

**MEMBER STATE CONDUCT UNDER THE SCOPE OF EU COMPETITION LAW: THE
EFFET UTILE OF EU ANTITRUST PROVISIONS**

A LEGAL MAPPING REPORT

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1 The jurisprudence

The EU Court of Justice has a limited amount of case law concerning Art. 4(3) TEU read together Articles 101 and 102 TFEU. Although these decisions prescribe a general prohibition of legislative measures being able to render ineffective the competition rules for undertakings, they also provide a detailed account of such conditions and facts that may justify these legislative provisions, in practice. Furthermore, the role of national courts in giving a final assessment of the specific legal provisions and fact is also highly emphasized by the Court of Justice.

There are two distinct patterns of cases:

cases relating to mandatory approval of various transport tariffs.

cases relating to legal provisions fixing various kind of prices or service fees.

There are certain unique cases based on an individual and specific background mostly stemming from national policy preferences.

1.1 Cases relating to mandatory approval of various transport tariffs

1.1.1 Mandatory approval procedure for road transport tariffs

The tariffs for long distance road transport are fixed by Tariff Boards composed of independent and honorary experts and binding on all economic agents. The decisions of Tariff Boards have to be approved by the Federal Minister of Transport with the consent of the Federal Minister for Economic Affairs.

Article 5 TEC second paragraph (Article 4(3) TFEU) and Article 85 TEC (Article 101 TFEU) do not preclude such a Member State practice since:

Bundesanstalt für den Güterfernverkehr kontra Gebrüder Reiff GmbH & Co. KG. (Case C-185/91) [1993] ECR I-5801; Centro Servizi Spediporto (Case C-96/94) [1995] ECR I-2883

(i.) The members of the Tariff Boards cannot be regarded as “representatives of undertakings in the industry concerned”, since they are not bound by the “orders or instructions” coming from the undertakings that proposed them to the Minister for appointment.¹²

¹ Case C-185/91 *Reiff* [1993] ECR I-5801, para 17.

(ii.) The relevant act (Law on the carriage of goods by road) obliges the Tariff Boards to take into account other interests – mostly related to public interest – than the sole interest of the undertakings in the road transport industry when fixing the tariffs. Among others, “the interests of the agricultural sector and of medium-sized undertakings or regions which are economically weak or have inadequate transport facilities”³ have to be considered in the decision about tariff.⁴ And, a compulsory consultation with the users of the services is also required before the final decision.

(iii.) Lastly, this solution cannot be regarded as delegation of public powers related to fixing of tariffs to private economic agents as the relevant act provides a specific legal basis for the Minister “to harmonize the services and the prices of the various means of transport in order to avoid unfair competition”, further the Minister has the opportunity to personally or by a representative attend the meetings of the Tariff Boards. Furthermore, the Minister with consent of the Minister for Economic Affairs may even fix the tariffs on his own if public interest requires it.⁵

1.1.2 Mandatory approval procedure for water transport tariffs

In the same vein as Reiff, but there are two differences in the relevant act (Law on inland waterways traffic). But these did not change the approach of the Court of Justice.

Delta Schiffahrts- und Speditionsgesellschaft (Case C-153/93) [1994] ECR I-2517; Centro Servizi Spediporto (Case C-96/94) [1995] ECR I-2883

The relevant act does not require the members of freight commissions to be experts, but they are described only as independent (being not bound by orders and instructions) and honorary office holders. The law also highlights that the chairman and the two assessors of expanded freight commission – that has to decide if the undertakings of the water transport industry cannot agree with a specific remuneration within the freight commission – discharge their duties independently.⁶ In sum, the decisive point is the independence and honorary office of the members.

The Minister is not entitled to participate personally in the work of these freight commissions, but he or she has the power to set them up and overrule their decision if public interest is at stake.⁷⁸

1.2 Cases relating to legal provisions fixing various kind of prices or service fees

² The composition of such a body may also be a relevant point, if the representatives of the economic sector are in minority it strengthens the body’s independent character. Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883. para 23.

³ Case C-185/91 *Reiff* [1993] ECR I-5801. para 18.

⁴ Cf. Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883. para 24.

⁵ Case C-185/91 *Reiff* [1993] ECR I-5801. para 21-22.

⁶ Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, para 16.

⁷ Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, para 21.

⁸ Cf. Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883. paras 27-28.

1.2.1 A tax law provision fixing the selling price of tobacco by the producers or the importers

This seems to be able to encourage the abuse of dominant position since the producers and the importers can oblige retailers to comply.

