

Competition Update
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OLSWANG



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The information contained in this update is intended as a general review of the subjects featured and detailed specialist advice should always be taken before taking or refraining from taking any action.

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Introduction



Dear readers,

As the year draws rapidly to a close, it is our pleasure to bring you the final news of the decade in EU competition law.

That makes auspicious timing for the announcement of the replacement of Neelie Kroes, the formidable head of the European Commission's Competition Directorate General, by Joaquin Almunia. He will succeed one of the most high-profile occupants of the post, and we wish him well. Mrs Kroes, as the new digital agenda Commissioner, will surely continue to play an important role in the competition and regulatory sphere – her new remit will of course overlap significantly with her previous work.

Importantly, 1 December also witnessed the coming into force of the Treaty of Lisbon. We feature a review in this edition of its impact on competition law practitioners, not the least of which is its highly inconvenient renumbering of Articles 81 and 82 to 101 and 102. Researching Article 101 case law in the new year promises to be a thankless task!

We also bring you the latest on Intel's antitrust woes, which now not only include the biggest ever fine imposed by the European Commission, but also a hefty payout as part of its settlement with AMD – which does not appear even to be a comprehensive settlement.

A pair of recent cases, *Akzo Nobel* in the ECJ and *Cooper* in the English courts, offer an interesting juxtaposition of arguments on liability of a parent and a subsidiary, respectively, arising from breaches of competition law. The ECJ's judgment in *GlaxoSmithKline* is also reviewed, in particular its important statements on exemption under (what used to be) Article 81(3).

On the UK front, we also review the progress of the OFT in the construction sector, a sector which rather unfortunately appears to have incurred not one but two recent cartel findings. From a broader perspective, we bring you a review of the EETS Decision, which we anticipate will bring significant beneficial effects for the development of the internal market, in creating a single pan-European system of road toll payment.

Finally, 2009 saw the only overtly Christmas-themed antitrust finding of which we are aware. A Danish court's judgment against the infamous "*Juletraesdyrkerforening*" (Christmas tree growers' association) cartel emphasises the point that any business can be on the wrong end of a competition law challenge. A summary of the case is available (in Danish) at:

<http://www.konkurrencestyrelsen.dk/konkurrenceomraadet/afgoerelser/afgoerelser-2009/konkurrenceraadets-moede-25-november-2009/oestre-landsret-har-idoemt-brancheforeningen-dansk-juletraesdyrkerforening-en-boede/> – we await your emails on the substitutability, or otherwise, of 'Nordmann firs'.

Best wishes for the holiday season.

Howard Cartlidge



Entry into force of the Treaty of Lisbon on 1 December 2009 – impact on EU Competition rules

Following the ratification of the Lisbon Treaty by the Czech Republic on 3 November 2009, it has now been ratified by all EU Member States and entered into force on 1 December 2009.

Structure and terminology of the new Treaties

The Lisbon Treaty amends, but does not replace, the EU's two core Treaties, i.e. the Treaty on European Union (the "TEU") and the Treaty establishing the European Community (the "EC Treaty"). The TEU keeps its present name; the EC Treaty is renamed the Treaty on the Functioning of the European Union (the "TFEU"). Together, the TEU and the TFEU (referred to as "the Treaties") form the foundation of the European Union and both Treaties, as well as all Protocols, have the same legal value.

Following the entry into force of the Lisbon Treaty, the European Union now has a single legal personality and replaces and succeeds the European Community. Henceforth, the term "European Community" will disappear, and all references to it are replaced by "European Union". The Commission of the European Communities is now officially called the European Commission; the Court of Justice of the European Communities is renamed the Court of Justice of the European Union; and the Court of First Instance is renamed the General Court. Finally, all references to the "common market" are replaced by "internal market".

Impact on competition rules

Renumbering. As a result of the Lisbon Treaty, the competition provisions contained in the former EC Treaty have been renumbered. Articles 81 (anti-competitive agreements) and 82 (abuse of dominance) EC Treaty become Articles 101 and 102 TFEU; Article 86 EC Treaty (public undertakings/special exclusive rights) becomes Article 106 TFEU and the State aid provisions (Articles 87-88 EC Treaty) become Articles 107-108 TFEU.

