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European Court of Justice rules non-compete clauses between companies in different sectors can be "by object" restriction

Introduction

On 26 October 2023, the European Court of Justice (CJ) handed down its judgment in response to a request for a preliminary ruling from the Lisbon Court of Appeal regarding the characterisation of a non-compete clause between companies operating in different sectors (also known as a cross-market non-compete clause). The CJ found that such a cross-market non-compete clause may constitute a restriction of competition by object.

Background

In 2012, Portuguese energy supplier EDP Energias entered into an association agreement with a retail food distributor Modelo Continente (part of the Sonae group of companies). Under the agreement, customers received a reduction in electricity prices in the form of vouchers redeemable in supermarkets, hypermarkets and retail outlets operated by other companies affiliated with the Sonae group.

The association agreement also contained a non-compete clause under which neither party could enter the other's market during the agreement and for one year following termination.

In 2017, the Portuguese Competition Authority found this agreement to be a restriction of competition by object in contravention of the Portuguese equivalent of Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits agreements which have as their object or effect the restriction, prevention or distortion of competition and trade between EU Member States. The decision was upheld at first instance (although the fine reduced by 10%), and on appeal the Lisbon Court of Appeal referred a number of questions to the CJ.

Request for preliminary ruling

The key points on which the CJ was asked for clarity were: (i) the relevant criteria for determining whether two undertakings active on separate product markets are potential competitors; and (ii) the distinction between a restriction of competition "by object" and a restriction "by effect", and specifically whether Article 101(1) must be interpreted as

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meaning that a non-compete clause such as that in issue constitutes a restriction by object.[1]

Potential competition

In essence the referring court asked whether and under what conditions an undertaking managing a network of consumer product retailers may be regarded as a potential competitor, on the electricity market, of an electricity supplier with which it has concluded an association agreement containing a non-compete clause.

The CJ noted that settled case law has found that, in order to determine whether an undertaking not present in a market is nevertheless a potential competitor on that market, it must be demonstrated that there are "*real and concrete possibilities*" for that undertaking to enter the market and compete with the undertakings established in that market.

Noting that a demonstration of potential competition must be substantiated by a body of consistent facts, taking into account the structure of the market and the economic and legal context within which it operates, the CJ went on to consider the types of evidence that may demonstrate potential competition. In particular, it considered that the conclusion of an agreement containing a non-compete "*is a strong indication that there is potential competition*", since *"[i]f the parties to a non-compete agreement did not perceive themselves as potential competitors, they would, in principle, have no reason to conclude such an agreement*". It also considered that earlier economic activities - by the party not currently present on the relevant market - on that market or upstream or related markets may constitute evidence of a potential viable economic strategy to enter the market concerned.

Restriction by object

As for whether a non-compete clause such as that in issue constitutes a restriction of competition by object, the CJ recalled the established case law on collusive practices which are capable of constituting "by object" restrictions, noting that such practices include market-sharing agreements and market-exclusion agreements.

Moreover, it reiterated that the mere existence of pro-competitive effects is not enough to rule out such classification – amongst other things, such pro-competitive effects must give rise to reasonable doubt as to whether the agreement caused a sufficient degree of harm to justify characterisation as a restriction by object. In this respect, the CJ noted that the national court must decide whether the pro-competitive effects in question were specific to the clause rather than merely connected with the agreement.

Conclusion

Whilst it is for the national judges to analyse the impact of this ruling on the case at hand, this latest judgment from the CJ further clarifies when restrictions can be regarded as anti-competitive by object. In summary, cross-market non-competes between non-competitors in agreements which give rise to consumer benefits are not immune from classification as an object restriction.

OTHER DEVELOPMENTS

ANTITRUST

European Commission sanctions pharma companies in €13.4 million cartel settlement

On 19 October 2023, the European Commission issued a decision imposing fines totalling €13.4 million on five pharmaceutical companies as part of a cartel settlement agreement. The press release indicates that this is the

[1] The CJ was also asked for clarity on the concepts of "agency agreements" and "vertical agreements", and on when a restriction on competition can be regarded as ancillary to a broader agreement which is not anti-competitive. The CJ considered that the agreement in this case could not be characterised as an agency agreement or a vertical agreement because the companies bear their own costs under the agreement and furthermore do not operate within the same production or distribution chain. The CJ also considered that the non-compete clause could not be "ancillary" to the broader association agreement, unless it was objectively necessary to implement the association agreement and proportionate to its objective.

Commission's first cartel infringement decision in the pharmaceutical sector and in relation to an active pharmaceutical ingredient.

The companies that are the subject of this decision are Alkaloids of Australia, Alkaloids Corporation, C2 PHARMA, Boehringer, Linnea and Transo-Pharm. However, C2 PHARMA was not fined as it received full immunity from fines for revealing the cartel to the Commission under the leniency program. Transo-Pharm and Linnea received a reduction of their fines of 50% and 30%, respectively, for their cooperation with the Commission's investigation. In addition, all six companies, which were either producers or distributors of the pharmaceutical ingredient, admitted their participation in the cartel and received a reduction of 10% of the fines imposed under the Commission's settlement policy.

