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CASE CARD | 4 October 2021

Béguelin Import (22/71)

Parallel trade

1. CASE SUMMARY

A. Summary of facts

Béguelin/Belgium was appointed as the exclusive dealer of cigarette-lighters of the Japanese manufacturer Oshawa for the Belgian and French territories. In respect of the French territory, Béguelin/France, a wholly-owned subsidiary company of Béguelin/Belgium was appointed as the exclusive dealer. Marbach is the Germany-based exclusive dealer of Oshawa. Import Export is an independent French importer.

This case relates to the distribution of cigarette-lighters in France. The independent French importer purchased products from the Germany-based exclusive dealer and offered them for sale in France. Béguelin sought a ban on the sale of products by Import Export in France and a compensation for unfair competition. Import Export and Marbach argued as their defense that the exclusive agreement relating to the French territory was null and void and contrary to Article 101(1) TFEU.

B. Legal analysis

B.1 - Questions raised for preliminary ruling

The following (sub-)questions raised by the Commercial Court of Nice for a preliminary ruling may still be relevant today:

- Whether an agreement whereby a parent company who received the right to distribute exclusively in respect of two Member States transfers the exclusive right to its subsidiary in respect of one of the Member States is caught by the prohibition of Article 101(1) TFEU?
- What other conditions apply to the exclusivity agreement to be considered valid under EU law?

In response to the questions referred by the Commercial Court of Nice, the ECJ ruled as follows:

B.2 - Article 101(1) TFEU – at least two independent undertakings

An agreement to transfer exclusive rights by a parent company (Béguelin/Belgium) to a wholly-owned subsidiary (Béguelin/France) that enjoys no economic independence has not as its object or effect to restrict competition in the sense of Article 101(1) TFEU. (§8) As such the arrangement whereby Béguelin/Belgium transferred its

exclusive distribution rights for France to its French wholly-owned subsidiary is not caught by Article 101(1) TFEU.

B.3 - Article 101(1) TFEU – affect trade between Member States/competition within the internal market

In respect of the exclusivity agreements concluded with the Japanese manufacturer, Article 101(1) TFEU applies to agreements whereby one of the parties is a non-EEA company since the agreements entered into are "operative" on the EEA territory. (§11)

B.4 - Article 101(1) TFEU – object or effect to prevent, restrict or distort competition

An exclusive distribution agreement breaches Article 101 TFEU if it prevents parallel imports or re-exports, possibly on the basis of a combination of the agreement and national legislation on unfair competition. In this case, the French exclusive distributor relied on French unfair competition rules to prevent parallel imports/re-exports. A distributor can furthermore only rely upon national legislation regarding unfair behavior by a competitor to the extent that it results from other factors than having undertaken parallel imports/re-exports. (§12-15)

B.5 - Article 101(1) TFEU – appreciable effect on trade

The ECJ confirmed that for Article 101(1) TFEU to apply trade between Member States must be affected to an appreciable extent. The clarification by the ECJ that the effect must be appreciable, came two years after the *Völk* judgment with regard to the concept of effect on trade between Member States. (§16)

B.6 - Article 101(2) TFEU – nullity

The nullity sanction of Article 101(2) TFEU is absolute and affects not only the parties to the agreement but also third parties. (§29) The defendants in the French court proceedings (the German exclusive distributor and the independent French importer) were not parties to the agreement conferring exclusive distribution rights in France, but can nevertheless invoke the nullity as a defence.

2. QUOTES

"*This is not the position in the case of an exclusive sales agreement when in fact the concession granted under that agreement is in part transferred from the parent company to a subsidiary which, although having separate legal personality, enjoys no economic independence.*" (§8)

"*The fact that one of the undertakings which are parties to the agreement is situated in a third country does not prevent application of that provision since the agreement is operative on the territory of the common market.*" (§11)

"*An exclusive dealing agreement entered into between a producer who is subject to the law of a third country and a distributor established in the common market fulfils the two aforementioned conditions [i.e. potentially affecting trade between Member States and having at its object or effect an impediment to competition within the common market] when, de jure or de facto, it prevents the distributor from re-exporting the products in question to other member states or prevents the products from being imported from other Member States into the protected area and from being distributed therein by persons other than the exclusive dealer or his customers.*" (§12)

"*Finally, in order to come within the prohibition imposed by Article [101 TFEU], the agreement must affect trade between Member States and the free play of competition to an appreciable extent.*" (§16)

"*Since the nullity referred to in Article [101(2) TFEU] is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties.*" (§29)

"*The relationship between two companies one of which is economically wholly dependant upon the other cannot be taken into account in determining the validity of an exclusive dealing agreement entered into between the subsidiary and a third party.*" (§1 of the operative part)

"*An exclusive dealing agreement entered into between a producer who is subject to the law of a third country and a distributor established in the common market comes within the prohibition imposed under Article [101 TFEU] in cases when, de jure or de facto it prevents the distributor from re-exporting the products in question to other Member States or prevents the products from being imported from other Member States into the protected area and from being distributed therein by persons other than the exclusive dealer or his customers. The latter condition is satisfied in particular in cases where, owing to the combined effects of the agreement and of national legislation on unfair competition, the exclusive dealer is able to prevent parallel imports from other Member States into the territory covered by the agreement.*" (§2 of the operative part)

"*The collective exemption conferred on certain categories of agreement by Regulation No 67/67 does not apply when an agreement prohibits the exclusive dealer from re-exporting the products in question to other Member States.*" (§3 of the operative part)

"*Since the nullity for which Article [101(2) TFEU] provides is absolute, the agreement concerned has no effect as between the contracting parties and cannot be set up against third parties.*" (§4 of the operative part)

"*An import or export transaction cannot as such come within the prohibition imposed by Article [101(1) TFEU].*" (§5 of the operative part)

3. RELEVANT LEGISLATION

- Article 101 TFEU

4. RELEVANT LITERATURE

On the intra-group agreements in the context of the "*at least two independent undertakings*" requirement, see F. WIJCKMANS and F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford University Press, 2018, §3.23 – 3.40. On vertical agreements on imports into the EU, see §3.140 – 3.141. On the need for the effect on trade to be appreciable, see §3.146 – 3.162. On the absolute nullity sanction, see §1.77 – 1.78.

5. PRACTICAL SIGNIFICANCE

The case is relevant for practitioners because it provides that:

- Article 101 TFEU may apply to agreements entered into by non-EEA companies. The nationality if the parties is not immediately relevant in this respect, but rather the place where the agreement is operative. This finding is frequently reiterated in case law (e.g. Case C-413/14 P, *Intel*, §43).
- Transferring rights to a subsidiary that enjoys no economic independence is not caught by the concept of "*at least two independent undertakings"* of Article 101 TFEU.
- The nullity sanction of Article 101(2) TFEU is absolute and affects not only the parties to the agreement but also third parties.