EEC ANTI-TRUST LAW
An elephant trap
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Introduction

Breach of EEC Anti-Trust law can have serious consequences for those concerned, something of which many insurance practitioners are blissfully unaware. It can also provide solutions to problems that no other law can reach. The purpose of this article is therefore to sketch the background of EEC Anti-Trust Law in general, before focusing on a selection of areas which are likely to be of practical importance within the insurance industry over the next few years. A similar regime will shortly apply to the European Economic Area.

When I began serious study of this area, I was struck by a similarity between this area of law and protestant dogma. I have to thank a Roman Catholic Don from Antwerp for extending this to an even closer parallel between Roman Catholicism and EEC Anti-Trust dogma.

Sin is defined in Article 85(1) of the EEC Treaty, which prohibits and makes automatically illegal and void:

> "All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States [of the EEC] and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market."

The founding fathers of the EEC fortunately realised that it was not a good idea to outlaw all cooperation between competitors, and thus Article 85(3) provides that the European Commission (though nobody else) may declare Article 85(1) to be inapplicable in the case of arrangements which:

> "(i) contribute to improving the production or distribution of goods or to promoting technical or economic progress; and
>
> (ii) allow consumers a fair share of the resulting benefits;
>
> and which do not:

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

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

In other words, if the particular arrangement is useful and beneficial to society, and neither contains unnecessary restrictions nor allows the potential for creating a monopoly or near monopoly, then *absolution* can be granted.

Absolution is however not available without *confession*. Secondary legislation provides that a party who fears that he may have sinned may confess. He does so by filling in a form and sending 13 copies of it to the European Commission.

In theory, once the Commission has digested the details, it can take one of three courses. Firstly, it can declare that there has been no sin, and that the supplicant has not infringed Article 85(1) at all. In the jargon, this is called *"Negative Clearance"*. Alternatively, the Commission may accept that there has been sin, but grant absolution on the basis that the criteria in Article 85(3) have been satisfied. This is called *"Exemption"*. Thirdly, the Commission may order the sinner to mend his ways, and impose *divine retribution* in the form of fines.

In practice, the Commission also offers Comfort Letters. Characteristically, these either say that the Commission, without committing itself, does not think that there has been an infringement of Article 85(1) at all, or that the Commission believes that, looking at the situation in the round, it is likely that it would ultimately grant an exemption under Article 85(3). Comfort Letters are very useful in transactions which involve insignificant amounts of long term liability or risk transfer. If this is not the case, as frequently happens in the insurance sector, comfort letters can be dangerous for reasons which will become apparent.

Article 85 is a remarkably succinct piece of legislation – it easily fits onto a single page. Behind it lies a substantial raft of implementing legislation. The basic regulation, Regulation No. 17[1], set up the regime for dealing with individual applications for Negative Clearance or Exemption, the general investigative powers of the Commission and a stiff regime of fines.

1. Officially known as Council Regulation No. 17 of 6 February 1962

Other Regulations complete the matrix of secondary legislation, and this includes a number of "Block Exemptions", which provide automatic exemption from Article 85(1) for whole categories of arrangements. To supplement this legislation, the Commission have published a series of Notices, which contain guidance as to the Commission's policy and thinking on various recurring issues.

History

Let me begin by putting this regime in a historical context as regards insurance. Prior to 1987, the insurance industry argued strenuously that EEC Anti-Trust Law had no application at all to the insurance industry. Despite the constant references to "goods" particularly in Article 85(3), the European Commission persisted in its argument that Article 85 did apply to the insurance sector. Some players within the insurance market accepted this at least on prudential grounds;[2] but it was not until 1987 that, in the Fire Insurance case,[3] the European Court of Justice pronounced in the Commission's favour. Following that Judgment, the CEA advised all its members to notify to the Commission any arrangements which might be restrictive of competition, ostensibly with a view to obtaining either negative clearance or exemption of the arrangements. Whilst this might have been one of the objectives of this mass notification (which resulted in more than 300 arrangements being reported to the Commission), the real reason was undoubtedly that notification brings an immediate reward: protection from the Commission's wrath in the shape of hefty fines.

