Seminar 2015 Competition Law

Read relevant parts of your book, plus
C-468/06 - Sot. Lélos kai Sia
C-501/06 P - GlaxoSmithKline Services
C-128/11 – UsedSoft
Joined Cases 56 and 58/64 - Consten and Grundig

Q 1

The European Commission has informed the Spanish pharmaceutical company Rundbeck of its objections regarding agreements concluded with four wholesalers concerning several different pharmaceuticals, “the General Sales Conditions”. The General Sales Conditions apply to 82 medicines intended for sale to wholesalers established in Spain with whom Rundbeck has commercial relations in Spain outside any distribution network. Those wholesalers may intend to resell the medicines to Spanish hospitals or to Spanish pharmacies, which dispense them to patients on presentation of a medical prescription. They may also intend to resell them in other Member States, through parallel trade, in which they engage on account of price differentials. The 82 medicines to which the General Sales Conditions apply include eight medicines which, according to Rundbeck, are prime candidates for parallel trade, principally between Spain and the United Kingdom.

For all 82 medicines concerned, Clause 4 of the General Sales Conditions provides for two different prices, ‘the Clause 4 A price’ and ‘the Clause 4 B price’. Clause 4 is worded as follows:

‘(A) Pursuant to the provisions of subsections 1 (first paragraph) and 2 of Article 100 of [Law 25/1990], the price of pharmaceutical products of Rundbeck and its subsidiary companies shall, in no event, exceed the maximum industrial price, established by the Spanish health authorities when the two factors which allow for the application of the said legal rules are present, namely:

– that the aforementioned pharmaceutical products are financed by the funds of the Spanish Social Security or by Spanish public funds,

– that the acquired pharmaceutical products are subsequently marketed at a national level i.e. through pharmacies or Spanish hospitals.

(B) In the absence of one of these two factors (i.e. in all cases where Spanish law gives full freedom to the laboratories to set the prices of their pharmaceutical products themselves), Rundbeck and its subsidiaries will fix the price of their pharmaceutical products according to real, objective and non-discriminatory economic criteria and completely irrespective of the destination of the product determined by the purchasing warehouse. In particular, Rundbeck and its subsidiary companies will apply to their pharmaceutical products the price which, on the basis of their internal economic surveys, had been initially proposed to the Spanish health authorities and objectively updated taking account of the increase in the cost of living in accordance with the provisions of subsections 1 (first paragraph) and 2 of Article 100 of [Law 25/1990] and other prior Spanish legislation concerning setting of prices of medicines.’

Please elaborate in your answers.
Clause 4 B will in practice apply to the eight medicines which, according to Rundbeck, are prime candidates for parallel trade.

A. Please analyze whether Clause 4 above violates Article 101(1) TFEU;
B. May Article 101(3) TFEU be applicable? If so, in what circumstances, please analyze each step in Article 101(3) TFEU;
C. When may Article 102 TFEU be utilized?
   a. What is the relevant market?
   b. What if Rundbeck is the only seller of certain medicines in Spain and in EU?
   c. Is there an exemption similar to Article 101(3) TFEU applicable under Article 102 TFEU? If so, please conduct an analysis whether such an exemption is applicable.
D. What is Rundbeck would only distribute medicine that falls under Clause 4 A; i.e. would refuse selling medicines that do not fulfill the requirements under Clause 4 A. May such refusal be a violation of EU competition law?

Q 2

Florensia SARL (‘Florensia’) is a Italian manufacturer of whiteboards. It supplies these to teaching institutions in Germany, Italy and France. For commercial reasons, mainly due to logistics and costs, Florensia has elected not to supply their whiteboards to potential clients in other Member States.

However, in the beginning of 2012, Florensia was approached by ByggMax, a Nordic wholesaler / retailer of building material. ByggMax would like to become Florensia’s exclusive distributor of whiteboards in the Nordic countries. In return for the exclusivity, ByggMax agree to invest in marketing activities concerning the whiteboards which would include TV-ads, billboards etc, in the Nordic countries. Moreover, ByggMax agrees not to marketed any other brands of whiteboards.

ByggMax would also, to the extent it is possible, like to be able to restrict Florensia’s and other distributors within Florensia’s distribution system to market whiteboards on the Internet that caters, or might cater, to the Nordic market. Foremost, ByggMax is concerned about internet-sales made by Florensia’s subsidiaries and/or distributors in Rumanian and China, respectively. Finally, ByggMax would like to rebrand the whiteboards under ByggMax own trade mark “ByggBIG”. Thus, Florensia’s all whiteboards should be fitted with both Florensias trade mark and ByggMax’s trade mark.

On a second note, regarding Florensia’s top segment whiteboards that include small processors and in fact are large “IPads”, connected to the internet and the Cloud, ByggMax would like to be able to prevent that purchasers of these very expensive boards to obtain software upgrades from firms like www.usedsoft.com. Instead, these customers should be contractually and technically encouraged to purchase such upgrades from ByggMax.

You are the in-house competition lawyer at Florensia:

A. what can you agree to concerning the above suggested requirements from ByggMax?
B. What can you not agree to, and
C. What may you perhaps agree to, but with what requirements and limitations?

Please elaborate in your answers.