公平交易委員會　國際反托拉斯宣導

歐盟垂直限制競爭規範與實務

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公平交易委員會　魏杏芳

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  http://ec.europa.eu/competition/index_en.html

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  - ✓ *Football Association Premier League (FAPL) and Others,* Joined Cases C-403-08 and C-429/08
  - ✓ *SA Binon & Cie v SA Agence et messageries de la presse,* Case 243/83

EU competition rules applicable to vertical restraints

- ✓ Vertical agreements are agreements for the sale and purchase of goods or services which are entered into between companies operating at different levels of the production or distribution chain.
- ✓ **Treaty on the Functioning of the European Union (TFEU), Article 101**

  Article 101(1) " Agreements which have as their object or effect the prevention, restriction or distortion of competition"

  Article 101(3) exemption, either by an individual exemption decision or by the application of block exemption regulations
- ✓ Whether the benefits of a vertical agreement outweigh the anti-competitive effects often depends on the market structure and normally requires an individual assessment.

Object restraints

- ✓ EU case law consistently reiterates that to identify agreements incorporating object restrictions, 'regard must be had to the content of its provisions, the objectives it seeks to ascertain and the economic and legal context of which it forms part'.
- ✓ The ECJ has clarified that Article 101(1) is not applicable where the impact of the agreement is not appreciable.
- ✓ Commission Notice on agreements of minor importance (*De Minimis Notice*): the market share held by each of the parties to the vertical agreement does not exceed 15% on any of the relevant markets affected by the agreement
- ✓ This Notice does not cover agreements which have as their object the restriction of competition.
- ✓ The relevant market: See the Commission Notice on definition of the relevant market (Official Journal of the European Union, C 372, 9.12.1997
- ✓ An accompanying document of *de minimis* notice : COMMISSION STAFF WORKING DOCUMENT, Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the *De Minimis* Notice (a list of object restraints, relating to absolute market partitioning and to limitations on the buyer's ability to determine its resale price)

Restrictions by object and 'hardcore' restraints

- ✓ The categories of object restraints broadly correspond with a list of 'hardcore' restriction of competition. It was seen that the Commission equates 'hardcore' with object restrictions. For instance, as regards agreements between competitors: price fixing, output limitation, allocation of markets or consumers. As regards agreements between non-competitors: resale price maintenance (RPM), market partitioning by territory or by customer group, etc.
- ✓ However, there is no definitive list of object restraints in EU. The Commission has created an impression that object and hardcore restrictions are most unlikely to satisfy the conditions set in Article 101(3), making the object restraint in EU more closely in line with those actions illegal *per se* in the US law.
- ✓ Most importantly, in EU, all agreements are capable of satisfying the conditions of Article 101(3), even those incorporating object restraints.

Agreement with anti-competitive effect

- ✓ appraisal of an agreement in its legal and economic context
- ✓ obtaining some degree of market power, contributing to the creation, maintenance or strengthening of that market power or allowing the parties to exploit such market power
- ✓ affecting actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability
- ✓ possible negative effects: foreclosure of other suppliers or other buyers by raising barriers to entry or expansion; reduction of inter-brand competition; reduction of intra-brand competition; obstacles to market integration
- ✓ normally necessary to define the relevant market, also necessary to examine and assess, *inter alia*, the nature of the products, the market position of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the level of entry barriers

The exemption: Article 101(3)

- ✓ In an individual case, the four cumulative requirements are needed to be proved, two positive and two negative:
  - achieving benefits concerning the production, distribution, promotion of technical or economic progress (efficiency gains)
  - allowing consumers a fare share of the resulting benefit
  - indispensable restrictions
  - not affording the parties the possibility of eliminating competition
- ✓ In principle, any agreement may be benefit from this paragraph, including agreements containing object restraints.
- ✓ The examiner must determine whether efficiencies achieved outweigh negative effects.
- ✓ The parties should submit evidence to support the satisfaction of Article 101(3), and the examiner must decide whether the criteria are met.

- ✓For efficiency gain claim, in the context of vertical and intellectual property licensing agreements, the following facts may be considered: an increase in production capacity, conferring incentives to promote a product, conferring incentives to concentrate sales efforts, and/or through reduction in transaction costs.
- ✓For consumers' fair share of benefits, it implies that the benefits passed on to consumers must compensate any actual or likely negative impacts. For example, paying a higher price resulting from the fixing retail price agreement would deprive of the opportunity to pay lower prices.
- ✓As for the condition of indispensable restriction, this is the application of the principle of proportionality. It is general believed that restrictive agreements by object or hardcore restraints are not indispensable.
- ✓As for the possibility of eliminating competition criterion, the Commission considers the market share of the parties, the incentive for actual competitors to compete, the impact of the agreement on the various parameters of competition, the actual market conduct of the parties, past competitive interaction, the scope of potential competition.

