Kluwer Competition Law Blog

A new standard for abusive denigration? Danish NCA condemns covert media campaign

Sam MacMahon Baldwin (Szecskay Attorneys-at-Law, Hungary) · Monday, February 11th, 2019

Antitrust enforcers are good at regularly reminding the competition law community that the various forms of abuse of dominance listed in Article 102 TFEU are not exhaustive. Indeed, the idea of what conduct falls outside *"competition on the merits"* is ever evolving. And this can make it difficult for practitioners to set clear lines on what constitutes abuse and what does not. In fairness though, that is exactly what makes being a competition lawyer so interesting.

The Danish Competition Council's (**DCC**) decision of 30 January 2019 is one of these reminders. The DCC holds that following a failed tender bid for the provision of ambulance services, the company Falck devised a comprehensive internal and external communications' strategy to make it difficult for the winning bidder, BIOS, to effectively take over the services it had won ahead of Falck. The purpose of this strategy, says the DCC, was to generate uncertainty and concern among all stakeholders about BIOS' ability to carry out these critical services and to effectively prevent BIOS from recruiting the necessary number of paramedics that were a scarce resource.

The DCC bases its decision on the broad-stroke *"competition on the merits"* standard while expressly acknowledging that there is no case-law serving as clear precedent for condemning Falck's conduct.

Despite the lack of clear precedent, the decision does contain elements similar to the decisional practice on abusive denigration developed particularly in France. There are also similarities with the CJEU's Article 101 TFEU judgment last year in the *Hoffman-La Roche/Novartis* case and, to a lesser extent, the European Commission's *AstraZeneca* case from a while back. The novelty in the Falck case is that the DCC places little emphasis – if any – on whether Falck's statements & communication were wrong or misleading in substance. According to the DCC, it was sufficient to find that the communication strategy was systematic, covert and likely to make life difficult for the competitor, BIOS. And it was therefore abusive, even if it conveyed information that was correct in substance.

As Falck has announced that it will not be appealing the decision, the precedent stands, and dominant companies are well-advised to review their public relations strategies & measures, in particular if they make use of external PR agencies or other intermediaries.

Falck's reaction to losing the tender for ambulance services to BIOS

Falck is the world's biggest international ambulance service company and in Denmark more or less synonymous with emergency medical services and roadside assistance. In 2014, the Region of Southern Denmark tendered ambulance services for four areas in the region, three of which were won by BIOS, a new Dutch-owned entrant, and none won by Falck.

Upon losing the tender, the DCC finds that Falck embarked on a strategy targeting BIOS and consisting of secretly feeding the press with negative stories about them. Falck also sought to dissuade Falck's paramedics from seeking employment with BIOS, making it more difficult for the latter to deliver on the contracts it had won.

In July 2016, BIOS (Denmark) went into bankruptcy, and from August 2016 the Region of Southern Denmark took over the provision of ambulances service in the region.

The "Masterplan", the PR agencies and the "double arms' length" communication

The DCC describes Falck's PR strategy as two-fold in that it targeted *external* stakeholders by way of the general public, politicians, and media outlets in the region of southern Denmark as well as *internal* stakeholders by way of paramedics employed with Falck.

Falck's communications strategy comprised feeding negative stories about BIOS to the press and mobilizing opinion ambassadors that would publicly make the case for Falck and against BIOS. To this end, Falck engaged a PR agency that drafted what it called a "Masterplan," laying out the most effective way to pitch stories to the press and taking various other measures. Part of the strategy was to ensure that the stories about BIOS were not traceable back to Falck. This served to ensure that the stories were seen as objective and as credible as possible. The DCC summarizes this in the following:

> *"A large part of Falck's exclusionary activities were carried out at "arms' length" – and in some cases "double arms' length" – from Falck through [Communications agency X], [independent communications consultant] and [Communications agency Y]. "Arms' length" is to be understood as meaning that the specific activities could not be traced back to Falck as the real initiative taker and sender, and the activities were thus perceived as objective and credible by the paramedics in Falck and the general public."* (translated from Danish)

One measure that the DCC describes in particular detail is how Falck created a group on a social media platform that appeared to be managed by a particular paramedic:

> *"The purpose of the [social media group] was to create uncertainty and concern for the paramedics in the region about BIOS as an employer and to mobilise the paramedics, their families, friends, and other members of the public in protest over BIOS as the future provider of ambulance services. The goal was for paramedics to refrain from seeking employment with BIOS. […] At the instruction of Falck, [Communications agency X] followed the group's activity and on a daily basis provided possible news topics that the [Paramedic in Region South] could post in the*

> *group. […] Moreover, Falck was in possession of log-in and password to [Paramedic in Region South's] profile on the [social media platform]. Falck thus had direct access to the group and could post, approve, and reject posts and remove comments on posts in the group." (translated from Danish)*

An important aspect of the case is that BIOS had to recruit a large number of Falck's paramedics in order to supply the services specified in the tender. With qualified paramedics being a scarce resource, Falck's strategy, according to the DCC, was to prevent BIOS from recruiting these in sufficient numbers. This is why the communications strategy was to target not only public stakeholders but Falck's own paramedics in particular. An attempt at input foreclosure of sorts.

Departing from the established standard for abusive denigration

The legal benchmark for considering commercial disparagement of a competitor to be abusive has generally been that the negative communication must be wrong or misleading on substance, or at least based on unverified assertions. The French case-law – e.g. the *Sanofi* decision in 2013 upheld by the Cour de Cassation in 2016 – seems to be a testament to this benchmark, as does the CJEU's judgment in *Hoffman-La Roche/Novartis* last year, although that was an Article 101 TFEU case. In a similar vein, in *AstraZeneca*, the European Commission took issue with information provided to the patent office on the basis that the information was misleading although that was not a denigration case as such.

In the Falck decision, however, the DCC does not seem to consider it all that significant as to what extent Falck's internal and external communication was misleading in substance:

> *"The Authority finds moreover that, even if some of the published stories are not factually inaccurate, the fact that (parts of) the implementation of Falck's communications strategy was carried out through an "arms' length' principle" – and with respect to the [social media group], a "double arms' length principle" – is in itself misleading and manipulative. Nor does this constitute "competition on the merits" according to the Authority." (translated from Danish)*

In other words, the DCC's position is that abuse can be established – even if the disparaging statements are completely accurate on substance – in cases where the communication to the market has taken place in a covert manner to create an air of credibility and objectivity. For example, by making use of an intermediary.

A lawyer's abuse case and no *ne bis in idem*

As abuse of dominance cases go, this decision does not contain much elaborate economic analysis by way of graphs, curves or equations and the like. And although the DCC does go into how the market works and how Falck's behavior was to be seen in that context, the decision reads more as one of unfair commercial & marketing practices. In fact, Falck did argue that boundaries as to commercial communication should be dealt with under the rules on marketing practices and not under competition law / antitrust.

The DCC rejected this argument saying that the potential application of marketing practices rules

to Falck's conduct does not preclude enforcement under antitrust rules. This is essentially the same reasoning as the Bundeskartellamt has just used in its Facebook case regarding data protection law vs. competition law. Intervention under one legal regime does not prevent sanctioning of the same conduct under another and there is no (successful) double jeopardy or *ne bis in idem* argument to be made here it seems.

The DCC's press release in the case is available in English here.

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

Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law 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, February 11th, 2019 at 8:50 am and is filed under Source: OECD">Abuse of dominance, Source: OECD">Antitrust, Denmark
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a

response, or trackback from your own site.