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ROUND UP OF KEY DEVELOPMENTS: October–December 2009

Jacques Derenne*

Cartels and horizontal agreements

Binding commitments of standard making organisation

On 14 October 2009, the European Commission adopted a decision making commitments offered by IACS binding for a period of 5 years pursuant to Article 9 of Regulation 1/2003. The European Commission's decision brought proceedings against IACS to an end without concluding whether there had been or still was an infringement of the antitrust rules. The European Commission had started the investigation with unannounced inspections at the premises of the association and of some classification societies on 29–30 January 2008. The European Commission market tested the commitments for one month from 10 June 2009 and subsequently adopted them, making them binding on IACS.

IACS offered commitments to address the preliminary concerns expressed by the European Commission that it may have infringed Article 81 EC and Article 53 of the EEA Agreement. In particular, the European Commission expressed concerns regarding the criteria and procedures governing membership of IACS and the suspension or withdrawal of membership, and the way that those criteria and procedures had been applied. It also raised concerns relating to the elaboration and accessibility to non-IACS classification societies of IACS' resolutions and technical background information relating to those resolutions.

According to the European Commission's decision, IACS disagreed with the European Commission's concerns but nevertheless agreed to establish new qualitative membership criteria and guidance for their transparent application and the institution of an independent appeal board. In addition, IACS will allow non-member classification societies to participate in its technical work and will continue to ensure that all current and future IACS' resolutions and technical background documents are put into the public domain.

Key issues

- This article provides an overview of key developments which have taken place between October and December 2009 in the areas of Article 81 and 82 EC and the EU Merger Regulation. Amongst key recent developments, readers should note that on 7 October the Court of Justice issued the final judgment in the GlaxoSmithKline dual pricing case. On 5 October, the European Commission published a draft proposal for a replacement of the insurance block exemption. Decisions have been adopted by the European Commission regarding State aid provided to deal with the financial and economic crisis, and these decisions will be analysed shortly in a survey.

In a speech on 15 October 2009, Competition Commissioner Neelie Kroes commented: 'There is an important element of IACS' work we did not intervene in, however. We have acknowledged the special technical competence of IACS and their right to set high minimum standards. This is important; openness must not be a synonym for low standards ... as long as a classification society can meet the objective technical competence conditions for admission to IACS, it will now have the possibility to co-decide future de facto industry standards. This is good for the industry in my view, and shows that an open process for standard-setting is widely applicable as best practice.'

Fines imposed in heat stabilisers sector

On 11 November 2009, the European Commission announced that it has imposed fines on 10 undertakings for their participation in cartels in the tin stabilisers and epoxidised soybean oil/esters markets. These two products are types of heat stabiliser and are used

* Lovells LLP, email: jacques.derenne@lovells.com. With many thanks to Peter Citron, Heather Craig, Guido Dolara, Martin Farley, and Kat Wilson for their contributions to this article.

in the manufacture of PVC-based products such as packaging, bottles and flooring.

The European Commission launched its investigation in this case following an immunity application by the US company Chemtura. On 12 February 2003, inspections were carried out by the Commission in France, Netherlands, Italy, Germany, Belgium, and the United Kingdom. The antitrust authorities in Canada, Japan, and the USA also conducted inspections on this date.

The European Commission ultimately found that two cartels had been operated in the EEA. The cartel in relation to tin stabilisers was held to have been implemented between 1987 and 2000, and the ESBO/esters cartel found to have been operated between 1991 and 2000. Both cartels involved price-fixing, sharing customers, allocating markets, and exchanging sensitive information.

The European Commission imposed fines with an aggregate value of €173 million on Akzo, Baerlocher, Chemson, Ciba, Elementis, Elf Aquitaine (the parent company of Arkema France at the time of the infringement), GEA, Faci, Reagens, and AC Treuhand. Chemtura was granted full immunity from fines as it had disclosed the existence of the cartels. Those fines imposed on Elf Aquitaine (Arkema France), Baerlocher, and Ciba were reduced for cooperating with the investigation. However, the level of Arkema France's basic fine was increased by 90 per cent for recidivism.