Substance unchanged. The Lisbon Treaty does not change the substantive content of the main Treaty articles dealing with competition, apart from some minor amendments to Article 85 and Articles 87-88 EC Treaty (after amendment Articles 105 and 107-108 TFEU). The substantive competition provisions contained in the former EC Treaty and in secondary legislation remain entirely in force.

Exclusive competence of the Union. The Union's exclusive competence in the area of the establishing of the competition rules necessary for the functioning of the internal market is now explicitly embedded in Article 2B(1)(b) TEU.

Protocol on the Internal Market and Competition. Following representations by the French government, the reference to "undistorted competition", contained in former Article 3(1)(g) EC Treaty, has been removed from the Union's principles (Article 2 of the TEU merely mentions the establishment of an internal market as an objective and further refers to "a highly competitive social market economy"). The reference is

instead placed in a Protocol (No 27) on the Internal Market and Competition. In this legally binding Protocol (which forms an integral part of the Treaties to which it is annexed and has the same legal value as Treaty provisions), the Member States confirm that the system of undistorted competition remains an integral part of the concept of the internal market:

“The High Contracting Parties, considering that the internal market as set out in Article 2 of the Treaty on European Union includes a system ensuring that competition is not distorted, have agreed that, to this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 308 of the Treaty on the Functioning of the Union”.

In view of the fact that this new Protocol on the Internal Market and Competition, which has the same value as the Treaty provisions, paraphrases the wording of the old Article 3(1)(g) EC Treaty and thus constitutes a legally binding affirmation of the current situation, the removal of the reference to “*undistorted competition*” from the Union’s objectives seems to have limited practical consequences, whatever the political value of the change in certain Member States. The formal view of the European Commission is that the change has no legal effects.

Services of General Economic Interest. A specific legal basis is introduced for services of general economic interest (Article 16 TFEU). In addition, Protocol (No 26) on Services of General Economic Interest has been annexed to the Treaties which sets out the shared values of the European Union.

Comments

The Lisbon Treaty results in a renumbering of the main competition provisions but the substantive content of these provisions remains unchanged. The Commission’s central powers for ensuring that competition rules are complied with thus remain intact. Hence, the impact of the Lisbon Treaty on the existing competition rules appears to be rather formal than substantial. As stated by departing Competition Commissioner Kroes: “*They have moved the furniture round, but the house is still there*”.

However, losers from the Treaty will include those competition lawyers – especially those of longer vintage – who must re-learn Article numbers yet again and apply caution when carrying out online searches for cases relevant to a particular Article.

ECJ ruling in *GlaxoSmithKline*, on parallel imports of pharmaceuticals in Spain

The European Court of Justice has upheld a finding of infringement of Article 101(1) (formerly Article 81) by GSK's dual pricing agreement in Spain, intended to restrict parallel trade of its pharmaceuticals. The ECJ also confirmed that an agreement must have appreciable objective advantages for exemption under Article 81(3) - an assessment of such advantages should have taken into account the nature and specific features of the pharmaceutical sector. However, the ECJ found that the lower court erred in requiring proof of harm suffered by final consumers as a prerequisite for a finding of anti-competitive object.

Background

In 1998, under the since-abolished notification procedure, GSK notified new conditions for the sale of certain of its medicines to wholesalers in Spain to the Commission, requesting either negative clearance under Article 81(1) or exemption under Article 81(3) EC. The conditions stated that, where the medicines were to be sold within Spain, GSK would limit the price it charged to that established by the Spanish health authorities under national law. Where the goods were to be sold outside Spain, however, the price would be higher. More than 90% of the Spanish wholesalers accepted the new conditions, but a number of others filed complaints with the Commission alleging infringement of Article 81(1).

In 2001, the Commission found that GSK had infringed Article 81(1) by entering into an agreement with the Spanish wholesalers which distinguished between prices charged in the case of domestic resale of reimbursable drugs, and higher prices charged for drugs to be exported to other Member States. It rejected GSK's request for exemption under Article 81(3) and ordered GSK to bring an end to the infringement immediately. GSK challenged the Commission decision before the Court of First Instance (now the General Court).

The CFI upheld the Commission's finding that GSK's dual pricing system constituted an agreement which had the effect of restricting competition, infringing Article 81(1). However, it annulled the Commission's decision on the grounds that it had erred in finding that the agreement had the *object* of restricting competition, and had failed to carry out an adequate examination of GSK's request for an exemption. The CFI decision was appealed to the ECJ by GSK, the Commission, and two trade associations.