This deluge of notifications kept the small insurance team in the Commission's competition directorate (known in the trade as "DG IV") busy for some years. One has only to see how few individual cases were brought through to a formal Decision over the ensuing years. The insurance team in DG IV spent the time sifting through the applications and trying to establish patterns of cooperation which it could find acceptable; for one of the main tools for reducing administration within DG IV is the issuing of Block Exemptions. These set out restrictions on competition which are regarded as acceptable, and if a particular piece of collaboration falls within those parameters, then it is *automatically* exempted from Article 85 (1) without having to complete any paperwork and without having to take up the Commission's time. The result of the labours of the insurance team inauspiciously came into effect on 1 April 1993, in the shape of the Insurance Block Exemption.[4]

2. For example the P & I Clubs, OJ 1985 L376/2
3. Fire Insurance, OJ 1985 L 35/20, affirmed by the European Court of Justice in Fire Insurance (ECJ), [1987] ECR 405
4. Insurance Block Exemption, OJ 1992 L398/7

As a result of this, DG IV is now expected to clear most of its insurance backlog fairly rapidly. This is a process which was achieved in other sectors some years ago. Experience suggests that once the Commission has cleared its backlog, the newly liberated specialist team does not sit idly by awaiting redundancy notices. The pattern is that the now expert but underemployed team directs its energy towards identifying sinners who have not confessed. It will do both by carrying out specific investigations; and by acting on complaints made by aggrieved (or in some cases just plain malevolent) complainants.

Against that background, I shall now focus on three areas; the effect of breach of Article 85(1), clearing a potentially anti-competitive arrangement and Investigations by the Commission.

The effect of breach of Article 85(1)

Three distinct categories of consequences follow from a breach of Article 85(1). The first, and most obviously unpleasant, is the exposure to fines. The Commission has power to fine businesses up to 10% of their turnover (e.g. premium income) in the previous trading year for breaches of Article 85. After a relatively gentle start, the Commission has now begun using its powers to the full. The current record is about £50m (in fact imposed on a company which has abused a dominant position, breaching Article 86, Article 85's anti-monopoly twin). The Commission can also impose fines at a daily rate against those who refuse comply with a Commission order to bring to an end a breach of Article 85(1).

Fines are obvious penalties. More insidious are the civil law consequences of breach. Article 85(2) states that any agreements or decisions prohibited pursuant to Article 85 (1) shall be automatically void. On first reading this statement, it might be thought that the *entire* arrangement is rendered void as between the parties, but this is not always the case, particularly if it is only a particular feature of the arrangment which makes it offend against Article 85 (1). The position, so far as European law is concerned, is that Article 85(2) only strikes down those parts of the arrangement which actually offend against Article 85(1)[5]. The fate of the remainder of the agreement is then to be decided in accordance with national laws – usually the Governing Law of the contract.

5. See Société Technique Minière, [1966] ECR 235

It is clear from my researches that the position under different national laws ranges from individual clauses being struck down but the remainder of the contract remaining valid; to the entire contract being unenforceable and void. The importance of this where there is significant risk transfer, (for example, pooling arrangements which involve reinsurance) can be drastic if the pooling arrangements infringe Article 85(1). A company which assumes the direct risk but has automatic reinsurance could find that its assumption of the risks is valid as against third party assureds; but that, despite its having paid premium to pool reinsurers, its reinsurers are not liable to indemnify it in the event of a claim. It is in situations such as these that comfort letters are particularly inadequate.

Certain types of arrangements – such as tariff agreements or agreements on standard conditions may be void with no direct civil law consequences as between participants. What, is the effect on contracts entered into with third parties pursuant to such arrangements? The answer is probably that such derivative contracts themselves are unaffected.[6]

However, the third civil law aspect of a breach of Article 85(1) is the exposure of miscreants to claims from third parties for damages for its breach or injunctions. Consider once again the insurance tariff agreement entered into in breach of Article 85(1). Third parties buy insurance at rates above the "free market" level. Do they have any remedies? The answer is now clearly positive. Article 85(1) is directly a part of the national law of every EEC Member State, and it creates direct rights in favour of individuals which must be protected by all national courts. The position was considered extensively in the *Garden Cottage*[7] decision, particularly by Lord Diplock. The case was in the context of a breach of the Article 86, but the same principle applies. Lord Diplock stated:

> "A breach of the duty imposed by Article 86 not to abuse a dominant position in the Common Market or any substantial part of it can thus be categorised in English law as a breach of statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the Common Market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty.