A fine of €348,000 was imposed on AC Treuhand, a Swiss consultancy firm not involved in the manufacture of heat stabilisers. The Commission found that AC Treuhand had organised the operational framework of the cartels and monitored implementation. For example, AC Treuhand was held to have provided its Zurich offices for meetings between the cartel members, and it was at these meetings that the principal decisions for the two cartels were made. This is the first time that the Commission has fined to a significant degree a company found to have been involved in a cartel in this manner. AC Treuhand has announced that it will appeal the decision.

European Commission fines power transformers cartel

On 7 October 2009, the European Commission adopted a decision imposing fines totalling €67.6 million on seven companies for their participation in an oral market sharing agreement relating to the supply of power transformers.

The European Commission found that between 1999 and 2003 European and Japanese producers of power transformers agreed via a 'Gentlemen's Agreement' that European manufacturers would refrain from selling power transformers in Japan and Japanese manufacturers would refrain from selling power transformers in Europe.

Power transformers are major electrical components that reduce or increase the voltage in an electrical circuit. They are used by electricity suppliers in their electricity grids for the transmission and distribution of electric power to the customer. The European Commission estimated the parties' combined annual sales in the EEA to be around €100 million at the time of the infringement.

The decision of the European Commission covers all power transformers whether supplied alone or as part of a turnkey project. It excludes, however, those power transformers sold as part of gas-insulated switchgear substations, which were already subject to a decision of the European Commission in January 2007 (Case COMP/F/38.899—Gas Insulated Switchgear).

Fines were imposed on ABB, Areva T&D, ALSTOM, Fuji Electrics, Hitachi, and Toshiba. Siemens was the first to reveal the existence of the cartel in question to the European Commission and therefore received complete immunity from fines. Fuji was also granted a reduction of 40 per cent under the Leniency Notice. Leniency applications by ABB, Areva T&D, and Hitachi were rejected for not having provided significant added value compared to the information already in the European Commission's possession. The fines, however, on Hitachi and Areva T&D were each reduced by 18 per cent for cooperation outside the scope of the leniency notice. The fine imposed on ABB was increased by 50 per cent for recidivism.

CFI rejects application for suspension of payment of fine

By an order dated 29 October 2009 (Case T-352/09R), the Court of First Instance (CFI, now the General Court) rejected an application by Novácke chemické závody a.s. ('NCHZ') for suspension of the enforcement of payment of the fine imposed on it for participating in a cartel in the calcium carbide and magnesium sectors.

The fine imposed by the Commission in its decision of 22 July 2009 on NCHZ, a Slovakian producer of calcium carbide, and its former parent company was €19,600,000. Eight other undertakings active in the relevant markets were also fined for their participation in the cartel. On 14 September 2009, NCHZ filed two applications; the first was for a partial annulment of the decision and the second for interim measures for suspension of the decision, until a ruling in the main proceedings, to the extent it obliges NCHZ to pay the fine.

In its application for interim measures, NCHZ had claimed that the enforcement of the payment of the fine imposed on it should be suspended until a ruling in the main proceedings. The CFI noted that the Commission had, in its letter of 24 July 2009 notifying the decision to NCHZ, stated that payment of the fine would not be enforced while an appeal is pending, as long as a bank guarantee was provided by NCHZ. The purpose of this application for interim measures, therefore, was to obtain an exemption from the obligation to provide a bank guarantee as a condition for non-enforcement by the Commission of its right to payment of the fine.

The CFI ultimately rejected NCHZ's application for interim measures on the basis that it lacked urgency.

NCHZ alleged that if payment of the fine was not suspended within the 30 days following the date payment fell due, it would be obliged to institute liquidation proceedings before the Slovakian courts. Under these insolvency proceedings, the company's assets would be sold off and its business ultimately closed down. As such proceedings are 'irretrievable from an economic point of view', this would amount to serious and irreparable harm.

As stated in Case T-173/09 R Z v Commission, the harm alleged must be ongoing until a final decision is made by the judge hearing the application. The court noted, however, that two days after NCHZ made its application for interim measures, it filed a petition to start insolvency proceedings in Slovakia. The Slovakian court declared NCHZ insolvent on 2 October 2009. The CFI held that this rendered the grant of the application for interim measures unnecessary, as the alleged harm had already occurred and could not be avoided by ruling in the applicant's favour. The CFI did not address whether this harm constituted 'serious and irreparable' harm.

