European Competition Law Newsletter

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Introduction

With this European Competition Law Newsletter we will inform you of recent developments in competition law at European Union level. We hope that this newsletter contributes to your awareness of pitfalls in overseas business.

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European Court of Justice rules on the abuse of dominant position concerning royalties with respect to remuneration paid for the broadcast of musical works protected by copyright

A judgement of 11 December 2008 of the European Court of Justice, KANAL 5 AND TV 4, concerned the remuneration paid by television channels to an organisation that represents composers and music publishers and administers and licences rights to music and lyrics on their behalf.

In this case the European Court of Justice has ruled that Article 82 of the EC Treaty (which concerns the prohibition of the abuse of a dominant position) is to be interpreted as meaning that a copyright management organisation with a dominant position on a substantial part of the common market does not abuse that position where, with respect to remuneration paid for the television broadcast of musical works protected by copyright, it applies to commercial television channels a remuneration model according to which the amount of the royalties corresponds partly to the revenue of those channels, provided that that part is proportionate overall to the quantity of musical works protected by copyright actually broadcast or likely to be broadcast, unless another method enables the use of those works and the audience to be identified more precisely without however resulting in a disproportionate increase in the costs incurred for the management of contracts and the supervision of the use of those works.

Furthermore did the European Court of Justice consider that Article 82 of the EC Treaty is to be interpreted as meaning that, by calculating the royalties with respect to remuneration paid for the broadcast of musical works protected by copyright in a different manner according to whether the companies concerned are commercial companies or public service undertakings, a copyright management organisation is likely to exploit in an abusive manner its dominant position within the meaning of that article if it applies with respect to those companies dissimilar conditions to equivalent services and if it places them as a result at a competitive disadvantage, unless such a practice may be objectively justified.

European Court of First Instance: parent companies are jointly and severally liable for cartel conduct by their subsidiary

By decision of 21 December 2005 the European Commission determined that several companies in the rubber chemical market had infringed the cartel prohibition laid down in the EC Treaty by making price-fixing agreements and the exchange of confidential information between 1999 and 2000. In respect of those infringements the Commission imposed a fine jointly and severally on Repsol YPF, Repsol Quimica and their subsidiary General Química. Repsol YPF owns Repsol Quimica, and Repsol Quimica holds 100% of the shares in General Química.

Repsol YPF, Repsol Quimica and their subsidiary General Química appealed this decision before the European Court of First Instance stating, among other things, that the Commission incorrectly held Repsol YPF and Repsol Quimica jointly liable with their subsidiary General Química. The parent companies argued that they were not liable for their subsidiary because they did not participate themselves in the cartel conduct and that the subsidiary operated as an autonomous economic entity in the market. With reference to case law the parent companies stated that a parent company can only be held reliable for conduct of its subsidiary if the parent company has some influence on the behaviour of the subsidiary. In absence of such influence on General Química, they held that the Commission could not hold them responsible for the infringements committed by that subsidiary.

The European Court of First Instance did not accept this argument and upheld the decision of the Commission. The European Court of First Instance pointed out, with reference to case law, that in order to hold a parent company liable for conduct of its subsidiary it is sufficient for the Commission to prove that the parent company holds 100% of the shares in a subsidiary which has been found guilty of cartel conduct. In that case there is a rebuttable presumption that the parent company actually exerted a decisive influence over its subsidiary's conduct. The parent will be hold reliable for the payment of the fine imposed, even if it is established that the parent company did not participate in the cartel conduct in question, except if the parent company proves that its subsidiary acted as an autonomous entity on the market. Thus, it is for the parent company to reverse the mentioned presumption by adducing evidence to establish that its subsidiary was independent. The European Court of First Instance also pointed out that EC competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 of the EC Treaty if the companies concerned do not determine independently their own conduct on the market.

