Kluwer Competition Law Blog

The battle of the 'object' box – Appeals Tribunal hands down important precedent pushing back Danish NCA

Sam MacMahon Baldwin (Szecskay Attorneys-at-Law, Hungary) · Monday, October 1st, 2018

The question of what constitutes a restriction of competition 'by object' has forever been intensely discussed and heavily litigated across the EU. As AG Kokott stated in her opinion in *T-Mobile*, the existence of an 'object' box is justified by the benefit of legal certainty and, not least, the need for conserving resources of competition authorities. She went on to say that allowing enforcers to condemn certain practices regardless of their effects is no different than criminalising drunk driving regardless of whether any road users are actually hurt or endangered as a result.

Case law shows, however, that the appeal of placing practices in the object box – and thus not having to bother with effects – may sometimes entice competition authorities to overreach and push the boundaries of what kind of practices they can reasonably declare as restrictions by object.

The Danish roof felt case is one of these cases. On 12 September 2018, the Danish Competition Appeals Tribunal (the **"Tribunal"**) annulled and remitted the Danish Competition Council's (the **"DCC"**) decision against roofing felt companies Icopal and Nordic Waterproofing. The Tribunal held that the DCC's limited analysis of the legal & economic context of the industry standards for roof felt – and the way in which the standards were set – fell short of what CJEU case law requires. No 'by object' infringement had therefore been demonstrated, the Tribunal said.

The decision is very important and a useful tool in the private practitioner's tool box. This is because the Tribunal makes it clear in which cases a competition authority can get away with a less intensive analysis of legal & economic context when considering whether there is a by object restriction. And importantly in which cases it cannot.

The roof felt industry standards and the contested decision

In the 1980's, a set of voluntary, technical quality-standards were developed by a council (the **"Council"**) established by a trade association in the Danish roof felt industry. The standards were drawn up to promote product credibility and regain the

market's trust in using roof felt following a number of construction scandals in the 1970's. The technical quality-standards became known as the TOR-standards. In 2014, a labelling initiative was introduced by an entity under the Council that would grant any and all companies the right to use the label of "TOR-Approved" on products complying with the TOR-standards.

In its decision in May 2017, the DCC found that Icopal and Nordic Waterproofing (along with the trade association and the Council it had established) had infringed Article 101 TFEU and the equivalent Danish provision. Relying on various email correspondence, the DCC considered that the TOR-standards and the TOR-Approved labelling-scheme formed part of a broader concerted practice serving to foreclose competitors to Icopal and Nordic Waterproofing from the Danish market.

Putting the cart before the horse

The DCC's assessment on whether there was a restriction of competition by object was structured – as you would expect under EU case law – under the separate headings of i) the content of the practice ii) its objectives, and iii) the legal & economic context.

However, as the DCC came to the third part on analyzing the legal & economic context, it stated the following in the contested decision:

"As demonstrated above [under the sections of i) content and ii) objectives], the broader restrictive agreement between [the parties] is a restriction of competition by object in violation of Section 6(1) of the Competition Act and Article 101 TFEU. In cases where an agreement is a by object infringement, only a cursory review is required with respect to the legal & economic context, which follows e.g. from the CJEU's judgment in the Siemens case." (underlining added)

On appeal, the Tribunal agreed with Icopal and Nordic Waterproofing that the DCC was hereby putting the cart before the horse. As a general rule, analysing legal & economic contest is a *pre-requisite for* finding a by object restriction – and a less intensive, cursory review can therefore not become the *legal effect of* finding a by object restriction.

The Tribunal accordingly held that there were no grounds for the DCC's position that the TOR-standards and the TOR-Approval labelling-scheme were sufficiently harmful to competition by their very nature to render a deeper context analysis unnecessary. And it was neither persuaded, the Tribunal said, that the main driving force behind the TOR-standards and TOR-Approval was to foreclose competitors from access to the market, even it were accepted that commercial interests had played some part in setting the standards.

All theories of harm are equal. But some are more equal than others.

Another pivotal part of the contested decision that the Tribunal took issue with is the following in which the DCC stated:

"Experience from decisional practice demonstrates that agreements on market sharing, and thus foreclosure of the market against other market players, constitute particularly serious infringements of competition law."

In this statement, the DCC rather casually equates potentially market-foreclosing practices with actual market sharing. The DCC further asserted on this basis that the (alleged) foreclosing nature of the TOR-standards and the TOR-Approved labelling-scheme was tantamount to market sharing. Moreover, the DCC in fact submitted to the Tribunal itself that there is no difference between agreements that foreclose competition from third party competitors and agreements that 'foreclose' competition between the parties to the agreement.

The DCC seemed to argue this point to be able to elevate the parties' conduct to a level equivalent to market sharing, i.e. a hardcore cartel. This is because in the case of hardcore cartels the CJEU has indeed accepted that analysis of legal & economic context can be *cursory* or to use the CJEU's specific wording *"be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object"*.