ECJ judgment

On GSK's appeal against the CFI's finding of a breach of Article 81(1), the ECJ found that the CFI was wrong to insist that an agreement intended to limit parallel trade would only be considered to have an anti-competitive object insofar as it entailed disadvantages for final consumers. However, there was no need to set aside this part of the CFI's decision as it had, in any case, found the GSK pricing agreement to have anti-competitive *effect*, contrary to Article 81(1).

The Commission and the appellant trade associations made a number of arguments in relation to the CFI's analysis of GSK's request for an exemption under Article 81(3). The principal arguments related to:

- **Burden and standard of proof required in relation to Article 81(3):** The ECJ found that the CFI had ruled correctly that the burden of proof falls on the undertaking requesting the exemption, but that the facts relied on by that undertaking may be such as to oblige the other party to provide an

explanation or justification, failing which it is permissible to conclude that the burden of proof is discharged. The CFI had also correctly stated that, when dealing with an application for annulment of such a decision, it carried out only a restricted review of the merits of the case.

- **Probability of efficiency gains:** The ECJ ruled that the CFI had rightly observed that, in order to be capable of being exempted under Article 81(3), the agreement must be "sufficiently likely" to deliver appreciable *objective* advantages (i.e. not advantages from which only the undertakings participating in the agreement benefit). The CFI was correct to consider whether the Commission was entitled to conclude that GSK's arguments and evidence did not demonstrate with sufficient probability that its pricing system would, by encouraging innovation, deliver appreciable objective advantages.
- **Structural nature of price differences:** According to the Commission, the CFI imposed a high standard on it for the analysis of GSK's arguments because of the structural pricing of medicines in different Member States. The ECJ ruled that the examination of an agreement for the purpose of establishing whether it contributes to the improvement of production or distribution or to the promotion of technical or economic progress, as required by Article 81(3), may require the specific features of the sector concerned to be taken into account. This does not, however, mean that the burden of proof is reversed, so the CFI was entitled to take into account the structural nature of pricing in the pharmaceutical sector.
- **Causal link between restriction of competition and promotion of technical progress:** The Commission and one trade association argued that the CFI was wrong to hold that the restriction of competition brought about by GSK's dual pricing contributed to the promotion of technical progress because it led to increased profits for the manufacturer which *may* be invested in R&D. It argued the need for a specific link between the restriction and the advantage claimed. The ECJ held that not *all* of the additional profit accruing to the manufacturer from the restriction of competition must be invested in R&D in order to show an appreciable objective advantage.

Comments

Although the ECJ dismissed the appeals against the CFI's decision, it is significant that it disagreed with the CFI's finding that it was necessary to show consumer harm in order to establish that an agreement which seeks to restrict parallel trade is anti-competitive by object. The Commission will now have to reconsider whether GSK's dual pricing system, as notified to it in 1998, can benefit from exemption under Article 81(3). Since the coming into force of the Modernisation Regulation 1/2003, the Commission no longer considers applications for individual exemption but it will be required to do so under the regime which was in force at the time of notification. An obvious concern is that this will require the Commission to carry out an exercise which it is no longer in the habit of undertaking, in relation to information notified to it over a decade ago. This decision is also interesting in light of another recent ECJ judgment in a case involving GSK, in which the ECJ held that dominant manufacturers of pharmaceutical products may protect their commercial interests by refusing orders from parallel importers which are "out of the ordinary" in terms of quantity.

European Commission publishes Intel abuse decision, Intel settles with AMD

In May 2009 the European Commission fined Intel over €1 billion for abuse of a dominant position on the x86 CPU market, through its pricing practices of: (i) 'conditional rebates'; and (ii) 'naked restrictions'. Intel has also (partially) settled the complaints of its competitor, AMD, for \$1.25 billion.

Background

The Commission began investigating Intel's conduct in 2004, following complaints from AMD. AMD also initiated regulatory complaints against Intel in Japan and Korea, and filed its own lawsuits against Intel in Japan and Delaware, relating to the same practices. The Commission issued a Statement of Objections (SO) to Intel in 2007, and a Supplementary SO in 2008.