To determine that Repsol Quimica exerted a decisive influence on its subsidiary the sole finding that Repsol Quimica had ordered its subsidiary, after the Commission carried out inspections at the premises of General Química, to end all conduct that was contrary to the EC competition rules was sufficient to prove that Repsol Quimica had exerted a decisive influence over its subsidiary. Furthermore, the European Court of First Instance ruled that the Commission applied the Notice on immunity from fines and reduction in cartel cases correctly. The fine on General Química was reduced by 10% because it co-operated with the Commission. However, General Química argued that the Commission should have reduced the fine by a higher percentage taking into account the significance of the information put forward by General Química. According to the European Court of First Instance General Química was granted a fine reduction of only 10% on good grounds. General Química was the third company in row to meet the requirements mentioned in the notice. Moreover, in order to determine the percentage of fine reduction it was held that not only the significance of the submitted evidence by General Química had to be taken into account, but also the time of submission of that evidence. In this case General Química submitted the evidence a year and a half after the Commission's inspections to its premises. This case shows again the importance of providing the Commission with evidence of infringements of the cartel prohibition in a very early stage of the investigations in order to qualify for a high percentage of fine reduction.

European Court of Justice rules on agreements between national federations of farmers and slaughters with the object of suspending imports of beef and veal and fixing a minimum purchase price

The underlying competition case which has given rise to the appeal by the European Court of Justice arose as a result of the so-called second 'BSE' crisis. This crisis had an impact on meat consumption in Europe and created a crisis in the beef sector. Despite a number of measures adopted by the Community institutions in order to deal with the crisis, these measures were deemed insufficient by French farmers. In September and October 2001 relations between farmers and slaughterers became particularly tense in France. Groups of farmers stopped lorries illegally in order to check the origin of the meat being transported and blockaded abattoirs. These acts sometimes led to the destruction of plant and of meat. In return for lifting the blockade of abattoirs, the protesting farmers demanded undertakings from the slaughterers to suspend imports and to apply a so-called 'union' price scale.

In October 2001 several meetings took place between the associations representing beef farmers and those representing the slaughterers. On a request of the French Minister of Agriculture an agreement was concluded between six associations. The agreement consisted of two parts. The first was a 'temporary commitment to suspend imports' of beef. The second consisted of a 'commitment to apply the slaughterhouse entry price scale to culled cows'. The agreement contained, inter alia, a list of prices per kilogram of carcass for certain categories of cows.

After beginning an investigation on the matter the European Commission adopted the decision that the relevant associations infringed Article 81(1) of the EC Treaty by concluding a written agreement in order to set a minimum purchase price for certain categories of cattle and to suspend imports of beef into France, and by concluding, between the end of November and the beginning of December 2001, a verbal agreement having the same object, applicable following the expiry of the written agreement.

The European Court of First Instance delivered its judgment on 13 December 2006. It dismissed all the pleas of the associations of farmers en slaughters. In appeal the associations claimed that, in order to determine whether the agreement of 24 October 2001 was anti-competitive, the European Court of First Instance should have taken the economic context into account. The case had a very particular character in the sense that the sector in question found itself in a completely exceptional situation which had led the Community authorities to put in place a system of intervention to buy carcasses of meat and enable farmers to subsist.

The European Court of Justice upheld the judgement of the European Court of First Instance that the Court of First Instance did examine the context in which the agreement of 24 October 2001 had been concluded. In that regard, the European Court of First Instance took account both of the specific nature of the agricultural markets in question, to which, with certain exceptions, the Community competition rules apply, and of the legal and factual circumstances of the implementation of that agreement in a situation of crisis in the beef industry.

Furthermore, it is well established case law that, for the purposes of applying Article 81(1) of the EC Treaty, there is no need to take account of the actual effects of an agreement once it appears that its object is to restrict, prevent or distort competition. The Commission was therefore not bound to research the actual effects on competition of the measures adopted by that agreement.

Agreement to reduce overcapacity in the beef industry is contrary to EC Competition rules

On 20 November 2008 the European Court of Justice judged that an agreement between several companies in the beef industry in Ireland, for the purpose to reduce overcapacity in the sector infringes the EC Competition rules, more particularly Article 81(1) of the EC Treaty. The agreement had, according to the European Court of Justice, as its objective the prevention, restriction or distortion of competition.