The product concerned was N-Butylbromide Scopolamine/ Hyoscine (SNBB), which is an active ingredient in the abdominal antispasmodic drug Buscopan and its generic versions. The Commission found that the six companies co-ordinated and agreed to fix the minimum sales price of SNBB to customers and to allocate quotas as well as exchanging commercially sensitive information. The Commission determined that there was a single and continuous infringement in the European Economic Area which took place between 1 November 2005 and 17 September 2019.

The Commission has also opened proceedings against a seventh company, Alchem, in this investigation. However, Alchem decided not to settle and the investigation into this company is continuing under the standard cartel procedure.

GENERAL COMPETITION

CMA updates prioritisation principles following consultation

On 30 October 2023, following a consultation over the summer, the UK Competition and Markets Authority (CMA) published its updated prioritisation principles, which outline the factors the CMA will consider before deciding whether to take action in areas subject to its remit and where it has the discretion to act.

The updated prioritisation principles reflect changes to the context in which the CMA operates since the 2014 publication of its prioritisation principles. This includes, for example, the UK's exit from the EU. The update also includes reflecting the CMA's wider strategic aims, as outlined in its 2023/2024 Annual Plan. Other updates include the streamlining and simplification of the text, so it is shorter and easier to read.

The updated prioritisation principles consist of five key factors:

- **Strategic significance**: does CMA action in this area fit with the CMA's objectives and strategy? The CMA will look to align its work with its strategy outlined in its Annual Plan. It will also take into account the Government's Strategic Steer.
- **Impact**: how substantial is the likely positive impact of CMA action? The CMA will take into account both the direct benefit arising as a result of CMA intervention, and indirect effects arising from changes to the behaviour of those other than the direct subjects of the CMA's intervention.
- **Is the CMA best placed to act**: is there an appropriate alternative to CMA action? In deciding whether the CMA is best placed to carry out the work, it will consider whether there are alternative ways of achieving the desired result.
- **Resources**: does the CMA have the right capacity in place to act effectively? This includes a consideration of the resources required over the life of a proposed project, and whether the resource requirements are proportionate to the expected benefits from doing the work.
- **Risk**: what types of risks are associated with CMA action, and how significant are they? The CMA will assess risk against a number of themes such as litigation, financial / value for money, operational, legal compliance, reputation and strategy.

The CMA further explains that it will generally prioritise according to the strategic significance and impact of the work. It balances this against the risks and resources involved, and whether the CMA is best placed to act. It does

not intend to apply the principles in a mechanical way; rather, judgment and a reasoned balancing exercise are required for each case.

China's local competition regulator issues guidelines on the assessment of competition compliance of online platforms

Against the backdrop of increased global scrutiny of online platforms, the Shanghai Municipal Administration for Market Regulation (Shanghai AMR) issued a set of guidelines for the assessment of competition compliance by online platforms (Guidelines), as a follow on to its Guidelines for Competition Compliance of Undertakings, which came into effect in March 2021 and apply to business undertakings more generally.

At the outset, it is interesting to note that the Guidelines emphasise the use of "*soft*" regulatory tools and self-reporting, which signals that while the Shanghai AMR continues to consider antitrust compliance by online platforms a priority, it is leaning towards a more outcome-driven approach of regulation that encourages voluntary self-reporting, as compared to the more prescriptive approach that European and other regulators are adopting in the tech space.

The Shanghai AMR's publication notice highlights that platform enterprises bear the primary responsibility of developing compliance management systems that suit their individual characteristics, by making use of their advantages in scale, data and technology. The Guidelines encourage online platforms to carry out self-assessment of their compliance management systems and provide detailed guidance on how online platforms can do this. In particular, the Guidelines set out the detailed criteria for online platforms to grade themselves on the implementation of various aspects of the competition compliance management systems, from grade C (a serious lack of compliance management) to grade AAA (the golden standard of compliance management).

The follow-up action that the Shanghai AMR may take depends on the grade that the online platform itself has classified for its compliance management system (which will be verified by the Shanghai AMR):

- For online platforms that are grade A and above, they will be encouraged to develop innovative ways of compliance assessment and to "*accelerate the enhancement of global competitiveness*". The Shanghai AMR will continue to guide these online platforms' compliance by a mixture of "*soft*" tools such as holding meetings with them, asking them to offer compliance commitments, and providing administrative guidance, and will prioritise offering guidance and support to these online platforms in respect of compliance training and overseas antitrust investigations or lawsuits.
- For online platforms that are grade B and below, the Shanghai AMR may work with the relevant industry department to investigate the specific issues and propose improvements. There will be a strong enforcement focus on infringement by companies that are subject to a large volume of complaints.

Given the voluntary nature of this self-assessment mechanism at this stage, it will be interesting to see whether online platforms will choose to take up such exercise, especially as it requires the platforms to grade themselves and anything below grade A could attract further scrutiny from the Shanghai AMR. That said, the Guidelines shed light on the Chinese antitrust regulators' willingness to experiment with a more collaborative, supportive approach to regulating online platforms, with a view to normalising regulatory supervision to help platform enterprises address compliance risks, while "*continuously strengthening international cooperation and enhancing a new competitive advantage*".

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