The decision

According to the Commission's decision, published in September, Intel held a dominant position in the worldwide production and sale of x86 CPUs, the key component in PCs, with a market share around 70%. Since 2000 most of its competitors, other than AMD, have exited the market. The high barriers to entry into the market include huge R&D investment and costs of production facilities, but also Intel's "*must-stock brand status*", which prevent new entrants.

Intel abused its dominant position and therefore infringed Article 102 firstly by agreeing to pay customers '**conditional rebates**', i.e.:

- rebates to four major OEMs (e.g. Dell and Hewlett Packard), on condition that they purchase most or all (e.g. 80%, 95% and 100%) of their x86 CPUs from Intel; and
- payments to major PC retailer MSH, on condition that it exclusively sold Intel-based PCs.

Intel also engaged in so-called '**naked restrictions**', i.e. payments to OEMs conditional on restricting their sales of AMD-based PCs to limited distribution channels, or on delaying the launch of AMD-based PCs.

Intel's fidelity rebates obliged customers (including the key, strategically important, OEMs) to source all, or nearly all, of their CPU requirements from Intel, and therefore restricted their commercial freedom to source from competitors such as AMD. There was considerable evidence of direct (OEM) and indirect (IT manager) customer views of AMD as a genuinely viable alternative, and of Intel's intent to combat the "*growing competitive threat that AMD represented*".

Intel's (unjustified) conduct (a) directly harmed competition because consumers had less choice of available products than they would have had but for Intel's behaviour, and (b) was a "*strategy aimed at foreclosing AMD*" from the x86 CPU market. The Commission also conducted an in-depth economic analysis showing that Intel's payments were capable of foreclosing an "*as efficient*" competitor from entering the x86 CPU market, and causing competitive harm. Accordingly, the Commission imposed its largest ever fine on a single firm, €1.1 billion.

Intel's appeal

Unsurprisingly (particularly given the further prospect of damages claims by affected parties), Intel has appealed the Commission's decision on both infringement and the fine to the European Court of First Instance (now the General Court). Two aspects of Intel's grounds of appeal are interesting:

- Intel was conspicuously careful to ensure that its rebates etc. were not written into contractual agreements. The appeal is likely to focus on the diametrically opposed stances of the Commission and Intel as to whether the alleged rebates actually existed, and alleged failures in the Commission's evidence gathering. Intel has already challenged the Commission's procedures in the CFI (unsuccessfully), and via a complaint to the European Ombudsman (successfully). Whether the Ombudsman's finding of "maladministration" by the Commission, in not taking proper notes of a meeting with a Dell executive who allegedly exonerated Intel, affects the appeal remains to be seen – it is far from the only evidential point in the case.
- Intel argues that the Commission erred in law by finding that the conditional discounts granted by Intel were 'per se' abusive, i.e. without finding that they were actually capable of foreclosing competition. Given that the decision dedicated some 160 pages to an economic assessment of the "as efficient" competitor test and competitive harm, that appears a difficult argument to sustain.

Further litigation in the US, settlement with AMD

The Commission decision has fuelled further actions against Intel. In November, the attorney general of New York filed a federal antitrust lawsuit against Intel, and at the time of writing the US Federal Trade Commission is reportedly considering launching a regulatory investigation of Intel.

However, on 12 November AMD agreed to withdraw its lawsuits against Intel, and from the regulatory investigations, in return for payment by Intel of \$1.25 billion. The agreement is **not** a complete settlement. There is no agreement on other practices such as "retroactive discounts", where a discount is conditioned on a customer achieving a qualifying volume of purchases, but is applied to purchases including those below the qualifying threshold. AMD can make submissions to regulators on these being unlawful. AMD can also respond to a regulatory investigation where it is required to by law (e.g. by a statutory request for information).

The settlement also prohibits Intel from offering rebates of the type found abusive by the Commission decision. Effectively, this reverses the burden of proof which AMD would face in antitrust/competition law litigation. AMD would only have to prove the existence of such a rebate, i.e. a *prima facie* breach of contract. The burden of proof would then fall on Intel to prove one of the various carve-outs, e.g. that the rebate was lawful, or met "*in good faith*" a competitor's offer. Interestingly, the contractual prohibitions will fall away if Intel's market share falls below 65% – above the level at which Intel would be presumed dominant under EU competition law.