Block Exemption Regulation (BER)

✓ Regulation No 330/2010, a safe harbour for most vertical agreements

- no hardcore restrictions, such as RPM; but the imposition of maximum resale prices or the recommendation of resale prices is normally not prohibited.
- a market share cap of 30 % for both supplier and buyer
- excluded restrictions: non-compete obligations during the contract; non-compete obligations after termination of the contract; and the exclusion of specific brands in a selective distribution system

✓ Exception

The only exception concerns motor vehicles, the sales of which are covered until 31 May 2023 by a sector-specific block exemption granted by Commission Regulation (EU) No 461/2010

✓ Those agreements which exceed the market threshold require individual examination. The Commission also published 'Guidelines on Vertical Restraints' (the Guidelines) describe the approach taken towards vertical agreements not covered by the BER and to assist firms in carrying out such an examination.

Guidelines on Vertical Restraints

- The most common types of vertical restraints: single branding (non-compete obligations), exclusive distribution, customer allocation, selective distribution, franchising, exclusive supply, tying and resale price restrictions.

- The EU Commission has been hostile to RPM, even though it has granted undertakings the possibility to plead an efficiency defense in individual cases. (See the Guidelines, para. 225) Only 'fixed or minimum resale maintenance' are treated as a hardcore restriction.

The analytical framework of vertical agreements in EU

✓ **An agreement *vs.* an unilateral action in selective distribution system**

AEG-Telefunken v Commission, Case 107/82, ECJ [1983] ECR 3151 *; Ford Werke AG, Ford Europe Inc v Commission*, Cases 25 & 26/84, ECJ, [1985] ECR 2725; *Bayer v Commission*, " the existence of acquiescence between the parties", Case T-41/96, CFI, [2000] ECR II-3383

✓ **Object or Effect (No 'rule of reason' concept)**

The anti-competitive object and effect of an agreement are not cumulative but alternative condition for assessment. It is not necessary to examine the effects of an agreement once its anti-competitive object has been established. (Case T-8-08 *T-Mobile Netherlands and Others* [2009]ECR I-1000, paras. 28, 30)

'In order to assess whether an agreement is compatible with the Article 101(1), it is necessary to examine the economic and legal context in which the agreement was concluded, its object, its effects, and whether it affects intra-trade …, the products or services covered by the agreement, and the structure of the market concerned and the actual conditions in which it functions.' (*O2(Germany)Gmbh &Co OHG v Commission*, Case T-328/03, CFI, [2006] ECR II-1231, para.66)

‘That method of analysis is of general application and is not confined to a category of agreements….’ (para. 67)

‘…The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute…’(para. 68)

‘Such a method of analysis , as regards in particular the taking into account of the competition situation that would exist in the absence of the agreement, does not amount to carrying out an assessment of the pro-and anti-competitive effects of the agreement and thus to applying a rule of reason…, which the [Union] judicature has not deemed to have its place under Article 101(1) (para. 69)

- ✓ It is only the precise framework of the Article 101(3) that the pro and anti-competitive aspects of a restriction may be weighed. (*Métropole Télévision (M6) and others v Commission*, Case T-112/99, CFI, [2001] ECR II-2459,para. 74)
- ✓ Seeking for exemption under the Article 101(3)

Appreciable effect (de minimis), BER, Guidelines, individual exemption (no ‘illegal *per se*’ rule)

案例簡介

GlaxoSmithKline Services Unlimited v Commission, Case C-501/06 etc., (EU:C:2009:610)(Object or Effect, Parallel Trade, The four conditions in Article 101(3))

Facts

GlaxoSmithKline (GSK), formerly Glaxo Wellcome, (GW) is a producer of pharmaceutical products. In 1998, it notified to the Commission a 'General Sales Conditions' document it issued to its Spanish wholesalers, and sought for a clearance. The Clause 4 a 'dual pricing mechanism' in that document which resulted in higher prices charged for medicines export to other Member States than sold domestically. The large majority of wholesalers signed the new sales conditions.

This system aims to reduce parallel trade within the Single Market. In the Commission's view, the system interferes with the Community's objective of integrating national markets and restricts price competition for GW products. The Commission also concluded that the dual pricing system cannot be justified on economic grounds.

The Commission adopted a decision finding that the agreement between GSK and a number of Spanish wholesalers had infringed Article 101 (1) TFEU as a restriction by object, and also had the effect of excluding or impeding parallel trade. GSK had not proven that the conditions set out in Article 101 (3) . (Commission Decision 2001/79 1/EC of 8 May 2001 (OJ L 302 of 17.11.2001)

Appeals

GSK (GW) appealed to the Court of First Instance (now the General Court, 'GC'), challenging , among other things, the finding of an agreement between undertakings, the existence of anti-competitive object and effect, and the refusal of granting exemption.

On 27 September 2006, the Court of First Instance annulled the Commission's Decision (T- 168/01, CFI, ECR, EU:T:2006:265). It held first that the Commission had been wrong to find that the agreement was a restriction by object but it confirmed the Commission's conclusion that the Sale Conditions had the effect of restricting competition. Secondly, it however found that the Commission had failed to carry out an adequate examination as to whether the conditions under Article 101(3) TFEU were met.

