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Parallel imports

Parallel Imports: An overview of EU and national case law

BLOCK EXEMPTION (REGULATION), EXCLUSIVE DISTRIBUTION, PRICES, RESALE PRICE MAINTENANCE, SELECTIVE DISTRIBUTION, VERTICAL RESTRICTIONS, PARALLEL IMPORTS, SANCTIONS / FINES / PENALTIES, FOREWORD

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Introduction

Since the last special edition of e-Competitions on restrictions of parallel trade, there have been a number of national competition authority cases that have helped clarify and confirm this area of antitrust law. Often these have been in familiar sectors where parallel trade has been in the spotlight historically, such as pharmaceuticals and household products. We highlight some of the most interesting ones below.

And in a world where offline and online channels overlap and the treatment of online sales has particular implications for the assessment of trade restrictions, perhaps of most significance overall has been the European Commission's decision in *Guess* [1] and the new Vertical Block Exemption Regulation ("VBER") [2], which came into force on 1 June this year.

Trademark exhaustion has also regularly come up in the context of parallel trade restrictions and we highlight a number of recent cases in this foreword. Brexit, of course, has brought trade between the UK and European Union into sharp focus, also with respect to trademark exhaustion. Here the future remains somewhat uncertain, as we discuss below.

Online Sales and Trade Restrictions – the *Guess* decision and the new VBER

The Commission's decision in *Guess* helped clarify how suppliers should approach distribution offline and online. The Commission imposed a fine of EUR 39.9 million on Guess for restricting authorised retailers from advertising online and cross-selling to other retailers. Guess designs, distributes and licenses clothing and accessories under numerous trademarks and markets its products within the EU *via* a selective distribution network. In June 2017, the EC opened an investigation into a series of restrictions that Guess imposed on these distributors. It found that these agreements led to a partition of the European markets with higher retail prices in central and eastern Europe than in western Europe. According to the Commission, the clauses used by Guess from 1 January 2014 to 31 October 2017 prevented its retailers from (i) the possibility to use the trademark for online search advertisement (AdWords) in order to draw the clients to the Guess website instead of the retailers'

ones, (ii) selling online without Guess' prior discretionary approval and (iii) selling cross-border to consumers but also other wholesalers and retailers in other Member States. Any failure to meet these obligations amounted to a contractual breach and led to the termination of the agreement. According to the Commission, these clauses were limiting intra-brand competition and then "by object" infringements of Article 101 TFEU. Doing so, the Commission made clear that no further inquiry into their effects was necessary and that no economic efficiencies were admissible. Finally, as passive sales limitations they were considered as hardcore restrictions and thus did not benefit from the VBER in force at the time.

The new VBER is consistent with this approach, whilst introducing some flexibility for suppliers seeking to develop a selective distribution system. The previous VBER treated criteria for offline and online which were not "overall equivalent" as a hardcore restriction, so as to prevent restrictive online criteria being used as a way to frustrate online distribution and parallel imports. The new VBER allows more flexibility. Criteria for offline and online sales need not be "equivalent" provided that the criteria do not seek to "prevent the buyers or their customers from effectively using the internet".

NCA decision highlights from the last few years

We begin with a case in Spain. [3] In 2017, two years after initiating an investigation of a dual-pricing system used by Pfizer introducing pricing differentials based on the ultimate geographic destination of the pharmaceuticals, the Spanish Competition Authority ("SCA") decided to close its antitrust investigation. The turnaround followed a partial annulment of the 2015 decision by the Court of Appeal. Under its dual pricing model, Pfizer set a free price for pharmaceuticals sold to distributors and would subsequently adjust the price, to meet the Spanish regulated price cap, if a distributor proved that an order had been sold in Spain. On the merits of the case, the 2017 SCA decision considers that an essential element for the dual pricing system to be illegal – the voluntary establishment of two different prices depending on the destination of the pharmaceuticals in order to restrict their parallel trade – was not present. The logic behind Pfizer's dual pricing was to address a regulated cap price applicable to publicly financed products being sold in Spain. According to the SCA, Pfizer must be allowed to fix its own price freely, consistently with the general principle of freedom of enterprise. In addition, when pricing is exceptionally not free regarding certain products, then Pfizer must be able to adapt its prices to the regulatory obligations.

