



Single and Continuous Infringement: Asymmetric Liability

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Speaking in a personal capacity

Overview

- Focus on the undertaking, not the "cartel"
- Asymmetry is possible
- Explain exactly what parts of an SCI are / would be sta
- Follow Coppens, not Aalberts... hopefully

Precedents on SCI

Anic (CFI, 1992):

81... It follows that infringement of that article may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 85 of the Treaty.

Precedents on SCI

Team Locations:

35. ...in order to establish that there has been a single and continuous infringement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk...

36 Restrictive practices can be regarded as constituent elements of a single anti-competitive agreement only if it is established that they form part of an overall plan pursuing a common objective. In addition, only where the undertaking knew, or ought to have known, when it participated in those practices, that it was taking part in the single agreement, can its participation in them constitute the expression of its accession to that agreement

Elements

- The undertaking
 - intended to contribute
 - by its own conduct
 - to the common objectives pursued by all the participants
 - it was aware or could reasonably have foreseen the conduct...
- The restrictive practice
 - forms part of an overall plan pursuing a common objective

Consequences

- Prescription
- Fine
- Joint and several liability for damages

Hypothetical

- Market sharing agreements:
 - Company UK and Company DE
 - Company UK and Company FR
- DE and FR have no actual or constructive awareness of the other's agreement
- DE and FR compete fiercely in each other's market
- UK needs the agreement with both for the plan to succeed

Liability

- One single infringement?
 - Liability for damages of FR and DE?
- Two separate infringements?
 - Two fines on UK?

Asymmetric Liability

Company UK

- Single infringement encompassing both market sharing arrangements

Company DE

- Single infringement encompassing UK/DE agreement only

Company FR

- Single infringement encompassing UK/FR agreement only

Del Monte

- Commission at 258 explained that Weichert was only found liable for the part of the infringement for which it participated
- General Court (March 2013) at 648: "...the fact that an undertaking has not taken part – like the undertaking comprising Weichert and Del Monte in the present case – in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate is not material to the establishment of the existence of an infringement on its part. Such a factor must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine"

Coppens and Aalberts

Coppens:

- SCI: Widgets and Sproggets
- Annulled for Widgets, maintained for Sproggets

Aalberts

- SCI: Widgets and Later Widgets
- Annulled for Later Widgets, annulled for everything

Conclusions

- Focus on the undertaking, not the "cartel"
- Asymmetry is possible
- Explain exactly what parts of an SCI are / would be standalone infringements
- Follow Coppens, not Aalberts... hopefully