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The Dutch Beer Cases: The Value of Whistleblower Statements and the Cutback of Fines in Case of Unreasonably Long Commission Investigations

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The General Court has rendered a series of judgments in the Dutch Beer Cartel case that involve a number of legal issues, including in Grolsch v. Commission on September 15, 2011 and Heineken v. Commission and Bavaria v. Commission on June 16, 2011.

The Commission had found in its 2007 decision that InBev (which received full leniency), Heineken, Grolsch and Bavaria had participated in a cartel from 1996 to 1999, by coordinating prices. The Commission also held that the beer companies occasionally coordinated other commercial conditions such as loans given to retailers.

In Grolsh, the main issue was the liability imputed by the Commission to Koninklijke Grolsch NV for the Grolsch Group. Heineken and Bavaria in turn appealed against the Commission's decision on several grounds, including the Commission's alleged violation of the principles of good administration and due process, lack of evidence and the length of the procedure. Essentially, the General Court decided to lower the fines imposed on Heineken and Bavaria for two reasons: (i) the Court found that the Commission had not provided sufficient evidence with respect to the occasional coordination of commercial conditions relating to the loans; and (ii) the Court held that the administrative procedure was unreasonably long and the fixed reduction of EUR 100,000, as granted by the Commission, was not sufficient to repair such shortcoming.

Parent Liability

In Grolsh, the Court held that Koninklijke Grolsch NV, the addressee of the Commission's decision for the Grolsch Group, had not directly participated in the alleged cartel, and that the Commission had not sufficiently set out the reasons why it attributed the conduct of its subsidiary, Grolsche Bierbrouwerij Nederland BV, to Koninklijke Grolsch NV. The Court therefore declared the decision of the Commission void in so far as it concerned Koninklijke Grolsch NV's participation in the cartel.

Statements of Whistleblowers and Corroborating Evidence

First, as regards the lack of evidence with respect to the commercial conditions for

the loans offered to Heineken's and Bavaria's retailers, the Commission relied on (i) statements of InBev; and (ii) handwritten notes of the alleged meetings. The Court stated that the Commission may, in principle, rely on statements of participants to the cartel to prove infringements of Article 101 TFEU, since otherwise providing evidence would become unreasonably difficult. However, the Court confirmed past case law that there is a need for corroborating evidence in case the correctness of these statements is being challenged by the other allegedly infringing parties.

The court left open whether there is a threshold for challenging such statements. Is it sufficient that the alleged cartel participants simply contest the statements of the whistleblower or is there a need for, at least, a plausible counter-argument? In the case at hand, Heineken and Bavaria argued, as opposed to Inbev, that the beer brewers had only discussed topics they were legally allowed to discuss. Furthermore, they held that the statements of Inbev were vague, contradictory and often by hearsay.

As corroborating evidence, the Commission relied on some handwritten notes, which indicated that there had been contacts about prices, discounts, and loans. However, the Court concluded that these notes did not prove co-ordination with respect to the commercial conditions for loans. The Court held that the references to such commercial conditions in the notes were only sporadic and brief, that there was an alternative explanation for the notes, namely the doubtful solvency of some debtors, and that there was no other specific evidence. The Court, as a result, partly annulled the decision, and therefore reduced the fine imposed on Heineken and Bavaria.

Length of the Procedure

Second, the Court considered that the length of the procedure of around 85 months was mainly due to the Commission's inactivity. However, the Court found, in line with past case-law, that such an unreasonably long procedure may only lead to voiding the decision if the length of the procedure has negatively influenced the outcome of the procedure. This was not the case here: the appellants had been able to produce exculpatory evidence, and the appellants had not precisely enough explained the specific difficulties that they had encountered when collecting such evidence. Nevertheless, the Court accepted the plea of Heineken and Bavaria that the flat-rate reduction of EUR 100,000 granted by the Commission did not sufficiently compensate for the delay given the large size of the fine. The Court therefore held that the reduction should be increased to 5% of the fine.

The Court's reasoning is to be welcomed, in particular when taking into account the large discretion the Commission enjoys in setting fines and the crucial influence of the Commission on the length of cartel investigations. The Court ultimately decided to lower the final fine imposed on Heineken from over EUR 219 million to almost EUR 198 million. Bavaria's fine was reduced from almost EUR 23 million to EUR 20.7 million. Both companies stated in press releases that they considered appealing the judgment of the General Court.

The three judgements in the Dutch beer cartel case seem to confirm the Court's increased willingness to review closely Commission cartel fines as noted in a previous post by Eric de la Serre.

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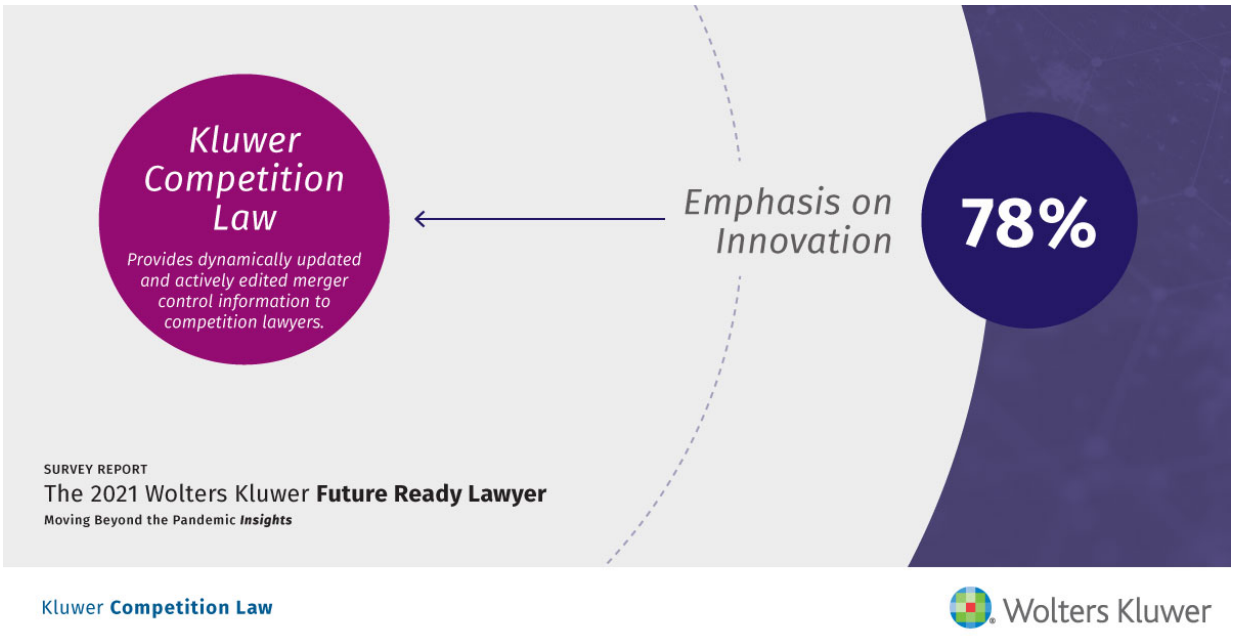

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