The Tribunal rejected the notion that the parties' conduct surrounding the TOR-standards and the TOR-Approval labelling-scheme could be compared with market sharing. Consequently, it neither accepted the premise in the decision that a restriction by object could be demonstrated in this case without an individual, detailed examination of the legal & economic context.

Importantly, the Tribunal hereby also rejected the DCC's conflation of two very distinct theories of harm to competition: Collusive cartels and anti-competitive foreclosure. This should be welcomed as it is after all for good reason that cartels are subject to tougher sanctioning than other competition law infringements in many jurisdictions – for example by way of prison sentences for cartel offenders.

Does this mean there are two legal standards within the object box?

In a sense, yes. Within the category of by object restrictions there would seem to be a super-category of hardcore infringements where it is accepted that the competition authority can conduct a less intense review of the legal & economic context. AG Wathelet, for example, pointed to such a distinction in *Toshiba*:

"In the case of the agreements expressly referred to in Article 101(1) TFEU, there is no need to depart from the Court's consistent case-law, according to which the existence of a plausible alternative explanation for the conduct complained of […] must not lead to the imposition of stricter requirements as to the evidence to be adduced. Conversely, while it is not precluded that other types of agreements, atypical or complex, may have an object capable of preventing, restricting or distorting competition, their prohibition requires a more thorough analysis of the economic and

legal context of which they form part, although that analysis does not go so far as an examination of the effects of the agreement." (underlining added)

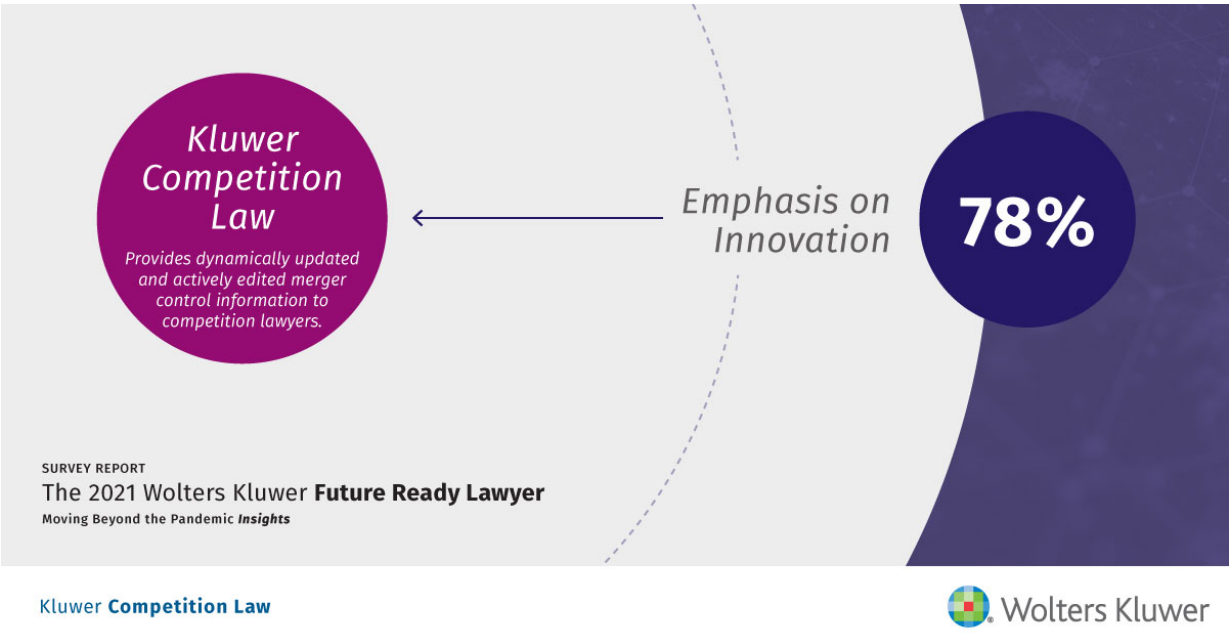
If the object box itself – allowing competition authorities to skip effects – is to be limited in scope as required in *Cartes Bancaires*, then surely any super-category – allowing competition authorities a lesser intense review of even the legal & economic context – ought essentially to be limited to hardcore cartels. For all other agreements and concerted practices an "*individual, detailed examination*", as AG Saugmandsgaard Øe put it last year in *Hoffmann-La Roche*, is required in order to demonstrate a by object restriction.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

Kluwer Competition Law

The **2021 Future Ready Lawyer survey** showed that 78% of the law firms realise the impact of transformational technologies. Kluwer Competition Law is a superior functionality with a wealth of exclusive content. The tool enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.



This entry was posted on Monday, October 1st, 2018 at 9:00 am and is filed under Source: OECD“>Cartels, Denmark, Restriction by object
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.