At the hearing NCHZ contended that the grant of the interim measures was still necessary, despite the commencement of insolvency proceedings, in order to prevent the loss of an opportunity to rescue the company. The applicant claimed that the administrator appointed in the insolvency proceedings would take the suspension of the enforcement of payment of the fine into consideration in making decisions about the company. In particular, suspension might increase the likelihood of the business being rescued.

The CFI observed, however, that under Slovakian law rescue proceedings must be commenced before the company is declared insolvent by the court. As no rescue proceedings had been started before the applicant was declared insolvent on 7 October 2009, any opportunity to rescue the company had already been lost. Furthermore NCHZ had stated in its application that the possibility of instituting rescue proceedings was 'theoretical', and getting the required approval of all its creditors for such proceedings was 'almost impossible'. The CFI found that harm resulting from the loss of an opportunity to rescue NCHZ was therefore hypothetical and, in light of existing case law, insufficient to justify the granting of interim measures.

The applicant was also held not to have satisfied the necessary criteria for an exemption from the requirement to provide a bank guarantee as a condition for the non-enforcement of payment. Such a dispensation is only granted in exceptional circumstances, these being that it is objectively impossible to provide such a guarantee, or that the undertaking cannot provide a bank guarantee without imperilling its existence. In assessing these criteria, the group of undertakings to which the applicant belongs and the resources available to the group as a whole must be taken into consideration.

NCHZ stated that it would be impossible for it to provide a bank guarantee and that its parent company, Disor Holdings, could neither invest in the company to the extent necessary for the applicant to have funds available to pay the fine nor provide a bank guarantee.

The court found that the applicant had not provided any letters from banks refusing to provide it with a guarantee, or evidence as to the financial situation of the group, in order to support these assertions. As a result it was unable to assess, in the context of the group to which NCHZ belonged, the seriousness of harm alleged.

In addition, the fact that the parent company had allowed insolvency proceedings to commence, rather than providing financial support, did not mean that the financial situation of the group could be discounted. According to established case law, a simple unilateral refusal of assistance by the parent company is not enough to prevent their situation being taken into account; it has to be prevented, for example by law, from assisting.

Vertical agreements

Final judgment in GlaxoSmithKline dual pricing case

On 6 October 2009, the Court of Justice of the European Communities (ECJ, now the Court of Justice of the European Union) handed down its judgment on the long-running appeal arising from the European Commission's 2001 decision that prohibited GlaxoSmithKline's dual pricing scheme in Spain (Joined Cases C-501/06P, C-513/06P, and C-519/06P).

The ECJ upheld the finding of the CFI (now the General Court) that the Commission had failed adequately to consider evidence presented by GSK in its request for exemption under Article 81(3) EC (now Article 101 (3) TFEU). However, it ruled, contrary to the CFI's judgment, that the Commission had been entitled to conclude that GSK's conditions of sale had the *object* of restricting competition without having to prove any detriment to consumers. Accordingly, the ECJ dismissed all of the appeals brought before it. The Commission must now reconsider whether GSK's general sales conditions in Spain may be exempted under Article 81(3) EC.

The ECJ has reaffirmed previous case law which established that, in principle, agreements aimed at prohibiting or limiting parallel trade have as their *object* the restriction of competition and, furthermore, has explicitly stated that this principle 'applies to the pharmaceutical sector'.

In so doing, the ECJ has, as a matter of law, provided welcome clarification as to the approach required when considering the 'object or effect' test under Article 81(1) (now Article 101 (1) TFEU), which had been thrown into some confusion by the position taken by the CFI. This judgment indicates that the CFI committed an error of law in reaching the conclusion that a restriction of parallel trade would only be considered to restrict competition by *object* if there was also evidence of consumer detriment. The ECJ stated resoundingly that 'neither the wording of Article 81(1) EC nor the case law lend support to such a position', finding:

- that Article 81(1) EC contains nothing that suggests only agreements that are detrimental to consumers should be considered to have an anti-competitive object; and
- that Article 81 EC aims at protecting the structure of the market and competition itself, as well as the interests of competitors and consumers.

Despite the CFI's error of law on this point, the ECJ considered that the rest of the CFI's judgment was well founded and that it need not be set aside in its entirety.

The Commission raised a number of grounds of appeal seeking the ECJ to overturn the CFI's finding that the Commission had failed adequately to consider the evidence put forward by GSK to support its application for an exemption under Article 81(3) EC. The main focus of these grounds was on the CFI's powers of review.