In a recent (2020) decision, the Hellenic Competition Commission ("HCC") investigated an agreement between Gambro – a manufacturer of artificial kidney machines and of spare parts – and Medical Products, a distributor and maintenance company for these specific products. [4] As a result of the agreement, Gambro's competitor Serko was obliged to purchase necessary spare parts from Medical Products, its main competitor in tenders for repair and maintenance of Gambro artificial kidney equipment in public hospitals. The HCC concluded that clauses prohibiting parallel imports, identified in numerous Gambro contracts with distributors, exacerbated the anti-competitive effects arising from the obligation to purchase spare parts from Medical Products. Interestingly, the HCC's analysis highlighted that if those contractual terms were considered independently they would not be anti-competitive *per se*. However, the same terms evaluated in relation to and in combination with the explicit prohibition of parallel imports meant that they acquired an anti-competitive nature, establishing a systematic ban of parallel imports for more than 10 years in the Greek territory. The main consequence was an isolation of the Greek market regarding in particular the repair and maintenance of Gambro artificial kidney machines.

Turning to a case we looked at in our last foreword, [5] last year the Danish Maritime and Commercial High Court upheld the Danish Competition Authority's 2013 finding of an anti-competitive agreement and abuse of dominance between Deutz AG ('Deutz'), a German internal combustion engine manufacturer, and its national distributor in the railway sector, Deutz / Diesel Motor Nordic. [6]

The case centered around a consortium handling the renovation of engines for the Danish State Railways. A member of the consortium, Fleco ApS (Fleco), was restricted from buying spare parts to be used in the renovation of the train engines.

Deutz attempted to block the delivery of the spare parts to Fleco by refusal to supply, as well as an agreement between Deutz and Danish distributor Diesel Motor Nordic A/S ("DMN") to block alternative access and passive sales to Fleco. As a result of the restriction, Fleco was only able buy the spare parts at a significantly higher rate directly from DMN, the Danish distributor of Deutz.

Of note, throughout the investigation of the case the Danish Competition and Consumer Authority collaborated closely with the competition authorities from Germany, Sweden and the Netherlands and was assisted by these colleagues, for example, when carrying out local dawn raids.

Turning to a case in Cyprus, the Cyprus Commission for the Protection of Competition ("CPC") imposed a EUR 3.3 million fine on Henkel AG & Co. KGaA ('Henkel'), jointly and severally with GPM-Henkel Ltd ('GPM-Henkel'), for infringement of section 6(1)(b) of the Cypriot law and the corresponding Article 102 (b) TFEU. [7] The investigation followed a complaint by a trading company active in the parallel import of Henkel products in Cyprus, alleging that Henkel prevented retailers from buying parallel import products.

The CPC concluded that GPM-Henkel held a dominant position in the relevant wholesale market for heavy-duty detergents in Cyprus and obstructed the sale of parallel imports. GPM-Henkel had sent letters of notice to importers/wholesalers demanding that they stop importing Henkel products. Similar letters of notice were also sent to certain retail stores that sold Henkel products sourced via parallel imports, demanding that they terminate the sale of these products. In addition, through its Directors and Sales personnel, in individual meetings with the owners or employees of retail stores, GPM-Henkel urged them to terminate the sale of these products. In one case GPM-Henkel stopped supplying a retail store temporarily. It also threatened to terminate cooperation with the retail stores if they continued to sell products from parallel imports, or that the terms of their cooperation would change, or that it would stop giving discounts and other favourable terms. GPM-Henkel also proposed to a retail store better/more favourable terms of cooperation and discounts, in case of exclusive cooperation, and when this specific retail store continued its cooperation with the parallel imports supplier, GPM-Henkel appears to have changed the terms of its cooperation and stopped some discounts, credit and merchandising services. GPM-Henkel also complained to the Ministry of Energy, Commerce, Industry and Tourism about the importation of the products, claiming that they constituted inferior products compared to those sold by GPM-Henkel and that consumers were misled. Evidence was also found which indicated that Henkel was aware of the actions of GPM-Henkel in the Cyprus market.

The CPC concluded that GPM-Henkel did not establish any objective justification for its conduct, since there were no efficiencies which outweighed any anti-competitive effects on consumers.