Comments

Rebates are one of the most contentious examples of abuse of a dominant position. The idea that a company should refrain from normal competitive behaviour to win customers, even where a rebate does not drive prices below cost, and where customers seemingly benefit from lower prices, is hugely controversial. Arguments have been strongly made for the need to show anti-competitive foreclosure as part of such an abuse. The Commission has hedged its bets, maintaining that the *Hoffman-La Roche* case

law sets out a 'per se' test, but going to conspicuous lengths to show competitive harm in any event. It is likely, given the grounds of Intel's appeal, that the CFI will have to address directly whether rebates are still to be considered a 'per se' abuse.

Parental responsibility: ECJ judgment in *Akzo Nobel* confirms that parent companies are liable for cartel behaviour of subsidiaries

The European Court of Justice has confirmed that parent companies are presumed to be liable for cartel infringements committed by a 100% owned subsidiary. The presumption is rebuttable, but parent companies are very unlikely to escape cartel fines by claiming their subsidiaries operate independently.

Background

In 2004 the European Commission fined Akzo Nobel and five other undertakings €66.3m for price fixing and other anti-competitive behaviour in the EEA market for animal feeds. The Commission addressed its infringement decision (and fines) to the group parent company, Akzo Nobel NV, despite acknowledging that the parent company had not itself participated in the cartel, but rather the infringing behaviour was entered into by subsidiaries within the Akzo Nobel group.

The Commission assumed that Akzo Nobel NV exerted a decisive influence over the commercial policy of its subsidiaries, all of which were 100% owned, either directly or indirectly. This finding was confirmed by the CFI (now the General Court) on appeal, which concluded that the Commission was not required to show that Akzo Nobel NV actually exercised control over its subsidiaries – merely to show that it owned 100% of the shares was sufficient to support a presumption of decisive influence. The burden fell on Akzo to rebut the presumption and prove that in reality it did not in fact exercise decisive influence.

Akzo appealed to the ECJ, arguing that in a 2004 decision the ECJ had suggested the Commission must produce additional factual evidence of parental control.

ECJ judgment

In its judgment of 10 September this year the ECJ upheld the findings of the Commission and the CFI. It noted that competition law applies to 'undertakings' which equates to an economic unit, irrespective of whether this economic unit is comprised of several natural or legal persons.

Where a parent company has a 100% shareholding there is a rebuttable presumption that the parent company in fact exercises a decisive influence over the conduct of its subsidiary. All that the Commission must do is show that the subsidiary is wholly owned by the parent. It is then up to the parent company to adduce evidence to prove that in reality the subsidiary acted independently on the market and that in fact the parent did not exercise decisive influence over the subsidiary.

The ECJ held that the CFI was correct to find that in considering whether a subsidiary acts independently in the marketplace, account must be taken not only of the parent's influence over the subsidiary's commercial policy, but also of other relevant factors relating to the economic organisational and legal links between the subsidiary and the parent. The conduct of the subsidiary on the market is therefore only one factor which would indicate the existence of a single economic unit.

Comment

This case should serve as a timely reminder to parent companies that they are almost certain to be liable for the cartel infringements of subsidiary group companies. This can have a number of important consequences:

- Directors should ensure that there are comprehensive competition compliance training programmes in place group-wide in order to minimise the risk.
- Anticompetitive agreements entered into by small subsidiaries can have significant financial implications as maximum fine levels are calculated based on group turnover.
- Higher fines on well known parent companies can result in higher and an increased number of claims for damages from affected third parties.
- Companies which operate across different product markets and industries need to be especially careful, as fines can be increased by up to 100% for repeat offending – so if a subsidiary in one market has previously been found guilty this can uplift the fine in another situation, despite the parent being involved in neither.
- The reputation of the group as a whole will be damaged.

The decision will be of particular interest to US companies as the law in the US is somewhat different. Unless the parent company is directly involved in the cartel itself it will generally escape liability for antitrust violations of its subsidiaries. In contrast, the test in the EC is now almost one of strict liability and it is practically impossible for a company to prove that it does not exercise decisive influence over a 100% owned subsidiary.

