Anglo-American Law

Leegin Creative Leather Products, Inc. V. Psks, Inc., Dba Kay's Kloset, Kay's Shoes

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Introduction

Mainly, agreements restricting competition are grouped in two: as horizontal agreements concluded between competitors of the same level of the market, and vertical agreements concluded between undertakings operating at different levels of the market. Vertical restraints mostly are those imposed on the distributor or the retailer of the product by the producer or wholesaler. On the one hand, vertical restraints are defined as the means to coordinate a cartel, which is to be established among producers and among distributors, and on the other, are considered as tools that can be used to exercise a type of effective distribution. Resale price maintenance is what is most discussed with regard to vertical restraints. Resale price maintenance has been accepted to be against the per se law ever since the Dr. Miles case of 1911 in the United States.

Nevertheless, the per se approach has faced heavy criticism in time, and there have been certain exceptions in the said rule. Recently, the Supreme Court has concluded in the Khan case in 1997 that the maximum resale price maintenance should be assessed under the rule of reason. In addition to assumption of facilitating cartels, the Resale price maintenance is the subject matter of efficiency descriptions such as provision of certain services, which increase sales via avoiding free-riding, facilitating market entry, expansion of the number of sales points, avoiding double markup, protection of the product image, and reduction of monitoring costs. Therefore it would be a rather accurate approach to assess resale price maintenance under "per se" legal rule or "rule of reason" as there is no economical reasons to make a separate evaluation.

In the present case; Leegin designs, manufactures, and distributes leather goods and accessories, including belts sold under the brand name "Brighton" PSKS operated a women's apparel store in Lewisville, Texas, that sold Brighton products. Leegin sold only to small specialty stores that it believed could offer customers better service and would "support the Brighton product". It had an announced policy of selling only to dealers who did not discount its suggested retail prices. When PSKS was found to be discounting the Brighton line of products, Leegin asked it to stop, and ceased selling to it when it refused. PSKS sued, alleging a violation of Section 1 of the Sherman Act as interpreted in Dr. Miles. The district court judge excluded Leegin's offer of evidence of pro-competitive effects, as is appropriate for a per se offense. A jury awarded PSKS damages in the amount of $1,200,000 which trebled and with attorney's fees and costs added, it amounted to almost $4,000,000. The Court of Appeals for the Fifth Circuit, following the example of the Sixth Circuit in Khan, properly rejected Leegin's argument for application of the rule of reason and affirmed.

The Supreme Court began its discussion of the applicable law by reiterating that the Sherman Act prohibits "only unreasonable restraints" and "resort to

per se rules is confined to restraints," such as horizontal price fixing and market division "that would always or almost always tend to restrict competition and restrict output." "The per se rule is appropriate," it continued, "only after courts have had considerable experience with the type of restraint at issue." Consequently, Dr. Miles is overruled and vertical price restraints are to be judged by the rule of reason.

Summary of American Law on the Issue

The Sherman Antitrust Act was the first United States Federal statute to limit cartels and monopolies. It falls under antitrust law. Section 1 of the Sherman Act prohibits "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce". The courts have interpreted the act to prohibit only unreasonable restraints of trade. The rule usually applied to business practices which has become known as a rule of reason. According to this rule, the actual or potential competitive effects of a challenged practice under the relevant market circumstances are analyzed in order to make a decision regarding the legitimacy of the practice. Restraints found to be reasonable are not condemned, whereas unreasonable restraints of trade are. Certain practices, however, have been found to be inherently unreasonable. When such practices are concerned, no inquiry into their actual effect is required. They are illegal per se. The per se illegality rule is appropriate for such restraints of trade.

In Dr. Miles Medical Co. v. John D. Park and Sons case, the United States Supreme Court affirmed a lower court's holding that a massive minimum resale price maintenance scheme was unreasonable and thus offended Section 1 of the Sherman Antitrust Act. The decision rested on the assertion that minimum resale price maintenance is indistinguishable in economic effect from naked horizontal price fixing by a cartel. Subsequent decisions characterized Dr Miles as holding that minimum resale price maintenance is unlawful "per se" that is, without regard to its impact on the marketplace or consumers.

