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Why does Article 101(2) TFEU not list concerted practices?

Jose Rivas (Bird and Bird, Belgium) · Tuesday, April 23rd, 2013

Article 101(2) TFEU states that agreements and decisions by associations of undertakings that contravene Article 101(1) TFEU are null and void. However, it is silent on the fate of concerted practices. Strikingly, apart from a tangential reference in the odd Opinion of an Advocate General or one Order of the President of the General Court, there is – to the best of my knowledge – no case law addressing the question of nullity for concerted practices. I have always found it intriguing that so little has been written about this issue and that the case law of the EU Courts on the topic is so scarce.

One may wonder whether the Treaty's silence on this issue is simply the result of an omission by its authors. In which case, should Article 101(2) be construed as applying equally to concerted practices?

The answer is "no", and in my post of today I attempt to explain why.

Nullity is probably the most severe civil law sanction that a legal order can impose on illegal acts.[1] However, even the most powerful legal order can only declare null and void those acts which produce legal consequences. That is, those acts (typically contracts) that produce rights and obligations. As the General Court has itself stated, Article 101(2) "*is intended for cases where a legal obligation is actually in issue*".[2]

While agreements and decisions by associations of undertakings may create legal obligations (and thus can be punished with nullity under civil law), this is not the case for concerted practices. Concerted practices – as defined in the relevant case law – do not produce either rights or obligations. As such, since they therefore cannot be sanctioned with nullity, they are not listed in Article 101(2) TFEU.[3]

While this appears relatively straightforward, the lack of a nullity sanction for concerted practices becomes more delicate when the concerted practice consists in entering into (or exiting) certain agreements, *i.e.* in creating legal obligations. These "consequential" agreements, although not anticompetitive in themselves, are the expression or consequence of an anticompetitive concerted practice. The question therefore follows as to whether – in these circumstances – such agreements can themselves be subject to Article 101(2) TFEU? Or, can the eventual nullity of agreements emanating from a concerted practice only result from other principles of national civil law, *cause illicite*, unfairness, unreasonableness, etc.

The view of the European Courts on this issue is quite clear. Agreements that are not in themselves anticompetitive but that are the result of anticompetitive concertation to which Article 101(2) TFEU does not apply, cannot be automatically null and void under that same provision.

This position was confirmed by the Order of the President of the General Court in the *Artisjus* case,[4] in which the Hungarian collecting society sought the suspension of the Commission's *CISAC* decision.[5] According to the Commission, the EU collecting societies had engaged in a concerted practice intended to divide the EU markets for the management and licensing of online music rights by imposing identical territorial limitations in each of their bilateral reciprocal representation agreements. Artisjus argued that the Commission decision, which ordered the collecting societies to review bilaterally the territorial extent of their agreements, created legal uncertainty. In particular, since it was unclear whether the territorial clauses in the reciprocal agreements were null and void, or whether they should simply be broadened.

The President of the General Court ruled, first, that nullity under Article 101(2) TFEU does not apply to prohibited concerted practices.[6] With regard to the reciprocal representation agreements resulting from the alleged concerted practice, he held that they were not void by virtue of the Commission's decision, since the Commission had not declared the reciprocal agreements themselves to be illegal. Nor did he consider them to be void as a result of the unlawfulness of the (alleged) underlying concertation. According to the President "*the unlawfulness of the concerted practice…cannot…make void the alleged result of that practice, namely the reciprocal representation agreements.*"[7] Surprisingly, however, the President made no allusion to the possibility that national civil law may nonetheless have something to say in the matter.

The President's position in this case echoes the approach previously adopted by the General Court in *Atlantic Container Line*. In that case, the Commission was sanctioned for ordering parties to an anti-competitive agreement to offer their customers an opportunity to renegotiate or terminate their contracts. The General Court considered that, absent a compelling rationale – which was lacking here – the Commission had exceeded its powers by interfering with consequential agreements.[8] However, the Court also stressed that "*apart from the penalty of nullity expressly provided for in Article [101(2)] of the Treaty, the case-law establishes that the consequences in civil law attaching to an infringement of Article [101(1)] of the Treaty … are to be determined under national law*".[9]

In conclusion, as a matter of EU law, neither anticompetitive concerted practices nor consequential agreements resulting from such practices can be declared null and void under Article 101(2). If at all, consequential agreements can only be impacted by national civil law applicable to the contract.[10]

Unfortunately, however, a cursory review of national case law on this issue reveals that the application of the above principles has been patchy at best.

In addition to the *Artisjus* case described above, the nullity consequences of the CISAC Decision were also put to the test by the Dutch collecting society, BUMA. Following the publication of the Commission's decision, BUMA took the view that the territorial limitation of its reciprocal agreement with the UK collecting society, PRS, was null and void. As such, it considered that it was no longer limited to granting licences for PRS repertoire within the territory of the Netherlands and began offering licenses to users abroad. PRS – which strongly contested BUMA's position–

initiated injunction proceedings at the District Court of Haarlem.[11] On 19 August 2008, the court ruled that the CISAC Decision did not result in the nullity of the reciprocal agreement between BUMA and PRS, since the Commission's CISAC Decision had declared only the concerted practice resulting in the system of identical agreements to be illegal and not the reciprocal agreements themselves. This position was subsequently confirmed by the Court of Appeal of Amsterdam.[12]

The Swedish Supreme Court has reportedly adopted a similar approach in *Boliden Mineral Aktiebolag/AB Fortum Värmesamägt med Stockholms stad*. In that case, an industrial buyer of electricity argued that the price adjustment clauses in its electricity supply contract were null and void on the grounds that they had been inserted as a result, or as part, of a concerted practice. The Supreme Court rejected this conclusion. It held that, since the concertation was not a binding agreement or decision between the parties, it could not be subject to nullity under competition law.[13]

However, the Supreme Court of the Netherlands recently adopted a somewhat different approach in its judgement in ***Batavus B.V. v. X***.[14] This case concerned an illegal concerted practice consisting of the termination of certain contracts. One of the victims of the terminations argued that the termination – as the consequence of the concerted practice –must be null and void. The Opinion of Advocate General to the *Hoge Raad* held that the termination of the contracts could not be null and void under competition law because neither Article 101(2) TFEU nor Article 6(2) of the Dutch Competition Act applies to concerted practices. He further held that, since concerted practices – unlike agreements or decisions – are not binding legal acts, they cannot lose their binding power. That said, the Advocate General noted that this did not preclude the contracts being annulled on the basis of national civil law grounds.[15]

Contrary to the Opinion of its Advocate General, however, the *Hoge Raad* held that there was no reason to exclude unilateral legal acts, such as terminating a contract, from the nullity provision in Article 6(2) of the Dutch Competition Act if the act follows from, forms part of, or is sufficiently linked to a concerted practice prohibited by Article 6(1) of the Dutch Competition Act. The *Hoge Raad* thus effectively ruled that the nullity provision of Article 6(2) of the Dutch Competition Act applies not only to concerted practices but also to consequential agreements to the extent that they are sufficiently linked to the concerted practice. This is at odds with both the spirit of Article 101 and the case-law of EU courts.

Finally, it has been reported[16] that the Hungarian Court of Appeal, in reversing a judgment of the Metropolitan Court, has ruled that consequential agreements remain unaffected by the nullity sanction applicable to the cartel agreement from which they derive. However, the Hungarian Court of Appeal was quick to add, in an *obiter dictum*, that the appropriate remedy for such cases is compensation by damages rather than an action for nullity.

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