European Commission gives green light to the European Electronic Toll Service (EETS)

The European Commission has adopted a decision setting out the technical, procedural and legal specifications for EETS, after almost five years of intense discussions. EETS will enable private and commercial road users to pay tolls throughout the European Union using a single interoperable device and one service contract.

Background

Over the past ten years national, regional or local road pricing schemes have been implemented in many European countries. Most of these modern, electronic schemes operate via a technical device, a so-called on board unit (OBU), installed in the vehicle which communicates with the toll operator's back office, transmitting the information needed to determine the relevant toll. While electronic tolling schemes enhance the fluidity of road traffic, as vehicles do not have to stop in order to pay the toll, the various national, regional and local electronic road toll systems are generally incompatible and can only communicate with their own OBUs.

The EC has considered these non-interoperable tolling schemes to hinder international road transport in particular, representing a barrier to the internal market, and decided to take action accordingly. The first step, the so-called Directive on Interoperability (2004/52/EC), was adopted in 2004, and set out the framework for what would become EETS. The subsequent EETS Decision (2009/750/EC) entered into force on 6 October, defining the essential technical specifications and requirements and laying down the rights and obligations of Member States, toll chargers, service providers (so called EETS providers) and users.

EETS will be an additional service to national tolling systems. In order to provide EETS, EETS providers will, after a registration and certification process, enter into contracts with each toll charger, which will include the technical and commercial conditions for the EETS provider to enter the toll charger's domain. These conditions must be non-discriminatory and transparent, and will be published by the relevant Member States.

According to the Decision, EETS will be available within three years for all vehicles above 3.5 tonnes or allowed to carry more than nine passengers (including the driver), and for all other vehicles within five years.

Comments

Once EETS is implemented, hauliers in particular will benefit from the opportunity to subscribe to the interoperable service. A road user travelling through Europe today requires several OBUs to pay the toll in the various toll domains through which it travels. The road user will contract with a number of different providers (operators and concessionaires in the respective toll domains), and will receive several invoices (one or more for each country). EETS will therefore save time and money, as the road user will only require one OBU, which will combine all of the relevant technologies. Further, the road user will only have to contract with one service provider, and will receive a single invoice from its chosen EETS provider.

European Commission Vice-President Antonio Tajani, in charge of Transport, called the adoption of the EETS Decision "*the most important improvement for drivers since the abolition of border controls*". The

implementation of EETS will have a major influence on existing and new road pricing schemes in Member States, and is intended to create a new market for cross-border tolling services in Europe.

The EETS Decision does not affect the competence of Member States to establish tolling systems on their own territories. However, where they have toll domains to which the EETS Decision applies (schemes must be electronic, have a relevant size and it must be necessary to use an OBU in the vehicle), they must adapt those schemes to enable EETS Providers to gain access to their toll domain and provide the service to customers.

Implementing EETS in line with the Decision's ambitious timetable will be a challenge for both Member States and toll chargers, as well as to those companies which elect to become providers in the evolving EETS market.

The Olswang office in Berlin has been intensively involved in the drafting of the EETS Decision over the past years as advisors to the German federal government and members of the interdisciplinary expert group CESARE IV, a project set up by the EU, the ASECAP (the European Association of Toll Motorways Operators) and European public road authorities to design, develop, promote and implement EETS.

English High Court damages claim in *Cooper* gives guidance on staying of actions pending parallel proceedings, and liability of subsidiaries

This recent judgment establishes that a company can be sued in follow-on damages from a competition law infringement finding, even where the finding was made against its parent company. It also indicates limits on the ability of a cartelist to frustrate damages actions by starting proceedings in another jurisdiction.

In 2008 the European Commission made an infringement finding relating to a synthetic rubber cartel. A number of cartelists, including the ENI group, were fined. ENI commenced court proceedings in Italy against a number of tyre manufacturers (customers for synthetic rubber), seeking declarations including that the cartel had caused the tyre manufacturers no loss or damage.

Jurisdictional issues

A number of the tyre manufacturers subsequently brought a damages action in the English courts against the cartel, raising the following jurisdictional questions:

1. *Did the English court have jurisdiction over a subsidiary, where the non-English parent was the subject of the infringement finding?*

Only three of the 24 defendants named in the English action were domiciled in England, and they were not direct addressees of the Commission's infringement finding. They were UK subsidiaries of the addressees (Shell, Bayer and Dow), joined as defendants by the claimants solely to obtain English jurisdiction. However, they had sold (small amounts of) 'cartelised' synthetic rubber.