On appeal, the European Court of Justice in its judgment of 6 October 2009 overturned the GC's reasoning, upholding the Commission's conclusion that the agreement was a restriction by object. However, the ECJ confirmed the GC's finding that the Commission had failed to conduct a full examination of the arguments put forward by GSK, in particular the arguments on efficiency gains. On that ground the ECJ dismissed the appeal brought by the Commission, and the Commission's Decision was considered null and void.

Football Association Premier League (FAPL) and Others, Joined Cases C-403-08 and C-429/08 (ECLI:EU:C:2011:631)(sale restrictions on licensees)

Fact

FAPL runs the Premier League in England. FAPL organizes the filming and exercises the broadcasting rights. FAPL grants licenses of those broadcasting rights for live transmission, on a territorial basis. Those rights are thus awarded to broadcasters under an open competitive tender procedure. As a rule, the boundary of the broadcasting rights is based on national territory. Where a bidder wins, for an area, it is granted the exclusive right to broadcast them in that area. In order to protect the territorial exclusivity of all broadcasters, each broadcaster undertakes to ensure that all of its broadcasts are encrypted securely. Second, broadcasters are in particular prohibited from supplying decoding devices to television viewers outside the territory for which they hold the license.

In the United Kingdom certain restaurants and bars have begun to use foreign decoding device which allow them to receive a satellite channel broadcast in another Member State.

Consequently, FAPL and others have brought the cases before the court of England and Wales, alleging that those defendants are infringing their copyright, designs and patents. And that Court refers questions to the ECJ for a preliminary ruling, asking whether the exclusive license agreement concluded between a holder of intellectual property rights and a broadcaster constitute a restriction on competition prohibited by Article 101 TFEU.

Held

The mere fact that the right holder has granted to a sole licensee the exclusive right to broadcast and consequently prohibits its transmission by others, during a specified period, is not sufficient to justify the finding that such an agreement has an anti-competitive object .

Regarding the territorial limitations upon exercise of such a right, agreements which are aimed at partitioning national markets according to national borders or make the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition.

The clauses designed to ensure compliance with the territorial limitations, namely the obligation on the broadcasters not to supply decoding devices, prohibit the broadcasters from effecting any cross-border provision of services, enables each broadcaster to be granted absolute territorial and, thus, all competition between broadcasters in the field of those services to be eliminated.

SA Binon & Cie v SA Agence et messageries de la presse

Case 243/83 (ECLI:EU:C:1985:284)(resale price maintenance)

Fact

SA Agence et messageries de la presse (AMP) is responsible, either itself or through its subsidiaries, for the distribution to retailers of a large proportion — close to 70% — of Belgian newspapers and periodicals. It operated a selective system for newspapers and periodicals in Belgium. AMP refused to supply newspapers to SA Binon & Cie (Binon). The dispute between the two companies reached the Brussels Commercial Court. The Court, in a preliminary procedure, asked questions to the ECJ, one of which concerned the legality of a clause in AMP's selective distribution system, according to which the distributor reserved the right to fix prices and compel retailers to respect those prices.

Held

'…the third question is … whether the fact that, within the framework of a selective distribution system of newspapers and periodicals, fixed prices must be observed renders the system incompatible with the prohibition laid down in [Article 101 TFEU].'(para. 39)

'The Government of the Federal Republic of Germany … considers that the freedom of the press … entails the freedom to contribute to the formation of public opinion. For that reason newspapers and periodicals as well as their distribution have special characteristics. The nature of newspapers and periodicals requires an extremely rapid system for their distribution in view of the very limited period during which they can be sold before they are out of date; at the end of that period, … , newspapers and periodicals have practically no value. To those factors must be added the heterogeneity of newspapers and periodicals and the lack of elasticity in demand since each newspaper or periodical has more or less its own body of customers.' (para. 41)

‘The German Government concludes that, from the point of view of competition, the position of the market in newspapers and periodicals is so special that it is not possible to apply to it without modification principles …’(para. 42)

‘In the Commission's opinion any price-fixing agreement constitutes, of itself, a restriction on competition ... The Commission does not deny that newspapers and periodicals and the way they are distributed have special characteristics but considers that these cannot lead to an exclusion of such products and their distribution from the scope of [Article 101(1) TFEU]. On the contrary, those characteristics should be put forward by the undertakings relying upon them in the context of an application for exemption under [Article 101(3) TFEU].’ (para. 43)

‘…the fixing of the retail price by publishers constitutes the sole means of supporting the financial burden resulting from the taking back of unsold copies and if the latter practice constitutes the sole method by which a wide selection of newspapers and periodicals can be made available to readers, the Commission must take account of those factors…’(para. 46)

附錄

Article 101

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

   (a) directly or indirectly fi x purchase or selling prices or any other trading conditions;

   (b) limit or control production, markets, technical development, or investment;

   (c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

– any agreement or category of agreements between undertakings;

– any decision or category of decisions by associations of undertakings;

– any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

補充：What does a “Regulation” mean?

Article 288 of the TFEU (ex Article 249 TEC)

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.