In another case considering the liability of a parent, in 2015, the Hellenic Competition commission ('HCC') published its decision against members of the Colgate-Palmolive group of companies pursuant to an *ex officio* investigation in the detergents/cleaners for home use and cosmetics markets, which was initiated in 2005 after

consumers complained of the price differences between detergents/cleaners in Greece and other EU countries. [8]

The US parent company Colgate-Palmolive Co was found liable as it reviewed the clauses signed between its Greek subsidiaries and Greek supermarkets from 1991 to 2008. For the majority of the HCC members, there was sufficient evidence of the US-based parent company's involvement in the conception, planning, observance and realisation of the illegal conduct by its Greek subsidiaries. Therefore the HCC imposed a total fine of approximately EUR 8.7 million on the Colgate-Palmolive group.

Turning to a pharmaceuticals case in Greece, in 2018 the HCC found that GlaxoSmithKline SA and GlaxoSmithKline plc (together, 'GSK') abused their dominant position in the market for migraine medicines in Greece from 2000 to 2004, infringing Articles 2 of the Competition Act and 82 of the European Treaty. [9] GSK aimed to reduce parallel exports by initially refusing to meet all orders of the medicinal product Imigran in their entirety, and subsequently by refusing to meet 'ordinary' orders from wholesalers, and substantially reducing the quantities supplied to them. The 'ordinary' character of wholesalers' orders was estimated according to criteria previously set out in the Court of Justice's judgement in joined cases *C-468/06 to C-478/06, Sot. Lelos Kai Sia EE and Others v. GlaxoSmithKline AEVE*, in particular by reference to the annual size of orders and supplies per wholesaler, the national consumption per year, and the pattern of previous business relations between the pharmaceutical companies and wholesalers during the years prior to the infringement.

The HCC imposed fines totalling just over EUR 1.1 million for the above infringement, as well as for the infringement of Article 82 of the European Treaty found by the Athens Administrative Court of Appeals in connection with the supply policy of the medicinal product Lamictal for periods in 2000, 2001 and 2002. In light of the Court of Justice's judgment in *Lelos*, the HCC further clarified that orders by certain wholesalers of the medicinal product Imigran in quantities which were out of all proportion to those previously sold by the same wholesalers to meet the needs of the Greek market were 'extraordinary' in character. Refusing to meet orders of significant quantities of medicinal product Imigran essentially destined for parallel export and reducing the quantities supplied to wholesalers/ exporters, were not therefore instances of abusive behaviour.

Trademark exhaustion cases

In 2017, in a helpful elucidation of the law concerning trademark exhaustion, the European Court of Justice ("ECJ") held that the owner of a trademark may not oppose the parallel importation of goods bearing an identical trademark but originating in another Member State in circumstances where the owner has assigned the parallel trademark to a third party but is responsible for maintaining the image and impression of a unified global trademark.

The ECJ ruled that Schweppes Spain may not oppose the import from the UK of tonic water bottles under the trademark "Schweppes". Whilst Schweppes Spain was the owner of the trademark "Schweppes" in Spain, the trademark had been sold to the Coca-Cola Group in many other EU countries including the UK. [10] Following a preliminary ruling, the ECJ recalled that the function of the trademark is to guarantee the identity of the origin of the product to the consumer by enabling them, without any possibility of confusion, to distinguish that product from goods having a different origin. However, the proprietor of this trademark in one country may not rely on the necessity of protecting that function to oppose the import of identical goods bearing the same trademark coming from another Member State where that mark is owned by a third party. The ECJ added that this statement is also applicable "even in the event that the proprietor has not promoted the image of a single global trademark".

Another case regarding the exercise of trademarks followed in May 2019, when the Czech Supreme Court partially granted an extraordinary appeal lodged by Mountfield, a Czech retailer of homeware and garden tools, in a dispute with Fiskars, a producer of various homeware and garden tools under trademarks. [11] Fiskars had alleged a violation of its rights to trademarks, and unfair competition by Mountfield.

The Supreme Court considered the Czech High Court to have erred in its conclusion that an exercise of rights to trademarks to prevent parallel imports can never be an abuse of a dominant position. The High Court was wrong to reject Mountfield's defense to that effect without a proper assessment. Under extraordinary circumstances, invoking IP rights (incl. trademarks) can be considered an abuse of a dominant position. Partially cancelling the High Court's judgment, the Supreme Court ordered the High Court to undertake an analysis of whether Fiskars enjoyed a dominant position, and whether an abuse had occurred or not.

