Kluwer Competition Law Blog

Alrosa, negotiated procedures and the procedural economy/due process conundrum – one step forward, three steps back?

Damien Gerard (College of Europe, Belgium) · Tuesday, July 6th, 2010

Friends of the blogosphere: greetings!

There was something refreshing in the judgment rendered in 2007 by the General Court (GC) in the Alrosa case (T-170/06). If somewhat excessive in the formulation of some of its grounds, the GC had displayed a clear willingness to control the exercise of the Commission's discretion in Article 9 (commitments) proceedings and to fill in the legal black hole of the (third?) parties' due process rights. In doing so, it had endeavoured to go beyond legal formalism and brought its reasoning to a level of transparency not often encountered.

The contrast with the position adopted recently on appeal by the ECJ (C-441/07 P) is striking: the judgment of the GC is set aside, rather squarely, and Alrosa's action is dismissed…in four paragraphs. Predictably, the Commission rejoiced at the outcome of this "very important decision" which, in its view, "confirms that the Commission's handling of the case was appropriate and fully respected the rights of defence of third parties" (see MEMO/10/285)…

Here is obviously not the place for a detailed analysis of the judgment of the ECJ, even though the latter is remarkably short in view of the importance of the questions addressed. I will limit myself to three considerations that are, in my view, at the heart of the case. In a nutshell, my overall feeling is that: (i) the ECJ lost sight of Alrosa's peculiar situation as the immediate contractual counterpart of De Beers and, as a corollary, the fact that De Beers' commitment were immediately binding on Alrosa; and (ii) missed the main due process claim and thus the opportunity to bring much needed clarifications to the sequencing of Art. 9 proceedings. Hence, it also missed the inherent link between the substantive (i.e., proportionality) and procedural (i.e., due process) aspects of the case. Moreover, the case could have a wide impact on the scope of the GC's judicial review of the Commission's findings in antitrust cases across the board.

First, on the assessment of the proportionality of commitments, the ECJ holds that the Commission's task is limited to considering whether the "undertakings concerned […] have not offered less onerous commitments that also address [the] concerns

[identified in its preliminary assessment] adequately" (¶¶39-40). Likewise, "undertakings which offer commitments on the basis of Article 9 of Regulation 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination". Thus, the premise is that submitting commitment is a voluntary process and that undertakings are bound by the scope of the commitments they put forward. Va bene. But then the ECJ itself acknowledges that, in the case a quo, the parties were informed after the market test "of the nature of the commitments which the Commission expected the parties to give following the negative result of the consultation with third parties, namely cessation of all relations with effect from 2009 and a new offer of commitments on that basis" (¶86). Voluntary, uh? Take a minute to consider: (i) the alternative (i.e., formal proceedings, multi-million euros fine, etc.), which is…well, not particularly attractive; and (ii) the scope of the commitments "expected" by the Commission in this case: no more dealings (nada!) for an unlimited period of time. Moreover, equally important is the fact that Alrosa did not submit the commitments that were de facto made binding on it, i.e., the voluntary character of those appears irrelevant as far as Alrosa is concerned. The ECJ could not have ignored those issues. Could have it been blinded by the alleged "principled importance" of the case, as argued by the Commission?

