occur in the context of Article 101(3), not when analysing whether a restriction by object or effect exists under Article 101(1) TFEU (*MasterCard*, paragraph 80). The Court of Justice has however made the divide between paragraphs 1 and 3 of Article 101 somewhat less stark through ruling that presumptions of restrictions of competition by object should not be applied if relevant and significant pro-competitive effects are demonstrated (*Generics*, paragraphs 103-110).

While the language of an “individual exemption” is still useful to distinguish agreements deemed legal by direct application of Article 101(3) TFEU from those falling within the conditions of a block exemption regulation (themselves applications of paragraph 3 by proxies), this is an evolution from when “individual exemption” had a specific meaning. Prior to Articles 5 and 6 of Regulation 1/2003 giving Member State courts and competition authorities the power to apply all parts of Article 101 TFEU, the Commission had the sole power (subject to judicial oversight) to find agreements that breached the Article 101(1) prohibition nevertheless lawful pursuant to Article 101(3). Parties to agreements within the scope of Article 101(1) had to notify the Commission and, hopefully, receive an individual exemption decision. Especially when combined with the then expansive approach to the meaning of Article 101(1), the Commission could not cope with formally granting individual exemption under Article 101(3) to all notified agreements, often resorting to informal “comfort letters”. Following decentralisation via Regulation 1/2003, Article 101(3) is primarily intended to be applied by the parties to agreements themselves, though with national courts, competition authorities, the Commission, and EU Courts having the ability to accept or reject their analysis in any subsequent investigation or adjudication. At EU level, formal decisions on the application of Article 101(3) have been few and far between since 2004.

Regulation 1/2003 also marked a shift in the substantive application of Article 101(3) TFEU, at least from the Commission’s perspective. Its Guidelines limit the acceptable benefits that can be raised by the parties to economic efficiencies (e.g. cost and price reductions, new products). The fear was that a broader category of acceptable benefits would lead to the inconsistent application of Article 101(3) by national authorities throughout the EU. But when the Commission alone could grant an individual exemption it was less narrow in focus, with several instances of Article 101(3) being granted based on the restrictive agreement contributing to regional development, environmental protection, employment, and even arrangements reducing market output in a gentle manner (essentially crisis cartels). Indeed, the General Court gave some support to taking into account ‘considerations connected with the pursuit of the public interest’ when deciding upon individual exemption (*Métropole*, paragraph 118). Although the Commission has since shifted emphasis in its (non-binding) 2004 guidelines, the application of Article 101(3) by some Member State authorities remains more expansive, particularly in the Netherlands and Greece. Whether the Commission will stick with its narrow focus on efficiencies when (rarely) applying paragraph 3 is unclear; it may be swayed by growing calls for competition enforcement to promote environmental sustainability.

Case References

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- Case T-168/01 *GlaxoSmithKline v Commission*, EU:T:2006:265 (*'GSK'*).
- Case T-111/08 *MasterCard v Commission*, EU:T:2012:260 (*'MasterCard'*).
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