In reaching its assessment, the Supreme Court did not consider it necessary to ask the Court of Justice of the European Union ('CJEU') for a preliminary ruling. The Supreme Court noted that numerous case-law of the EU courts confirms that invoking IP rights (including trademarks) can be abusive under extraordinary circumstances. It referred for example to the CJEU's judgments in *Case 24/67 Parke, Davis & Co. v. Probol*, *Case C-102/77 Hoffmann-La Roche v. Centrafarm*, or *Case C-241/91 P and C-242/91 P Radio Telefis Eireann and Independent Television Publications v. Commission*. It also referred to the General Court's judgment in *Case T-198/98 Micro Leader Business v Commission*.

The new landscape post Brexit

As these cases on trademark exhaustion show, questions around IP and trademark exhaustion still surface from time to time before the Courts and regulators. Brexit has brought the subject of IP exhaustion into sharp relief as the situation with respect to parallel trade between the UK and EU following Brexit remains uncertain for now.

Before Brexit, the UK fell under the EU scheme for trade mark exhaustion, under which goods put on the market anywhere in the EEA with the IP owner's consent can be imported into any other EEA country without further consent, 'exhausting' the IP rights in those goods. There is no exhaustion for goods placed on the market outside the EEA by the trademark owner or with their consent.

Since Brexit, the UK is operating a unilateral version of the EU scheme, under which IP rights in goods in the EEA market are considered exhausted by the UK, and may be parallel imported into the UK. This is true both for trademarks originally registered as UK rights and for trademarks extracted from an EU trademark following Brexit. The EU has declined to operate equivalency in the other direction, meaning that IP rights in goods put on the market in the UK are not considered exhausted in the EEA, and cannot therefore be parallel imported into the EEA without the consent of the owner of the relevant IP rights.

Following a recent UK consultation [12] on the future of the UK's IP exhaustion regime the UK government concluded that there was not enough data available on the economic impact of exhaustion to dictate any new policy direction for now.

It will be interesting to see how the UK Courts clarify and develop the law. The EU scheme forms retained EU case law [13] in the UK under the EU (Withdrawal) Act 2018. The UK Supreme Court may depart from retained EU case law where it 'appears right to do so'. [14] At the same time, section 2 of The Intellectual Property

(Exhaustion of Rights) (EU Exit) Regulations 2019 maintains recognition of an exhaustion defence where one would have applied in the UK under the EU regime prior to Brexit.

For now, putting (genuine) goods on the market in the UK or the EU/EEA will continue to exhaust the trademark owner's rights in the UK. Putting (genuine) goods on the market outside the UK, EU or EEA does *not* exhaust the trademark owner's rights in the UK. But in the future, the Supreme Court or the Court of Appeal in the UK could decide to take a different approach.

One possibility therefore is that, at some point, UK Courts consider that it would be right to harmonise the approach taken for goods irrespective of where (outside of the UK) they were first placed on the market. An international exhaustion regime would be consistent with the established approach in the US and some others, such as Singapore and Canada. It would also be consistent with the UK approach to exhaustion before joining the EEC in 1973.

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

[1] Commission Decision AT.40428 [2018]. See, e.g. **European Commission**, *The EU Commission fines a clothing brand and retailer €40M for anticompetitive agreements to block cross-border sales (Guess)*, 17 December 2018, e-Competitions December 2018, Art. N° 88742, **Jacques Buhart**, **Mai Muto**, **Philip Bentley**, *The EU Commission fines a clothing company for restricting retailers from online advertising and selling cross-border to consumers in other Member States (Guess)*, 17 December 2018, e-Competitions December 2018, Art. N° 89396, and **Yves Botteman**, *The EU Commission fines a clothing company for restrictions relating to the online sales activities of its authorized distributors (Guess)*, 17 December 2018, e-Competitions January 2019, Art. N° 89277.

[2] See **European Commission**, *The EU Commission adopts new Vertical Block Exemption Regulation (VBER) and Vertical Guidelines*, 10 May 2022, e-Competitions May 2022, Art. N° 106584 and **Jan Philipp Sparenberg**, **Florian von Schreitter**, **Philipp Heuser**, *The EU Commission sets out new rules on dual distribution agreements, parity clauses and resale price maintenance in its revised Vertical Block Exemption Regulation and guidelines on vertical restraints*, 10 May 2022, e-Competitions May 2022, Art. N° 106967.

[3] See **Pedro Callol**, *The Spanish Competition Authority clears a dual pricing system (Pfizer / Cofares)*, 19 January 2017, e-Competitions January 2017, Art. N° 83837.