6. See Ciments et Bétons, [1983] ECR 4173
7. Garden Cottage Foods -v- Milk Marketing Board, [1984] AC 130

If this categorisation be correct, and I can see none other that would be capable of giving rise to a civil cause of action in English private law on the part of a private individual who sustained loss or damage by reason of a breach of a directly applicable provision of the Treaty of Rome, the nature of the cause of action cannot, in my view, be affected by the fact that the legislative provision by which the duty is imposed takes the negative form of a prohibition of particular kinds of conduct rather than the positive form of an obligation to do particular acts."[8]

Thus, if a third party has suffered a loss because of a breach by his insurer of Article 85, the third party, such as a policy holder or a broker can sue for damages or (as happened in *Garden Cottage*) for an injunction. The same could equally apply where, in breach of Article 85(1), assureds combine against brokers or underwriters, or brokers combine against assureds or underwriters; and for the imaginative, there are a number of other interesting permutations.

Experience shows that this area of law, deployed with sublety, holds the key to unlocking a number of commercial problems that are not susceptible to cure by any other means.

Clearing a potentially anti-competitive arrangement

Let us suppose that an arrangement between brokers or between insurers or indeed between brokers and insurers looks as though it may potentially infringe Article 85(1). What is to be done? There are two particularly easy solutions which may apply. If the agreement is one which only affects less than 5% of the relevant "market" (the definition of which may be problematical), then the arrangement may fall under the Commission's Notice on Agreements of Minor Importance.[9] This pragmatic Notice effectively decrees that certain types of agreement on a small scale are not regarded as being anti-competitive.

If the arrangement concerns the statistical study of losses, the production of standard investment return models, the negotiation of standard conditions of insurance, insurance or reinsurance pooling arrangements or the approval of security devices, then the arrangement may fall within the Block Exemption granted for the Insurance industry.[10]

8. *ibid* at page 141
9. OJ 1986 C231/2
10. *supra*

The trick here is to mould any proposed arrangement into a form which complies strictly with the terms of the Block Exemption. If that can be done, then the arrangement will be automatically exempted from Article 85(1), and no further action needs to be taken. If however that cannot be done, then the agreement may not exempted at all. [11]

Assuming neither of these two routes are available, an Application to the Commission has to be made. This is a laborious process involving filling in forms and providing information (13 copies no less). In practice, application is usually made for negative clearance as well as exemption.

Filing these forms gives immediate relief from the risk of fines (though not from the potential civil law consequences of a breach of Article 85(1)). The Commission will consider the application and quite often follow it up with questions. Negotiations on the form of the agreement may ensue (as occurred in the case of the P&I Clubs decision). If the Commission regards the arrangement as relatively innocuous, it may offer to issue a Comfort Letter. Careful consideration must be given before accepting a Comfort Letter. It does not *bind* the European Commission to reach a future decision either in favour of negative clearance or in favour of exemption. It remains possible for the Commission to reach an adverse decision, and the risk of this must be increased in a case where litigation breaks out. In this context, it is particularly important for the parties to analyse what would be the effects of their arrangements being void and being a breach of statutory duty, and wheter it matters to them.

Investigations

The history of the operations of DG IV shows that as they obtain experience in a particular sector, they begin to initiate investigations on their own initiative as well on the initiative of affected third parties. Thus, in the shipping field, not only has the Commission initiated the investigations into various arrangements between shipowners on its own initiative, but it has also acted on the basis of complaints made by affected third parties, for example the shippers of cargo.

11. This may depend on the country in which the dispute is to be resolved.
The risk of fines in unabated.