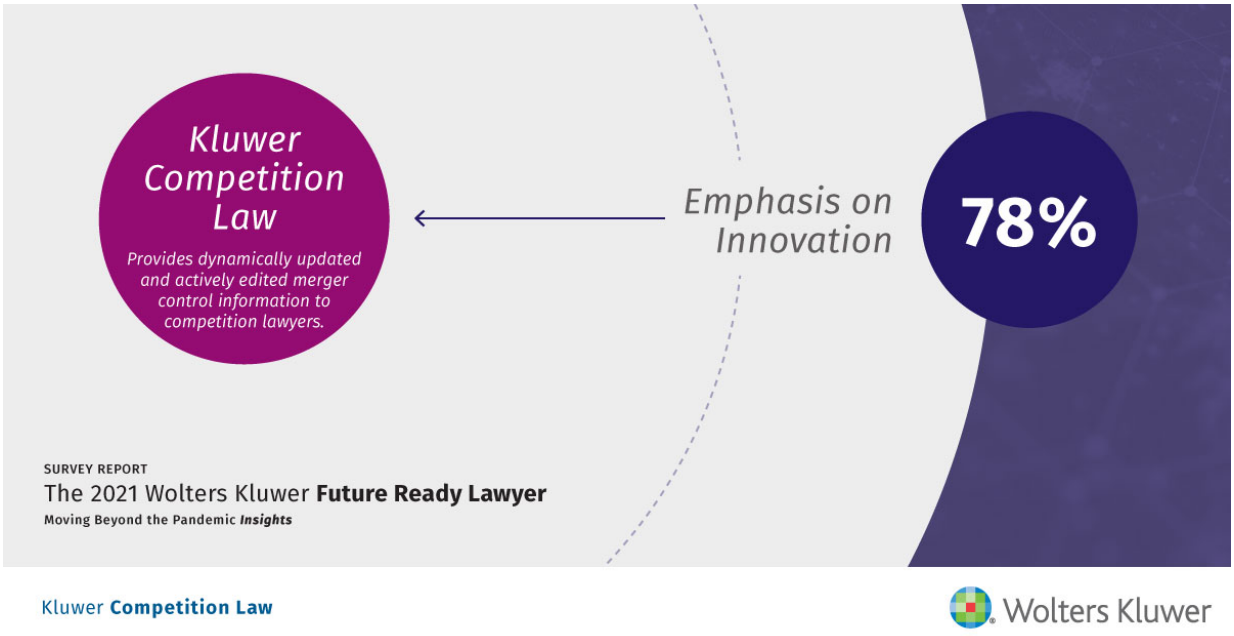
Second, the ECJ states, in passing, that "when carrying out [the assessment of the proportionality of commitments], the Commission must, however, take into consideration the interests of third parties" (¶41). Va bene. But, in practice, it would have meant, in all fairness, associating Alrosa to the settlement of the case or at least hearing its views properly both on the outcome of the market test and on De Beers' proposal. However, while being fully aware of Alrosa's peculiar position vis-à-vis De Beers, the ECJ denies Alrosa the status of "party concerned" to the case (or any equivalent – ¶90) and dismisses any attempt by the Commission to instrumentalize the opening of parallel 101 and 102 proceedings against the alleged anticompetitive effects of the Alrosa-De Beers agreement (i.e., by settling the case with De Beers on the basis of 102 and considering Alrosa a party to the 101 case but a mere third party in the 102 case and thus not entitled to be associated with the settlement). Here, not only did the ECJ test the outer boundaries of legal formalism but, in my view, it also missed the main due process stake of the case, namely that parties which submit commitments ought to be entitled to have full access in due time to the observations of third parties and to be heard on the outcome of the market test before the case moves forward in any direction. Instead, the ECJ prefers to confirm that the Commission is not bound to issue "a reasoned explanation of why the observations of the third parties had changed its position on the appropriateness of the joint commitments" (¶92); that may be the case, but this was not really the (main) point. Let's just hope that the Commission did draw internally the proper and necessary conclusions from the Alrosa case, in terms of due process and sequencing of Art. 9 proceedings.

Third, the ECJ finds that, in paragraphs 129 to 136 of its judgment at first instance, "the General Court put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment" (¶67). For the ECJ, "[T]hat error of the

General Court in itself justifies setting aside the judgment under appeal" (¶68). Really? Read again paragraphs 129 to 136 of the GC judgment (T-170/06): true, the GC discusses openly the scope and possible effects of the joint commitments proposed originally by De Beers and Alrosa. But did the GC "make it up", as the ECJ seems to imply? This is a view hard to concur with. In effect, those paragraphs seem simply to give credit to Alrosa's side of the story. And overall, it supported the GC overall conclusion that "less onerous alternative solutions for the undertakings than the total prohibition of transactions and that the Commission could not refuse to take them into consideration on the basis of the alleged difficulty in determining them" (¶154). More importantly, one may wonder about the impact of the ECJ's finding on the scope of the GC's judicial review of the Commission's reasoning in antitrust cases, generally? To what extent can the GC still question openly the reasoning of the Commission? Doesn't the control of the conclusions reached by the Commission, even under a manifest error standard, require consideration for counter-factuals, all the more so when they are suggested by the plaintiff? So far for the transparency of the judicial review process (see to that extent the four paragraphs relied on by ECJ to dismiss Alrosa's action – ¶¶118-121) even though, in the EU, it is supposed to condition the overall legitimacy of the exercise of the Commission's powers. Is this another story? Not sure.

In closing, let's leave the final word to the ECJ: "the Commission has a wide discretion to make a proposed commitment binding or to reject it" (¶94). Alrosa constitutes clearly a triumph for the Commission, but one that raises more questions than it solves, I am afraid.

Disclosure: When in private practice, I was once a junior member of the team advising Alrosa. Feels like ages ago. Yet, I remember clearly how it was one of those few cases which gave me the real sense of being a lawyer.



This entry was posted on Tuesday, July 6th, 2010 at 4:47 am and is filed under Source: OECD">Antitrust, European Union
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.