[4] See **Hellenic Competition Authority**, *The Hellenic Competition Authority finds two companies guilty of an anticompetitive vertical agreement for prohibiting parallel imports in the market for artificial kidney machines (Gambro Lundia / Medical Products)*, 8 October 2020, e-Competitions October 2020, Art. N° 97809.

[5] See **Ingrid Vandenborre, Nick Wolfe**, *Parallel imports: An overview of EU and national case law*, 4 June 2015, *e-Competitions Parallel imports*, Art. N° 73444.

[6] See **Danish Competition Authority**, *The Danish Maritime and Commercial High Court confirms the Competition Authority's decision stating that a Swedish engine manufacturer abused its dominant position (Deutz / Diesel Motor Nordic)*, 18 January 2021, *e-Competitions January 2021*, Art. N° 98878, **Morten Nissen, Frederik Haugsted**, *The Danish Maritime and Commercial High Court upholds the Competition Authority's decision finding an abuse of dominance and an anti-competitive agreement between a German internal combustion engine manufacturer and its national distributor in the railway sector (Deutz / Diesel Motor Nordic)*, 18 January 2021, *e-Competitions January 2021*, Art. N° 99743, and **Dilja Helgadottir**, *The Danish Maritime and Commercial High Court confirms a decision of the Competition Authority finding that a German internal combustion engine manufacturer had both abused its dominant position and entered into an anti-competitive agreement with its Danish dealer (Deutz / Diesel Motor Nordic)*, 18 January 2021, *e-Competitions January 2021*, Art. N° 99274.

[7] See **Cypriot Competition Authority**, *The Cypriot Competition Authority fines detergent seller €3.3M for abuse of dominance and obstruction of parallel imports of its products by competitors (K.A.C. Constantinides Trading / GPM-Henkel)*, 4 October 2019, *e-Competitions May 2020*, Art. N° 95079 and **Anastasios A. Antoniou, Dimitris Siallis**, *The Cypriot Competition Authority fines a chemical and consumer goods company €3,302,000 after finding that its exclusionary practices amounted to abuse of a dominance through portfolio effects in the wholesale market for heavy-duty detergents (K.A.C. Constantinides Trading / GPM-Henkel)*, 4 October 2019, *e-Competitions October 2019*, Art. N° 102824.

[8] See **Anastasia Dritsa, Violeta Panagiotopoulou**, *The Hellenic Competition Authority fines a company for abusing its dominant position and extends parent liability for competition law violations in the detergents, cleaners and cosmetics sector (Colgate / Palmolive)*, 24 April 2015, *e-Competitions July 2017*, Art. N° 99477.

[9] See **Hellenic Competition Authority**, *The Hellenic Competition Authority fines a pharmaceutical company for abuse of dominance in the market of migraine medicines (GlaxoSmithKline)*, 11 July 2018, *e-Competitions July 2018*, Art. N° 87385.

[10] **Peter L'Écluse**, *The EU Court of Justice clarifies exhaustion of trademark principles and broadens the interpretation of economic links between trademark owners (Schweppes / Red Paralela)*, 20 December 2017, *e-Competitions December 2017*, Art. N° 85788 and **Pedro Callol**, *The EU Court of Justice recalls the function of trademark and clarifies the criteria of exhaustion of trademark principle (Schweppes / Red Paralela)*, 20 December 2017, *e-Competitions December 2017*, Art. N° 96419.

[11] See **Jiri Kindl**, *The Czech Supreme Court confirms that invoking trademark rights to prevent parallel imports can be an abuse of dominant position (Fiskars / Mountfield)*, 29 May 2019, *e-Competitions May 2019*, Art. N° 92881.

[12] See <https://www.gov.uk/government/consultations/uks-future-exhaustion-of-intellectual-property-rights-regime/the-uks-future-regime-for-the-exhaustion-of-ip-rights#:~:text=If%20the%20UK%20were%20to,without%20the%20rights%20holder's%20permission>.

[13] See the EU's regional exhaustion regime was confirmed by the CJEU in *Centrafarm BV & Anr v Sterling Drug Inc* (Case 15/74) and *Centrafarm BV & Anr v Withrop BV* (Case 16/74), 31 October 1974 and incorporated into EU and UK trademark legislation.

[14] See *Austin v Southwark London Borough Council* [2010] UKSC 28.