Art. 101 para. 3 TFEU - role of the exemptions

A. Introduction: The ordoliberal school of competition theory

The role of the exemptions in Art. 101 para. 3 TFEU has been addressed by the ordoliberal school of competition theory and changed by the "more economic approach".

A. Introduction: The ordoliberal school of competition theory

The ordoliberal notion of competition policy was conceived in the 1930s at the Freiburg University in Germany by economist Walter Eucken and two lawyers, Franz Böhm and Hans Großmann-Doerth. Ordoliberal ideas became the key element of post-World War II German social market economy and influenced, either directly or indirectly, the EU competition rules.

Ordoliberals followed earlier conceptions of liberalism in considering that a competitive economic system is necessary for a prosperous, free and equitable society. In other terms, competition is necessary for economic well-being and economic freedom is necessary for political freedom. In their so-called ordoliberal version of society, competition is a central element to economic progress. They argued that it is not sufficient to protect the individual from governmental intervention in the economy; it also needs to be protected from the misuse of private economic power.

According to ordoliberal thinking, competition policy is primarily based on notions of "fairness" and that firms with market power should behave "as if" there is effective competition on the market. From the ordoliberal perspective, small and medium sized enterprises should be protected from the excesses of market power since they are important to consumer welfare. Moreover, economist Walter Eucken had proposed that, wherever possible, monopolies should be prohibited per se.

B. "more economic approach" to Art. 101 TFEU

Ordoliberasm's influence over EU Competition Law can first be seen in the drafting of the provisions in the Treaty. The Union's aim is according to Art. 3 TEU "to establish an internal market" and "a sustainable development of economic activities". Art. 101 para. 1 TFEU prohibits agreements that restrict competition and Art. 101 para. 3 TFEU allows for the competition authorities to exempt some of those agreements because of increased efficiency.

The Commission's initial approach to Art. 101 TFEU was rather formalistic; the agreements were treated by form-not by effect- in order to be determined whether or not they restrict competition. This method limited restrictions on the conduct of one of the parties and prevented any interferences with the single market project.

Today the Commission has changed methodology and takes into consideration the real economic effects of an anti-competitive agreement under both Art. 101 para. 1 and 3 TFEU, focusing on a consumer welfare and efficiency objective. The Commission now is more willing to accept that restrictive agreements can still have positive efficiency effects. Consumer welfare should be the benchmark against which agreements are tested. A stronger economic approach is also obvious in the "Guidelines on the application of Article 81 para. 3". The Commission notes that the objective of competition law is to enhance consumer welfare and to ensure an efficient allocation of resources.

However, this does not mean an acceptance of a "rule of reason" doctrine in the ECJs and CFIs application of Art. 101 para. 1 TFEU. In Métropole Télévision vs. Commission case the General Court expressly rejected that the judgement required a US rule of reason style analysis, but the impact of the agreement should be taken into account in the economic context in which the undertakings operated, the products or services covered by the agreement and the actual structure of the market concerned.

C. Conclusion

The Commission's interpretation of Art. 101 TFEU has evolved over time and has now moved towards an "economic approach" of modern EU Competition Law. It focuses on an effect-based analysis model: an analysis weighing anti-and pro-competitive effects of restrictive agreements.