Kluwer Competition Law Blog

Welcome To The Kluwer Competition Law Blog

Thomas Graf (Cleary Gottlieb Steen & Hamilton LLP) · Monday, July 5th, 2010

Welcome to the Kluwer Competition Law Blog. As its editor, it is a great pleasure for me to announce the launch of this new platform for the discussion of competition law developments in the EU and beyond. Our aim is to debate current competition law issues that are of interest for practitioners, companies, and scholars alike. We want to provide fresh and regular information as well as deeper analysis. While our main focus will be on EU competition law, we will also follow important developments in EU Member States and the United States.

We have brought together an international group of competition law experts who will contribute their thoughts and insights in regular posts. You can find details on our bloggers on the left hand side of this page. In addition, we intend to invite from time to time guest bloggers who will post on particular topics. We also welcome comments on individual posts, which we hope will enrich the debate.

Competition law is an area of the law that remains in constant flux. Just looking at the past few months, we can see a number of developments at the EU level alone that are likely to provide the subject of much discussion:

On May 4, 2010, the European Commission published draft revisions of its Horizontal Restraint Guidelines, R&D Block Exemption Regulation, and Specialisation Block Exemption Regulation. Among these revisions, the draft Guidelines' discussion of the principles governing standard setting under Article 101 TFEU will probably give most cause for debate. Many of these principles are important and valuable. But the draft Guidelines are somewhat unclear as to whether these principles are truly binding, what their exact meaning is, and what the legal consequences under Article 101 TFEU are if they are ignored.

Previously, on April 20, 2010, the Commission adopted its revised Vertical Restraints Block Exemption Regulation and Vertical Restraints Guidelines. The most important changes include a buyer market share threshold for the application of the Block Exemption Regulation and expanded rules on Internet sales in the Guidelines. These changes attracted some controversy during the public consultation and may continue to do so as they are being implemented in practice.

In the area of cartel prosecution, the Commission adopted its first decision under the new settlement procedure on May 19, 2010. The Commission has also indicated an increased willingness to consider the financial difficulties that large fines may cause for individual companies. This is reflected in the fines that the Commission imposed on June 23, 2010 in the bathroom fittings cartel case, several of which were reduced due to the companies' inability to pay.

The matters investigated during the pharmaceutical sector inquiry, which was conducted under the tenure of Commissioner Kroes, will likely continue to raise questions. The final report on the inquiry did not reach final conclusions. Instead, the Commission initiated a monitoring exercise for patent settlements in January of this year and is conducting a number of individual infringement investigations, which are likely to shape the scope for patent settlements in the pharmaceutical industry.

Just last week, on July 1, the General Court published its judgment in the *AstraZeneca* matter, largely confirming the Commission's finding that AstraZenca had abused a dominant position by providing incorrect information to patent authorities and deregistering an older version of its Losec product to impede generics and parallel trade. Although the case bears some relation to the matters investigated in the pharmaceuticals sector inquiry, the issues addressed by the Court are much narrower and are therefore unlikely to shed much additional light on the sector inquiry report.

Also last week, on June 29, the Court of Justice reversed the General Court's judgment in *Alrosa*. The Court of Justice held that the General Court erred in finding that the Commission's *De Beers* commitment decision was disproportionate and infringed Alrosa's rights to be heard. While the Court of Justice's judgment ends the diamond saga, it does not seem to have fully clarified the broader question of what principles, if any, should apply to the review of Article 9 commitment decisions.

Merger control, despite the reduction in notifications, also continues to raise important issues. In Oracle/Sun, the Commission introduced the idea that the acquirer's public declarations about its future conduct post-transaction can be taken into account as a relevant factual element without need for a binding commitment. This decision is now on appeal before the General Court. In EDF/SEGEBL, the Commission confirmed its willingness to challenge transactions with low combined market shares based on unilateral effects theories, and the recent decisions in T-Mobile/Orange and Cisco/Tandberg illustrate the possibility to resolve concerns with complex remedies in Phase I.

We intend the Kluwer Competition Law Blog to become a place for the high-quality discussion of these topics and many others that will no doubt arise. With the support of one of the leading competition law publishers in the world and the expertise and diversity of its contributors it is uniquely well placed to achieve this goal. We hope that you will enjoy the posts and will join in the debate.

Thomas Graf

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