In 1968, the Supreme Court extended the "per se" rule against minimum resale price maintenance to maximum resale price maintenance, in "Albrecht v. Herald Co." case. The Court opined that such contracts always limited the freedom of dealers to price as they wished. The Court also opined that the practice may channel distribution through a few large, efficient dealers, prevent dealers from offering essential services, and that the maximum price could instead become a minimum price. Several decades after, the Supreme Court overruled Dr. Miles, holding thatcades after such vertical price restraints are not per se unlawful but, rather, must be judged under the "rule of reason."

Summary of Turkish Law on the Issue

Turkey adopted its very first competition legislation in time. The Law on the Protection of Competition no 4054 was adopted by Turkish Parliament on 7 December 1994 provided for identical provisions to the competition rules of the EEC Treaty. Article 4, prohibiting agreements and concerted practices that have as the their object or effect the prevention, distortion or restriction of competition is mirroring the Article 81 and Article 6, condemning abuse of dominant position including non exclusive list of such practices almost as a copy of Article 82. The Law covers a very wide range of activities. Not only formal agreements and decisions which impair competition but also rather looser forms of agreement and, moreover, parallel actions of the undertakings which are referred to as concerted practices are within the scope of the Law.

The Law states that a "competition authority" which enjoys administrative and financial autonomy is to be established for the implementation of the provisions. The Competition Authority shall be comprised of a Competition Board, a Directorate and Service Departments. The duty of full implementation of the Law lies with the Competition Board, that is the decision making body of the competition authority.

By taking into consideration the relationship of the parties to an agreement or their position in the market, a distinction has been developed between horizontal and vertical agreements. Horizontal agreements are those which are made by firms that are at the same level of trade or industry, such as agreements between retailers or manufacturers or between wholesalers. Unlike horizontal agreements, vertical agreements are concluded between the parties who are not at the same level of trade or industry such as agreements between the wholesaler and the retailer or between the licenser and the licensee or between the manufacturer and the seller. Vertical agreements are not concluded between actual competitors, even tough there is always possibility that the parties to such agreement may be potential competitors. Vertical agreements are concluded between parties not at the same level of an industry or trade. Despite the fact that these are not made between competitors, vertical agreements still fall within the scope of the Law, since such an agreement may restrict competition between one of the parties to the agreement concerned and a third party.

Consequences of the infringement of competition rules are also mentioned in the Law. It is explicitly stated in article 56 of the Law that all the practices which are contrary to the prohibition foreseen in article 4 shall be void and the parties to such agreements cannot request the performance of their obligations arising from such agreements. Besides invalidity of such agreements, the Law, in article 57 and 58, also provides for compensation to be paid by those who had violated the law to persons who suffer damages by reason of such prohibited practices.

Article 4 also introduces a "presumption of concerted practice". If there is a lack of sufficient proof of the existence of an agreement, a presumption arises that the undertakings concerned have engaged in a concerted practice if competition is prevented or distorted or limited and there exist a similarity in the market concerned regarding price changes or in the balance of supply and demand or in the activities of the undertakings. If it is not possible to prove the existence of an agreement which distorts competition, but there is still an indication, explicit or disguised, of an anticompetitive activity in the markets, the competition authorities will be able to take an action against the undertakings who are deemed to have been involved in such activities. In such cases these undertakings must rebut the presumption of concerted practice and prove that they are not in such parallel conduct or, if they are, their conduct was based on proper economic grounds. In certain circumstances, prohibited practices which fall within the scope of article 4, may be exempted from the implementation of the prohibition clause. If the agreement, decision or concerted practice concerned meets certain requirements stated in article 5 of the Law, then the Competition Board may declare the provisions of article 4, inapplicable.