The ECJ dismissed each of these grounds of appeal in its judgment, asserting, inter alia, that:

- an undertaking attempting to rely on Article 81(3) EC must demonstrate that the conditions for obtaining an exemption are satisfied;
- although the burden of proof falls on the undertaking requesting the exemption, the Commission's examination of the objective benefits of an agreement must be undertaken in the light of the factual arguments and evidence provided by the undertaking in connection with the request for exemption;
- such an examination may require the nature and specific features of the sector concerned to be taken into account if they are decisive for the outcome of the analysis; and
- taking those matters into account does not mean that the burden of proof is reversed.

The ECJ concluded that the CFI had correctly held that the Commission had failed properly to consider the factual arguments and relevant evidence put forward by GSK, including the specific structural features of the pharmaceutical sector. The ECJ found that the CFI had been correct to hold that such an omission vitiated the examination of GSK's request for exemption under Article 81(3) EC.

Abuse of dominant position

Ombudsman finds procedural breaches by Commission in handling of Intel case

On 18 November 2009, the European Ombudsman published a decision in which it has found that the European Commission committed procedural errors, amounting to maladministration, in its handling of the investigation into an alleged breach of Article 82 EC (now Article 102 TFEU) by Intel. Intel claimed that the Commission failed to take minutes of a meeting with representatives of Dell, which related to the subject matter of the investigation. Intel claimed that the Commission did not make a record of potentially exculpatory evidence and that this harmed its rights of defence. The Ombudsman found that this constituted maladministration. However, he did not make any finding as to whether the Commission had infringed Intel's rights of defence.

The Ombudsman did not find any maladministration in respect of Intel's second allegation that the Commission encouraged Dell to enter into an information exchange agreement with the micro-chip producer AMD.

Intel has brought an appeal against the Commission's Article 82 decision, and one of the grounds of alleged procedural breach relates to the Commission's failure to take a minute of the meeting.

Mergers

Summary published of decision to fine Electrabel for gun-jumping

On 19 November 2009, a summary was published in the Official Journal (OJ 2009 C279/9) of the European Commission's decision to fine Electrabel for acquiring control of Compagnie Nationale du Rhone (CNR) before the acquisition was notified to and approved by the Commission, in breach of Article 7(1) of the old EC Merger Regulation (Regulation 4064/89) (COMP/M.4994). A full copy of the decision is now available on the European Commission's website. The Commission imposed a fine of €20 million on Electrabel under Article 14(2)(b) of Regulation (EEC) No 4064/89. According to Competition Commissioner Neelie Kroes, this fine 'sends a clear signal that the Commission will not tolerate breaches of this fundamental rule of the EU merger control system'.

The Commission concluded that Electrabel's acquisition of 47.92 per cent of the voting rights in CNR gave rise to an acquisition of de facto sole control. This conclusion was based on the level of attendance at CNR's shareholder meetings in previous years and the fact that CNR's remaining shares were widely dispersed. In addition, as a result of a shareholder voting agreement concluded with CDC (CNR's second largest shareholder), Electrabel was certain to gain control of CNR's board of directors, the corporate body that makes decisions by simple majority on strategic matters (such as the annual budget and CNR's business plan), and, as CNR's only shareholder from the industry, Electrabel took over the operational management of CNR's power stations and the marketing of the electricity they generate.

In setting the fine, the Commission took into account:

- the seriousness of the infringement ('the provision that was breached by Electrabel is one of the cornerstones of the EU merger control system');
- the fact that Electrabel is a major company with vast resources and significant previous experience of EU merger control and the target was a major company;
- the duration of the infringement (43 months and 17 days); and
- as mitigating circumstances, the fact that the concentration did not have an anti-competitive effect, and that Electrabel contacted the Commission of its own accord and then cooperated throughout the procedure.

General matters

Opinion on access to written pleadings

On 1 October 2009, Advocate General Maduro delivered an opinion in three joined cases (Joined Cases C-514/07 P, C-528/07 P, and C-532/07 P), each of which raised the issue of the extent to which the principles of transparency of judicial proceedings and publicity of trial require members of the public to be allowed access to written submissions filed with the European Courts by the parties to a case.