The key point was the concept of an 'undertaking' in EU competition law. The court held that Article 81 was infringed not only by the illegal agreement between the parents, but also by the **implementation** of that agreement, i.e. sale of the cartelised product. If a legal entity has knowledge of the agreement, so does the undertaking of which it is part. A subsidiary is part of that undertaking where it is engaged in the same economic activity, in this case selling the same synthetic rubber products which were the subject of the infringement finding. Note that this is not the same reasoning as that in *Akzo Nobel* (see elsewhere in this issue), where the parent company was not personally involved in the infringement – here the UK subsidiaries actually implemented the infringing agreements, and being English companies could be sued in England.

Interestingly, the court rejected jurisdiction based on where the "harmful event" (i.e. the agreement breaching Article 101) occurred, commenting on the difficulty, in the case of a pan-European cartel involving various meetings in various places, of identifying where it took place.

2. *Should the English claim be stayed pending the result of the Italian proceedings?*

Article 27 of the Brussels Regulation (Regulation 44/2001) states that if proceedings involving the **same cause of action** and **same parties** are brought in the courts of different Member States, the court first "seised" has jurisdiction, and the subsequent action must be stayed.

The question was whether the English proceedings were between the same parties. The English claimant tyre manufacturers were the same as the defendants in the Italian case. However, the claimant in the Italian case, ENI, was not a defendant in the English proceedings – the claimants having deliberately chosen not to join it as a defendant, given the parallel proceedings in Italy.

The court rejected the English defendants' argument that they were the 'same parties' as ENI in Italy due to their 'identity of interest'. While it was true that they and ENI both essentially argued that the cartel had caused no loss, their interests were not "*identical and indissociable*" because:

- ENI and the English defendants were legally distinct and separate entities;
- ENI was the main protagonist in the cartel, so their interests and arguments might diverge on questions such as contribution between joint tortfeasors; and
- ENI and the English defendants were entitled to conduct their own legal proceedings without interference from each other, including reaching independent settlements.

The Court also rejected a request for a discretionary stay under Article 28 of the Brussels Regulation. The object of Article 28 is to avoid the risk of conflicting judgments. There was a clear risk here of one of the Italian or English courts of finding that the cartel caused no loss, and the other the contrary. However, it was: (1) for a variety of reasons not certain that the Italian proceedings would actually reach a ruling on the question of loss; and (2) not all of the English defendants had requested a stay, i.e. there would be an English finding in any event – so a stay would not avoid potential conflicting judgments. Further, there was no reason, given the pan-European nature of the cartel, why Italy should be regarded as the 'centre of gravity' of the case.

Comments

Jurisdictional aspects of damages actions are inherent to any competition law infringement finding with a pan-Europe dimension. It is ironic that the cartelists accused the claimants of forum shopping by claiming in England. ENI's action in Italy may have been judicious use of the so-called 'Italian Torpedo', where potential claims are delayed by launching proceedings in what is perceived to be a 'less rapid' jurisdiction. As a result, the English claimants have been unable to claim against the alleged main protagonist. ENI's Italian action was in some respects dubious, e.g. in requesting a declaration that no cartel had existed – this should have been an appeal against the Commission decision to the European General Court, and so was thrown out by the Italian court.

Even if the forum shopping criticism is justified, it has its disadvantages. As the court noted, to sue on the basis of damage which occurred in England may limit the amount of the damage to "*a very small part of the whole*", given the limited sales which occurred here. Perhaps the claimants' strategy is to obtain a finding of loss in England first, as the precursor and basis for further proceedings in other Member States (or, more likely, bringing the cartelists to settle).

As regards the 'Italian Torpedo', it is interesting that in the UK follow-on damages actions are increasingly being launched in the High Court rather than the Competition Appeal Tribunal. The CAT, which requires an application for permission to bring a follow-on damages claim, is not "seised" until it grants permission. In the meantime, the defendant is alerted and typically has a month or so to launch proceedings elsewhere. By contrast, the High Court is "seised" immediately on the issue and service of a claim form, without such warning to the defendant.