Analysis

Application of the "Per Se" rule is simple. Did the defendant engage in the proscribed practice? If so, it is irrelevant whether there has been injury to competition. For instance, the law has traditionally characterized price-fixing as a per se violation. Assume the defendants have fixed the price at precisely the same level as would prevail in a perfectly competitive market. It matters not; injury to competition is irrelevant. Assume the widgets are priced even lower than the competitive price. Consumers may receive an unexpected windfall; nonetheless the sellers have violated the law. On the other hand, application of the "Rule of Reason" is more complicated. The true test of illegality ,under the Rule of Reason, is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." In other words, we are instructed to weigh the procompetitive aspects against the anticompetitive aspects. How does one do that? To answer that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Mostly, per se illegal activities are intended to support horizontal integration, in which a larger company owns or consolidates control over several smaller

subsidiary companies that produce the same good or market the same product. Vertical integration, by contrast, occurs when a single company absorbs several companies involved in related aspects of a product's manufacture and sale. The quintessential example of vertical integration is the industrial manufacturer that controls all phases of production and distribution, from the acquisition of raw materials to the transportation of finished goods.

Relatedly, minimum resale price maintenance ,the practice at issue in this case, is a type of vertical restraint wherein a seller of goods conditions their sale upon a buyer's agreement to not resell the goods below a specified price. While minimum resale price maintenance is illegal per se, maximum resale price maintenance and non-price vertical restraints like granting distributors exclusive territories are not. Rather, such practices warrant scrutiny under the rule of reason standard.

Comparison

To prevent trusts from creating restraints on trade or commerce and reducing competition, United Stated Congress passed the Sherman Antitrust Act in 1890. The Sherman Act was designed to maintain economic liberty, and to eliminate restraints on trade and competition. The Sherman Act is the main source of Antitrust law. American antitrust law began to take shape only when the Supreme Court began to build the basic framework of antitrust analysis in its decisions.

Certain anticompetitive acts or agreements are considered to be so injurious to the public that there is no need to determine whether competition is actually reduced or otherwise injured they are violations of the Sherman Act per se; and Rule of Reason: Acts or agreements that are not considered to be illegal per se are analyzed by comparing their positive effects (e.g., efficiency) against their potentially anticompetitive effects. If the act or agreement is found not to unreasonably restrain trade, it will not be considered a violation of the Sherman Act.

The "Rule Of Reason" , not a "Per Se Rule" of unlawfulness, is now the standard by which minimum vertical price restraints will be assessed under federal antitrust law because the rule of reason approach is a case-by-case, balancing approach, companies will need to pay careful attention to how the case law regarding minimum resale price restrictions develops in federal and state courts.

In contradistinction to US Antitrust Law, Turkish competition law is regulated by the Law, "The Act on the Protection of Competition." Article 4 of the Law prohibits "agreements, concerted practices, and decisions" that prevent, distort or restrict competition, or that have the potential to do so. The law includes a non-exclusive list of anticompetitive practices that constitute potential violations.

The Act empowers the Board to issue individual and "block" exemptions from Article 4, as well as case-specific "negative clearances" declaring that the given case does not violate the law.

At this jucture, US Law and Turkish Law are similar to prohibit resale price maintenance. However Turkish Law doesn't have concepts such as "Per Se Rule" or "Rule Of Reason" . A unique feature of Article 4 of Law is the "concerted practice presumption," under which the existence of unlawful collusion among competitors may be inferred if market conduct or conditions are similar to those that arise where competition is artificially distorted. The non-exclusive list of anticompetitive vertical practices in Article 4 includes resale price fixing, discrimination between similarly situated parties, tying, and actions designed to impede competitors or prospective entrants. According to decisions of the Competition Authority vertical price maintenance is not a flagrant violation.

In my point of view, sanction of the vertical price maintenance in Turkish Law is bear resemblance to "Rule Of Reason" in US Antitrust Law.