The cases related to a dispute between the Association de la presse internationale (API) and the European Commission (the Commission) regarding access to certain written submissions lodged by the Commission in proceedings before the CFI and the Court of Justice.

API requested by letter dated 1 August 2003 that the Commission give it access to a series of submissions, pursuant to Article 6 of Regulation No 1049/2001. The Commission refused on the basis that some of the documents related to cases that were still pending, and, therefore, their disclosure would adversely affect the Commission's position as the defending party. For the same reason, the Commission also denied access to submissions in a fourth case, which, although closed, was closely connected to an open case.

In his Opinion, AG Maduro considered that the situation differed depending on whether the case in respect of which the request was made related to a case that was still pending before the European Courts or whether the case had been closed.

In respect of pending cases, AG Maduro opined that requests from members of the public for access to written pleadings should be directed to the European Courts themselves. Such pleadings are elements in the judicial process and the Court of Justice is the body best placed to assess impartially whether access will disturb the integrity of the judicial process or undermine other legitimate interests. In pending cases, therefore, it is necessary to adopt a case-by-case approach.

By contrast, in closed cases a party should be allowed to make public its submissions, or those of another party, on its own initiative. After judgment has been delivered, it is no longer necessary that the submissions remain within the exclusive realm of the

Court. However, it should always be possible for the Court to impose on the parties an obligation of confidentiality if it considers that it is fair and just to do so.

It should be noted that an Advocate General's Opinion is not binding on the Court of Justice. It will, however, be persuasive.

What is to come?

European Commission consults on Insurance Block Exemption

On 5 October 2009, the European Commission published a draft proposal for a replacement for the insurance block exemption regulation (IBER) (Regulation 358/2003/EC) which is due to expire on 31 March 2010. The deadline for submission of comments was 30 November 2009.

The European Commission started its review of the IBER in November 2007 by consulting national competition authorities and in April 2008 it launched an initial public consultation. In March 2009, the European Commission adopted a report on the functioning of the IBER and it subsequently held a public hearing in June.

The European Commission has decided that the insurance industry still merits a specific exemption from the competition rules, although it proposes to reduce the scope of this exemption. In the draft replacement regulation, which confirms the position of the European Commission as expressed until now, the IBER will cover only:

- agreements related to joint compilations, tables, and studies of statistical data; and
- agreements setting up co-insurance and co-reinsurance pools.

This means that the proposed new regulation would no longer cover:

- agreements relating to the development and distribution of standard policy conditions for direct insurance and standard profit models for life insurance; and
- agreements on technical specifications, rules and codes of practice concerning security devices.

The European Commission has decided that these agreements should no longer be covered by the IBER as it considers that they are not specific to the insurance industry and therefore the application of a sector-specific competition regulation is not justified. The Commission is considering covering standard policy conditions and security devices in the general standardisation chapter of its Horizontal Guidelines which are currently being revised. The fact that these agreements are no longer exempted by the IBER does not mean that they would necessarily infringe Article 101(1) TFEU. It merely means that insurance companies in the future would have to self-assess whether Article 101(3) TFEU would be applicable.

With respect to joint compilations, joint competitions, studies and statistical data, the European Commission considers that this type of agreement has a pro-competitive effect and should be block-exempted. In the proposed draft, the European Commission proposes that access to this information should be made available to interested third parties, such as consumer organisations, large customers, or academics as well as new entrants to the industry (as currently permitted by the IBER). An exemption is being proposed on public security grounds only.

With respect to pools, the proposed regulation recognises explicitly that some pools do not involve a restriction of competition under Article 101(1) TFEU and therefore do not need to rely on the block exemption. The core exemption for pools stays the same in the proposed replacement regulation but the definition of 'new risks' will be expanded to cover risks which have changed so materially that it is not possible to know in advance what capacity is necessary to cover such a risk.

The European Commission also proposed to change the way that market shares are calculated to take into account the activities of pool participants outside the pool. This has been opposed by the industry, but was retained as it will bring the treatment of market shares of insurance pools in line with its treatment of similar arrangements in other industries.

The draft regulation also varies slightly the requirements for participants to be able to leave the pool which must now be on a 'reasonable period of notice'. It is also now clear that the block exemption of pools does not cover ad hoc co-insurance or co-reinsurance on the subscription market.

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