EXCLUSIVE RIGHT (ART. 106 TFEU)

AUTHOR DEFINITION

DEFINITION

According to Article 106 TFEU, the Member States of the EU have to respect the treaty rules with respect to public undertakings and to undertakings with special or exclusive rights. According to the Transparency Directive 2006/111/EC, the term ‘exclusive rights’ means ‘rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a service or undertake an activity within a given geographical area’. The most prominent example for undertakings with exclusive rights are state monopolies. Thus, Article 106 TFEU is the central norm on the legality of state monopolies in the EU.

COMMENTARY

When the European Communities were founded in the 1950s, there were major differences between the six founding countries regarding the role of the state in the economy. The Member States with a modest public sector were afraid that the powerful public undertakings of the more government-oriented countries would crowd out their smaller private enterprises and asked for strict control. The more government-oriented countries, on the other hand, wanted to maintain the operating range of their public

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und onase of the treaty negotiations, a compromise was cle on the public sector (today Article 106 TFEU) cont hat accommodated both sides: The first paragraph integrates the public sector in the system of the European treaties by subjecting public undertakings and state monopolies to the competition rules and to all other requirements of the European treaties. The second paragraph, on the other hand, provides an exception for services of general economic interest (SGEI). On an institutional level, the third paragraph grants the European Commission special powers: With respect to the economic activities of the state, the Commission cannot only take decisions but also adopt directives, a competence that is normally reserved for the Council and the Parliament of the EU.

The wording of Article 106 TFEU was deliberately kept obscure to allow both sides to find their point of view. This had an impact on the application of the provision: For a long time, Article 106 TFEU remained dead letter. The numerous state monopolies, for example in energy, transport and telecommunications, were not touched. Starting in the late 1970s, a debate on deregulation and privatization was initiated. The insight gained ground that state monopolies were responsible for high welfare losses. The discussion also left its mark on the law. With respect to Article 106 TFEU, *John Temple Lang* asked the crucial question in 1984: 'How Far May a State Establish Monopolies and Privileged Enterprises and Protect Them from Normal Competition?'

Based on these developments, the European Commission launched what has been called the 'public turn' of European competition policy (*David J. Gerber*). In the mid-1980s, the European Commission discovered (the precursor provision of) Article 106 TFEU and broke up state monopolies, pioneering in telecommunications. The European Commission started with a small segment, i.e. terminal equipment like for example telephone sets. In a directive from 1988 (Directive 88/301/EEC on competition in the markets in telecommunications terminal equipment), the European Commission obliged the Member States to withdraw all special or exclusive rights granted to certain undertakings for these devices. Until then, consumers in many Member States were limited to buying the telephone sets of the monopolist in their respective country. This excluded competition by domestic firms as well as imports of telephone sets from other Member States. The goal of the European Commission was to allow consumers choosing the equipment best suiting their needs, regardless of its origin. In 1991, the European Court of Justice confirmed the legality of the terminal equipment directive (Case 202/88). The Court found a violation of the rules on the free movement of goods. On the one hand, there is a measure having an effect equivalent to a quantitative restriction because exclusive importing and marketing rights make it impossible for competitors from other Member States to sell their telephones to consumers. On the other hand, a monopolist is not able to offer the entire range of telephones available on the market. All this reduces trade between the Member States, and a justification is not apparent since technical security can be guaranteed in other ways.

The judgment of the European Court of Justice in the terminal equipment

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The European Court of Justice in the terminal equipment case [illegible] ortance for exclusive rights in the European Unic[illegible] iderably restricted the Member States' discretion to e[illegible]lies. The fact that Article 106 paragraph 1 mentions 'exclusive rights' does not mean that they are necessarily compatible with the European treaties. The question of their legality rather depends on the provisions to which this article refers. On the one hand, the competition rules are expressly mentioned. The European Court of Justice has found an abuse of a dominant position if the state monopoly is unable to meet the demand for the monopoly good in terms of quantity, quality or innovation (Cases C-41/90 and C-179/90), or if there is 'abusive extension', for example if a monopoly for the telephone network is extended to the market in telecommunications services (Joined Cases C-271/90, C-281/90 and C-289/90). On the other hand, the free movement rules, in particular on goods and services, require the dismantling of state monopolies if no objective justification applies.

On this basis, the European Commission and the European Courts have declared exclusive rights in favour of state monopolies illegal, not only in telecommunications, but also for example in the field of postal services, television, employment services, dockworkers and ambulances. By contrast, with respect to the energy markets, the European Commission has not made use of Article 106 TFEU, but has based its unbundling and liberalization measures on rules involving the Council and the Parliament of the EU (today Article 194 TFEU).

More recently, a swinging back of the pendulum can be observed. Globalization critics and privatization sceptics have stressed the importance of the public sector. Against this backdrop, the original rationale of Article 106 TFEU must be recalled. On the one hand, exclusive rights must not violate competition law and the free movement rules. On the other hand, there is an exception for services of general economic interest whose importance is confirmed by other treaty articles (e.g. Article 14 TFEU as well as Article 36 Charter of Fundamental Rights of the European Union) and explained in communications of the European Commission. Thus, European law respects different traditions in the Member States and a diversity of views on public service. However, the granting of exclusive rights is subject to a justification requirement. If state monopolies are established, they must pursue legitimate goals, be capable of fulfilling their task and proportionate. In this sense, Article 106 TFEU is the basic norm for the relationship between the state and the market in the European Union. It differs considerably from the legal situation in the US where antitrust law avoids application to state behaviour ('state action doctrine').

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AUTHOR

Andreas Heinemann

University of Zurich

QUOTATION

Andreas Heinemann, Exclusive right (Art. 106 TFEU), Competition Law Dictionary, Concurrences, Art. N° 86073

INSTITUTION DEFINITION

Article 106(1) TFEU states : "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 the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109". © **TFEU**

Article 4(3) of Directive 2014/25 : 'Special or exclusive rights' means rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercice of the activities defined in Articles 8 to 14 to one or more entities, and which substantially affects the ability of other entities to carry out such activity. © **TFEU**

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