Studies carried out on behalf of the Irish government and representatives of the beef industry concluded that it was necessary to reduce the number of processors in the beef industry from 20 to 4, 5 or 6 in order to reduce the processing capacity by 25%. For this purpose an agreement was implemented between the companies which were to remain, the stayers, and those which would withdraw, the goers. The companies agreed that the stayers are to compensate the goers. Furthermore they agreed that the goers undertake: i) to decommission or put beyond use their processing plants or sell them only to persons established outside the island of Ireland, or, if necessary, to the stayers on condition that they be used as back-up equipment or spare parts, ii) not to use the land on which those plants were situated for the purposes of beef or veal processing for a period of five years, and, iii) not to compete with the stayers in the beef and veal processing market in Ireland for two years.

The companies involved argued that the agreement did not come within the category of infringements which have an anti-competitive object, but should, on the contrary, be analysed in the light of their actual effects on the market. It was stated that the agreement first, was not anti-competitive in purpose and, second, did not entail injurious consequences for consumers or, more generally, for competition. In addition it was argued that the purpose of the agreement was not adversely to affect competition or the welfare of consumers, but to rationalise the beef industry in order to make it more competitive by reducing, but not eliminating, production overcapacity.

This argument was rejected by the European Court of Justice. According to the European Court of Justice, even supposing it to be established that the parties to the agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying the cartel prohibition. An agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives. An agreement of the type as mentioned above is contrary to the principle of the competition rules, according to which each economic operator must determine independently the policy which it intends to adopt on the common market. Article 81(1) of the EC Treaty is intended to prohibit any form of coordination which deliberately substitutes practical co-operation between undertakings for the risks of competition.

The European Court of Justice stated that the undertakings which signed the agreement would have, without such an agreement, no means of improving their profitability other than by intensifying their commercial rivalry or resorting to concentrations. With the agreement it would be possible for them to avoid such a process and to share a large part of the costs involved in increasing the degree of market concentration as a result, in particular, of the levy of € 2 per head processed by each of the stayers.

Even though legitimate objectives of agreements are in general not relevant for the application of the cartel prohibition laid down in Article 81(1) of the EC Treaty, such objectives are taken into account for the purposes of obtaining an exemption under Article 81(3) of the EC Treaty.

European Commission presents preliminary report on pharmaceutical sector inquiry

In January 2008 the European Commission launched a sector inquiry into EU pharmaceuticals markets under the EC competition rules because information relating to innovative and generic medicines suggested that competition may be restricted or distorted. The information indicated that fewer new medicine were brought to the market and that the entry of generic medicine seemed to be delayed. The inquiry relates to the period 2000-2007 and has resulted in a preliminary report presented on 28 November in Brussels. In this preliminary report the Commission presents evidence that originator companies have engaged in practices with the objective of delaying or blocking market entry of competing medicines. A final report is expected in a few months.

The inquiry is not aimed at individual companies but at the pharmaceutical sector as a whole. Sector inquiries are investigations that the Commission may decide to carry out into sectors of the economy, when a sector does not seem to be working as well as it should. The Commission uses the information obtained in the inquiry to better understand the market from the point of view of competition policy. The report does not establish whether the EC competition rules have been infringed. Should there be grounds for doing so, the Commission may assess whether it needs to open specific investigations aimed at certain undertakings to establish whether the competition rules have been infringed.

The preliminary report emphasises that patents are key in the pharmaceutical sector. Originator companies produce and sell pharmaceutical products (originators) developed during a lengthy and costly research and development process, involving substantial commercial risks. These originators are protected by patent rights, which give the originator company the opportunity to recoup investment costs and gain benefits rewarding it for its innovative efforts. Originator companies compete with other originator companies as well as with generic companies. Generic companies produce and sell an equivalent version of the originator medicine once patent protection of the originator has expired. The Commission indicated that competition between generic and originator companies may begin before patent expiry if the generic company finds a way of entering the market without infringing the patent protecting the originator product, or if the patent relied upon by the originator company is not valid, in particular if it is annulled prior to the formal patent expiry date. The prices of generic medicines are substantially lower than those of originator medicine. The entry of a competing generic product on the market inevitably results in a significant decline in the price and market share of the corresponding originator product. The preliminary report states that therefore, originator companies seek to protect their market position using various means ranging from strategic patenting around the product to patent litigation and interventions before national regulatory authorities when generic companies ask for regulatory approvals.

