

# Article 86 EC Treaty

Monique Negenman

DG COMP/A3

# Art 86 EC – Text

Article 86 EC provides:

- 1) In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.
- 2) Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
- 3) The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States

# Art 86 EC – General remarks (1)

- Three paragraphs of Art 86 EC serve different purposes:
  - Art 86(1) EC: prohibits state-organised restrictions of competition; responsibility of MS not undertakings
  - Art 86(2) EC: defence of Member States (MS) and undertakings with special mission (services of general economic interest (SGEI))
  - Art 86(3) EC: specific enforcement powers Commission; procedural derogation to common infringement procedure of Art 226 EC

# Art 86 EC – General remarks (2)

- Competition may be distorted both by undertakings and MS
- MS may notably distort competition by State Aid or by protective regulatory measures in favour of certain undertakings
- Procedural tools:
  - Art 88 EC
  - Art 226 EC
  - Art 86(3) EC

# Art 86(1) EC - State responsibility

- Three constitutive elements:
  - 1) Public undertaking (State controlled) or privileged undertaking (exclusive or special rights)
  - 2) State measure with regard to this undertaking
  - 3) Contrary to EC Treaty rules (internal market rules, competition rules)
- Reference rule: always in combination with other Treaty provision

# Art 86(1) EC combined with EC competition rules

- Art 86(1) EC combined with Artt 81/82 EC obliges MS with regard to public and “privileged” undertakings to refrain from any legal or factual influence which:
  - leads to/reinforces actual anti competitive behaviour by these undertakings, or
  - creates the concrete danger that such conduct may occur
- Parallel liability MS and undertaking concerned if margin of manoeuvre of the undertaking
- Clarify: there can be breach of Art 86 EC combined with Art 82 EC even without abuse (*Höfner*)

# Art 86(1) EC combined with Art 81 EC

- State measure inducing one or more public or privileged undertakings to agree between themselves and/or with other undertakings to restrict competition
- No Commission decisions yet
- Few case law (e.g. *Ahmed Saeed*: Artt 86(1) + 81 EC prohibit MS to promote/authorise anti-competitive tariff agreements between two airline companies enjoying exclusive and/or special rights)

# Art 86(1) EC combined with Art 82 EC

- Conditions:
  - State measure with regard to public undertaking/undertaking with exclusive or special rights
  - The undertaking concerned is dominant on a substantial part of the relevant market (exclusive rights implies not necessarily dominance)
  - Effect on trade between MS
  - « abuse » -three situations:
    - Actual abuse (inevitable abuse)
    - Potential abuse: concrete likelihood of abuse (abstract possibility of abuse is in principle not enough, only accepted in *Corbeau*)
    - Effects similar to those of abusive behaviour (extension of a dominant position)



# Art 86(1) EC combined with Art 82

## EC- examples

- Actual abuse: the undertaking concerned cannot avoid abusing its dominant position
  - Classic abuses, e.g.
    - relating to prices: discriminatory landing fees (*Zaventem*); excessive prices (*port of Genoa*); predatory prices
    - refusal to deal, refusal to grant access to an essential facility;
- Potential abuse: state measure affects the structure of the market which leads an undertaking to abuse its dominant position
  - conflict of interest doctrine (bundling regulatory and commercial activities, *RTT, Greek Television Monopoly*)
  - demand limitation doctrine (failing monopoly, undertaking concerned manifestly unable to satisfy demand (*Höfner*))
- Effects similar to those of abusive behaviour:
  - doctrine of extension of dominant position from one market onto a neighbouring but separate market without objective justification (*Telemarketing, Ambulanz Glöckner*)

# Art 86(2) EC – exception

- As regards undertakings entrusted with SGEI the EC Treaty rules only apply in so far as this does not obstruct the performance of the particular tasks assigned to these undertakings
- Objective:
  - to ensure the good functioning of SGEI (or revenue producing monopolies)
  - in the way that is least restrictive for the internal market and for competition (proportionality principle)
- Therefore: balance between Community objective of market integration and national public service objectives
- Derogation –to be strictly interpreted
- Can be invoked by:
  - Undertakings entrusted with SGEI as a defence against 81/82 EC
  - MS as a defence in Art 86(1) EC procedure

# Art 86(2) EC - conditions

- Undertaking entrusted by the State with a service of general economic interest (SGEI). Examples: basic postal services, electricity and gas distribution, water distribution
- Proportionality: if SGEI is provided as a universal service (avoid cherry picking) not necessarily making task objectively speaking impossible but rather more difficult; case law still developing
- Safeguarding Community interest: trade must not be affected in a manner contrary to the Community interest. General view: merely clarification of the proportionality test

# Art 86(3) EC- enforcement powers

- Same aim as Art 226 EC procedure, i.e. bring about a MS to end an infringement. Specific: instead of a reasoned opinion COM can adopt a binding decision which can be challenged by MS within 2 months before the ECJ
- Origin: own initiative cases or complaints. Commission usually acts upon complaints but is not bound to take up every complaint (wide discretion powers)

# Art 86(3) EC – COM Decisions

- In principle addressed to single MS
- Purpose: declaring that a MS has infringed Art 86(1) EC and obliging MS to put an end to the infringement
- No specific procedure nor implementing powers foreseen in Treaty. General principles of EU law apply (rights of defence). In practice Art 226 EC procedure followed
- Examples: 17 COM decisions so far in various areas, e.g. postal services, landing tariffs, ports, broadcast television advertising, telecommunication services etc

# Art 86(3) EC - COM Directives

- In principle addressed to all MS
- Purpose:
  - specifying obligations contained in Art 86(1) EC and/or
  - preventing future infringements
- Examples:
  - Transparency Directive 80/723: to facilitate state aid control (transparency financial relation relations between MS and public undertakings)
  - Telecommunication sector
    - Telecom terminal equipment directive 88/301 (abolishing exclusive/special rights to import/market/maintain terminal equipment)
    - Telecom Services Directive 90/388 (abolishing exclusive/special rights in telecom services)
  - No specific procedure set out in the Treaty. In practice: wide consultation (green/white paper, EP etc)