In assessing the compatibility with the Treaty of a system for fixing retail selling prices, a national court must take into account:

GB-Inno-BM (Case 13/77) [1977] ECR 2115

- (i.) If the option to oblige retailers to follow the prices fixed by the manufacturers and importers could constitute a dominant position.⁹
- (ii.) The compulsory nature of these prices.¹⁰
- (iii.) The effect of price-fixing on inter-Member State trade.¹¹

1.2.2 A national provision fixing the maximum level of both basic interest and fidelity or growth premium rates for savings deposits

The objective of this provision is to limit the scope of tax exemption for savings deposits by limiting the yield on savings deposits.

Van Eycke (Case 267/86) [1988] ECR 4769

In general, this is not incompatible with Art. 5 EEC (Article 4(3) TFEU) read in conjunction with Arts 3 (1) g) and 85 EEC (Article 101 TFEU).¹² however, it is for the national court to ascertain:

- (i.) whether this provision may be regarded as intended to reinforce the effects of pre-existing agreements, decisions or concerted practices¹³
- (ii.) whether there are circumstances capable of depriving the legislation of its official character¹⁴ (the ECJ declared that no delegation to any private trader occurred in this case, so it has an official character¹⁵)

1.2.3 Adoption of a legal instrument approving a tariff fixing minimum or maximum fees for members of the Bar

Article 5 (Article 4(3) TFEU) and 85 TEC (Article 101 TFEU) does not preclude the adoption of such a law or regulation since it does not divest the

⁹ Case 13/77 *GB-Inno-BM* [1977] ECR 2115. para 37.

¹⁰ Case 13/77 *GB-Inno-BM* [1977] ECR 2115. para 37.

¹¹ Case 13/77 *GB-Inno-BM* [1977] ECR 2115. para 38.

¹² Case 267/86 *Van Eycke* [1988] ECR 4769. para 20.

¹³ Case 267/86 *Van Eycke* [1988] ECR 4769. para 17.

¹⁴ Case 267/86 *Van Eycke* [1988] ECR 4769. para 17.

¹⁵ Case 267/86 *Van Eycke* [1988] ECR 4769. para 19.

rules from the character of legislation by delegating them to private economic operators.

Arduino (Case C-35/99) [2002] ECR I-1529

a professional body of the Bar (National Council of the Bar composed of members of the Bar) provides a draft and it is approved by the Minister for Justice after obtaining the opinion of the Interministerial Committee on Prices). This decision is made in every two years.

the legal basis, the Royal-Decree Law requires that the fees have to be fixed on the basis of (i.) the monetary values of the disputes, (ii.) the level of court seised, and (iii.) the duration of the procedure in criminal matters, however no public interest criteria is mentioned.¹⁶

Therefore, the Italian government did not waived its power to make decisions of last resort or to review the implementation of the tariff.¹⁷ That is the drafting committee does not work “like an arm of the State working in the public interest.”¹⁸

However, such a provision, with special regard to the prohibition of derogation from the fees determined this way, may constitute a restriction of freedom to provide services and it is for the national court to determine if this restriction may be justified by public interest (the objectives of protection of consumers and proper administration of justice).¹⁹

1.2.4 A legal provision enabling the competent authorities to fix the selling price of petroleum products by taking into account various factors

This way of fixing prices by the authorities on a monthly basis is not contrary to EU in general.

Cullet (Case C-231/83) [1985] ECR 305

Each refinery or petroleum importer is free to determine the “ex-refinery price” for petroleum products in principle however it cannot exceed a “ceiling price” fixed on a monthly basis by the authorities. Practically, it means that the “ex-refinery prices” are equal to the fixed “ceiling price”. When determining this “ceiling price” the authorities take into account (i.) the cost price of French refineries, (ii.) the rate of the dollar, (iii.) maritime freight and refining costs, and (iv.) rates recorded on the European market.²⁰

A more general conclusion: “Article 5, in conjunction with Articles 3 (f) and 85 of the Treaty, does not prohibit the Member States from regulating (...) the fixing of retail selling price of goods in this way.”²¹

¹⁶ Case C-35/99 *Arduino* [2002] ECR I-1529. para 38.

¹⁷ Case C-35/99 *Arduino* [2002] ECR I-1529. para 40.

¹⁸ Case C-35/99 *Arduino* [2002] ECR I-1529 para 39., *Cipolla (Joined cases C-94/04 and C-202/04) [2006] ECR I-11421 para 52.*

¹⁹ *Cipolla (Joined cases C-94/04 and C-202/04) [2006] ECR I-11421 para 70.*

²⁰ *Cullet (Case 231/83) [1985] ECR 305 para 5.*

²¹ *Cullet (Case 231/83) [1985] ECR 305 para 18.*

However, if the “ceiling price” is calculated only based on the costs of French refineries when the European fuel rates are 8% above or below it creates an obstacle to imports what is prohibited by Article 30 TEC (Article 36 TFEU).²²

1.3 Cases related to specific national policy preferences

1.3.1 A legal provision requiring that a legal State examination committee has to be partially composed of members of the bar being nominated by a joint proposal of the National Lawyers Council and the local bar councils

The State examination board consists of five persons: two judges, one professor and two advocates nominated by a joint proposal of the National Lawyers Council and the local bar councils.

