

# Effect on Trade between Member States

20.09.2012

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# Introduction

- The requirement of effect on trade between member states
  - Why this topic?
  - Two main questions
    - When is trade affected?
    - Do we need to rethink this “jurisdictional” requirement?

## When is trade between Member States affected?

- “it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that it might hinder the attainment of a single market between Member States.”
  - The general statement used by the courts

## When is trade affected? cont.

- Direct or indirect
  - case 123/83, *BNIC mot Clair*, ECR( 1985) p. 391, para 29.
- Actual or potential
- Hinder the attainment of a single market... ?
  - No requirement of negative effect
    - case 56 and 58/64, *Consten and Grundig*
- On the pattern of trade between member states
  - Effect on the exchange of goods
  - Effect on market structure

## When is trade affected? cont.

- At least one party is active in more than one member state
- Conduct or agreements that affect trade of a product that normally is exported/imported
- An agreement affecting the whole of a national market
  - case 8/72 *Vereenig van Cement-handlaren* – presumption of effect
  - case 73/74, *Papier Peints* – not really a presumption?
  - Cases 125,133,135,135/07, *Austrian Bank Case*, presumption returning?
- Agreements or conduct that is limited to part of a Member State

## When is trade affected? cont.

- Appreciable effect
  - Case 5/69, Völk
  - The NAAT-rule
  - Outside the NAAT rule
- National regulations and effect on inter-state trade
  - Case c-215/96 Bagnasco.
  - Difference between local and nationwide regulations
  - Nationwide regulations similar to nationwide agreements?
  - Local regulations

## Why raise the question of rethinking the effect on trade between Member States requirement?

- The broad interpretation
  - Often explained by being “only a jurisdictional criterion”
    - Only partly a true statement
- Effects Member States competence
  - Reg. 1/2003 art. 3 (2)
  - State action
  - Art. 106
- Are the broad interpretation and its effect on Member State competence intentional?

## Are there other arguments to rethink the requirement?

- The discussion in the late 90s
  - The subsidiarity principle
  - Development of EU competition law
    - Less focused on internal market and more on economic efficiency
  - Commission workload
- Are there any unintentional effects of the inter-state trade requirement?
  - “Close to border” cases
  - Favoring bigger countries?



## The difference of the rules effect on undertakings and on member state competence

- Main purpose: To regulate undertakings behaviour
  - No problem with the broad interpretation
  - A more broad interpretation might even be positive
- Side effects (?) on member state competence
  - A broad interpretation leads to reduced freedom to regulate markets (both pro-competitive or anti-competitive regulations)

## Do we want more freedom for member states?

- Pro-competitive regulations
  - Better knowledge of national markets?
- Anti-competitive regulations
  - Very much a political question
  - Is the freedom today reduced as an unintended side effect?
  - The Lisbon Treaty and the social market economy goal - of any relevance?
- Can more freedom be achieved through other means than a less broad jurisdictional requirement?

## Important aspects related to changing the requirement

- Changing the requirement to avoid a side effect may have unwanted effects on the primary purpose
- Can a new requirement or new interpretation satisfy both the application on undertakings behaviour and the effect on Member State competence?
  - Fx a community dimension threshold

## Is the main purpose of the requirement opposing a change?

- The jurisdictional purpose
- Original purpose of covering a lack of competition rules in Member states
- Securing the single market goal a role in competition law
- Uniform competition rules all across EU

## Alternative path

- If Member State freedom is wanted, is it better to rethink how competition rules should affect Member States competence as such?