Office of Fair Trading fines over 100 construction companies for bid-rigging, and construction recruitment agencies for price-fixing and collective boycott

In its largest cartel investigation to date, the OFT has fined 103 construction companies for engaging in "cover pricing", a form of bid-rigging. Separately, the OFT has fined six recruitment agencies for fixing fee rates and withdrawing from or refraining from entering into contracts with an intermediary company for the supply of candidates to construction companies in the UK.

Bid-rigging cartel

The OFT found that between 2000 and 2006 the construction companies concerned had fixed prices and exchanged commercially sensitive pricing information as part of a practice known as "cover pricing". Cover pricing is a form of bid-rigging where one or more bidders in a tender process is informed of an artificially high price by a competing bidder. The price is designed so as not to win the contract but be submitted as a genuine (losing) bid. In addition, in a small number of cases "compensation" payments had been made to the losing bidder, a practice considered by the OFT to be a particularly serious form of bid-rigging. The companies' aim was to appear to be a willing bidder, in order to maintain relations with the contracting authority, whilst avoiding the risk of winning a contract which the loser could not service.

The OFT's investigation originated from a specific complaint in the East Midlands region in 2004. However, it became clear from the evidence that the practice of cover pricing was widespread. The scope of the investigation was therefore extended to elsewhere in England. Further, the OFT received evidence of cover pricing implicating many more companies than those which were the subject of the OFT's decision, but it focused its investigation on those instances where it had the strongest evidence.

In September 2009 the OFT imposed fines totalling £130 million, representing on average 1.13% of the parties' annual worldwide turnover. 33 parties benefited from discounts on the level of fines of 35%-65% under the OFT's leniency programme and 41 others received up to 25% discount under the OFT's "fast track offer". Prior to the issue of the statement of objections and without providing the parties with any evidence, the OFT gave the non-lenient parties the opportunity to make certain admissions in return for a reduction in penalty (the fast track offer). The fast track offer assisted the OFT in deciding which tenders to include in the statement of objections and in deciding what further investigative steps it should take, as it had found that, given the number of companies involved, it would have been too time-consuming to fully investigate all the companies.

The OFT considers that deterrence is an important part of its fining policy and factored deterrence into its fining in this case. It was particularly important here because cover pricing was endemic and had continued throughout the construction industry despite the OFT's earlier fining decisions for cover pricing in the related roofing sector.

Construction recruitment agencies cartel

A company, Parc, entered the market with a new business model to act as an intermediary between construction companies and different recruitment agencies for the supply of candidates, which put pressure on the margins of the recruitment agencies. The parties formed the Construction Recruitment Forum which met five times between 2004 and 2006. In this forum they agreed to boycott the intermediary and fix the fees they would charge intermediaries and construction companies.

In September 2009 the OFT imposed fines totalling £39.3 million. The other two recruitment agencies involved were granted immunity from fines in return for exposing the cartel.

Comments

The construction industry in the UK has come under serious scrutiny by the OFT in recent years, both through these two cartel investigations and earlier investigations in the roofing sector, resulting in five OFT decisions and a number of appeals. The OFT will now be hoping that companies in the construction sector will be deterred from engaging in cartel activity and that it will be able to focus its resources on other activities and other sectors.

The novel use of the fast track offer in the bid-rigging case is an interesting feature of that case. However, there is a question as to whether the OFT would use the procedure again, since it was a particular way of dealing with a case where the cover pricing had been endemic.

The bid-rigging case also raises a number of issues for purchasers, i.e. those conducting tendering exercises. These include the question of whether those fined by the OFT should be excluded from future tendering exercises (blacklisting). The OFT has issued a non-binding Information Note discouraging blacklisting on a number of grounds, but it is ultimately for the purchasers to decide whether to accept this recommendation. Purchasers may also be considering seeking damages from those involved in the cover pricing. To be successful they would, however, need to show loss in the form of the difference between the price paid and the competitive price (that is the price which would have been paid absent the cover pricing). The OFT was not required to identify the competitive price in its decision and accordingly expert evidence would be needed on the question of the competitive price.

Finally, a large number of the bid-rigging construction companies recently appealed the OFT decisions to the Competition Appeal Tribunal. If nothing else, the sheer number of appellants promises to be a major procedural headache for the CAT, and indeed for other unrelated actions in the CAT which may have to be accommodated around the construction appeals.

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