Article 81 and 82 TEC (Articles 101 and 102 TFEU) (read in conjunction with Article 10 TEC (Article 4(3) TEU)) do not preclude such a rule since:

Mauri (Case C-250/03) [2005] ECR I-1267

the State did not divest its own rules to the “on access to the profession of advocate of the character of legislation by delegating to advocates responsibility for taking decisions concerning access to their profession.”²³

Since the judges in the committee are related to the State, further, the Ministry of Justice has substantial supervisory powers at each stage of the process, and it may also intervene into it, and, lastly, a negative decision may be subject to proceedings before the administrative courts.²⁴

In sum, the State “has not given up the exercise of its powers in favour of private economic operators”²⁵ Moreover, the State did not require or encourage any acts that may be contrary to both Article 81 and 82 (Articles 101 and 102 TFEU).

1.3.2 Labour law provisions prohibiting the employment of workers in retail shops on Sundays after 12 am.

This provision is not contrary to competition rules as:

Criminal Proceedings against André Marchandise et al (Case C-332/89) [1991] ECR I-1027

²² Cullet (Case 231/83) [1985] ECR 305 para 34.

²³ Mauri (Case C-250/03 [2005] ECR I-1267 para 31.

²⁴ Mauri (Case C-250/03 [2005] ECR I-1267 paras 33-35.

²⁵ Mauri (Case C-250/03 [2005] ECR I-1267 para 36.

This legislation does not seek to “to reinforce the effects of pre-existing agreements, decisions or concerted practices. Moreover, no aspect of the legislation is liable to deprive it of its official character.”²⁶

1.3.3 A decision by the public authorities making affiliation to a sectoral fund compulsory if representative labour organizations request it based on their prior agreement

Article 101 TFEU does not prohibit such provisions as:

Albany International (Case C-67/96) [1999] ECR I-5751

It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers.²⁷

Further, the agreement at issue in the main proceedings does not, by reason of its nature and purpose, fall within the scope of Article 85(1) TEC (Article 101 TFEU) as it derives from a social dialogue and it contributes to improving of working conditions.²⁸

The decision of the authorities is made on the basis of legal regime ‘designed to exercise regulatory authority in the social sphere.’ That is, no delegation of governmental power to private parties occurs.²⁹

1.3.4 A quota-allocation system imposed by legislation and operated by a consortium of domestic manufacturers composed of members of the industry (match manufacturers in this case)

This way of quota-allocation may be contrary to competition rules. Further, this case is in a strong contrast with the Reiff case law.

Consorzio Industrie Fiammiferi (CIF) (Case C-198/01) [2003] ECR I-8055

A regime established by legislation with optional membership in the consortium (compulsory membership existed until 1994) operating the quota-allocation committee.³⁰

However, the agreements on production quotas and exchange of quotas were not prescribed by law but they were results of occasional agreements between the undertakings.³¹ Moreover, this committee was also autonomous when fixing quota for imports (15%).³²

The composition of quota-allocation committee: four from five are

²⁶ Criminal Proceedings against André Marchandise et al (Case C-332/89) [1991] ECR I-1027 para 23

²⁷ *Albany International (Case C-67/96) [1999] ECR I-5751* para 59

²⁸ *Albany International (Case C-67/96) [1999] ECR I-5751* paras 62-63.

²⁹ *Albany International (Case C-67/96) [1999] ECR I-5751* 69.

³⁰ *Consorzio Industrie Fiammiferi (CIF) (Case C-198/01) [2003] ECR I-8055* para 60.

³¹ *Consorzio Industrie Fiammiferi (CIF) (Case C-198/01) [2003] ECR I-8055* para 72.

³² *Consorzio Industrie Fiammiferi (CIF) (Case C-198/01) [2003] ECR I-8055* para 73.

members of the industry and “nothing in the relevant national legislation prevents from acting exclusively in their own interests.” And, as the committee makes decisions by a simple majority, it can make decisions contrary to the vote of the chairman having public interest duties.³³

Lastly, the public authorities have no effective means to control the quota-allocation committee’s decisions.

In sum, the members of the committee may be capable of engaging in autonomous business conduct that may be contrary to Art. 81. TEC (Article 101 TFEU).

It is for the national court to assess the complexity of the situation.

³³ Consorzio Industrie Fiammiferi (CIF) (Case C-198/01) [2003] ECR I-8055 para 77.