Considering the findings in the report, it is not impossible that the Commission will open investigations concerning certain originator companies in the pharmaceutical sectors. Originator companies should therefore be prepared for further investigations aimed at determining whether Articles 81 and/or 82 of the EC Treaty have been infringed. Considering this, originator companies should already seek judicial assistance.

Over € 1.3 billion fine for cartel conduct by car glass manufacturers

In November 2008 the European Commission imposed its highest fine ever for cartel conduct. Four manufacturers of car glass, Asahi, Pilkington, Saint-Gobain and Soliver, were fined for over € 1.3 billion for infringements of the EC competition rules. According to the Commission these companies were engaged in market sharing and exchange of commercially sensitive information between 1998 and 2003.

In this case also the biggest fine in history on a individual company was imposed. Saint-Gobain was penalisied for € 896 million. The Commission increased the fine for Saint-Gobain by 60% because this company was a repeat offender having already been fined for cartel conduct in two previous cases. This is not the first case in which the Commission increased fines imposed on repeat offenders. The Commission already stated it will keep increasing fines for repeat offences. As mentioned in an earlier edition of this Competition Law Newsletter, it is therefore recommended for companies to set up compliance programmes to prevent cartel conduct to occur repeatedly.

One of the companies fined applied for leniency and its fine was reduced by 50% because it fully co-operated with the Commission and provided additional information to help exposure the cartel. For co-operating fully with the Commission a company can also be rewarded with fine immunity. In order to be granted fine immunity or a fine reduction the company has to fulfill certain conditions laid down in the Leniency guidelines and apply for leniency before any other company does so.

Consumer welfare at heart of European Commission's fight against abuses by dominant undertakings

The European Commission has published guidance on its enforcement priorities in applying EC Treaty rules on abuse of a dominant market position (Article 82) to abusive exclusionary conduct by dominant undertakings. Such conduct aims to exclude actual competitors from expanding or would-be competitors from entering a market, thereby potentially depriving customers of more choice, more innovative goods or services and/or lower prices. The guidance sets out the Commission's determination to prioritise those cases where the exclusionary conduct of a dominant undertaking is liable to have harmful effects on consumers.

The main principles of the effects-based approach to Article 82 of the EC Treaty are that fair and undistorted competition is the best way to make markets work better for the benefit of EU business and consumers. Healthy competition, including by dominant undertakings, should be encouraged. The focus of the Commission's enforcement policy is therefore on protecting consumers, on protecting the process of competition and not on protecting individual competitors. The Commission does not need to establish that the dominant undertaking's conduct actually harmed competition, only that there is convincing evidence that harm is likely. Since the focus of the Commmission's enforcement policy is on conduct that harms the competitive process rather than individual competitors, for pricing conduct the Commission examines whether the conduct is likely to prevent competitors that are as efficient as the dominant undertaking from expanding on or entering the market and that can be expected to be most relevant to consumer welfare. The Commission will in the future examine claims put forward by dominant undertakings pleading that their conduct is justified on efficiency grounds – as is already the case under Article 81 of the EC Treaty and for merger control.

European Commission consults on review of rules for assessing horizontal co-operation agreements

In order to prepare the regime to be applied after the expiry of the current rules on horizontal co-operation on 31 December 2010 the European Commission has launched a public consultation on the functioning of the current regime for the assessment of horizontal co-operation agreements under EU antitrust rules. The Commission focuses particularly on the Specialisation and Research & Development Block Exemption Regulations and the Horizontal Guidelines. The purpose of the review is to evaluate how these rules have worked in practice.

We will inform you of any developments, thus enabling you to adapt your co-operation agreements in time.

Nysingh European competition and public procurement law team

Nysingh 3 partner and 7 associates dedicated European competition and public procurement law team has many years of experience in competition law – in European competition law and, since the Dutch Competition Act took effect in 1998, in Dutch competition law as well. We advise companies and national and international trade associations in many sectors of the economy, such as the agro, chemical, cleaning, bicycle, fishing, care, transport, insurance, building and installation industries on competition law and regulatory matters. We advise on the application of competition law to a wide range of trade practices and agreements. In recent years we defended companies and trade associations in over 25 investigations by the Netherlands Competition Authority and the European Commission and defended clients before both national and EU Courts. The competition law team has got high rankings by Chambers during the last 4 years.

Colophon

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