New Approach on EU Competition Law-Effect Based Approach

In recent years, Eu Competition Law has adopted the effect based approach. It is easily seen from recent decisions of the Court of Justice (hereafter called CJEU). CJEU began to leave per se illegal view in CJEU decisions about infringements in Article 101 and Article 102.

Restriction by object is restrictions about agreements that have anti-competitive effect by its nature. The court does not have to demonstrate any actual or likely anti-competitive effect of these agreements on the market[1]. For instance, price fixing, limit exports or imports. If an agreement is not restricted by its object, it does not mean there is not an infringement. Any agreement or concerted practices that harm the competition on the market is restricted by its effect. The Court shall examine the impact of the agreement or concerted practise on the market and demonstrate it for deciding the infringement.

There must be ‘sufficient degree of harm to competition’ for determining the restriction by object. On 11 September 2014, CJEU quashed the General Court decision about Cartes Bancaires because CJEU argued that General Court erred about applying the notion of restriction by object. With this case, CJEU approached to ‘effect-based approach’. CJEU said that in paragraph 58 that “the concept of restriction of competition by ‘object’ must not be interpreted ‘restrictively’. The concept of restriction of competition ‘by object’ can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition. The fact that the types of agreements covered by Article 81(1) EC do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant.”[2]. CJEU does not want to expand the ‘object box’ anymore. Also, in that case, CJEU mentioned that ‘sufficient degree of harm’ need to be examined. This examination contrarian to the nature of the restriction by object. This view of CJEU can be interpreted like CJEU has approached to consideration of “restriction by effect.”

In Intel Case[3], General court opinion is exclusivity and loyalty rebates harm the competition by their nature, and General Court did not examine economic analyses. CJEU reversed this decision and confirmed the use ‘effect-based approach’ in exclusivity rebate. CJEU argued that exclusivity and loyalty rebates are types of abuse of dominant position, but these abuses should be only rebuttable presumptions. The accused dominant undertaking can disproof this presumption with proving these behaviours have efficiencies which benefit to consumers. At a preliminary stage, the as-efficient competitor test is applied for determining the infringement[4]. This test investigates the critical conduct is sufficient for eliminating the undertaking which is as efficient as the dominant undertaking[5]. This decision can be interpreted like CJEU began to adopt the effect-based approach in abuse of dominant position. Also, the use of the “As Efficient Competitor” (AEC) test for the assessment of rebates was considered by the EU Commission in its 2009 Guidance Paper in order to refine the scope of its investigations under Article 102. In Intel Case, the Court annulled the previous General Court ruling
because, in its 2009 Decision, the EU Commission had relied on the AEC test, while, on appeal, the General Court did not take into consideration Intel’s arguments which challenged the application of this test by the EU Commission[6].

In conclusion, CJEU has already welcomed the ‘effect-based approach’ in merger cases. With recent cases about Article 101 and Article 102, CJEU began to adopt the “effect-base approach”. CJEU accepts that approach to developing the efficiencies which consumers enjoyed the benefits and raise the competition on the market.

[1] Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice


