Distribution Law Center
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German Competition Authority acts against non-compete obligation in a selective distribution system

Facts of the case

Stihl, a manufacturer of chain saws and other outdoor power tools, distributes its products through a network of several hundred independent distributors. In Germany, Stihl operates a selective distribution system with two categories of distributors: “normal” dealers and “service” dealers. In the distribution agreements with service dealers non-compete clauses were included which barred the dealers from selling competing products of other manufacturers. Adherence to the non-compete obligation was monitored by Stihl and distribution agreements were terminated in case of repeated violations of the clause. The duration of these contractual arrangements typically was more than five years and the Bundeskartellamt (the German Federal Cartel Office, 'FCO') established market shares of Stihl on the relevant markets exceeding 30%. Stihl rescinded the non-compete obligations in the course of the FCO’s procedure.

Decision of the Federal Cartel Office

The FCO conducted an individual assessment of the non-compete clauses under Section 1 of the German Act Against Restraints of Competition and Article 101 TFEU. There was no possibility to benefit from the Vertical Block Exemption Regulation as the 30% market share threshold was exceeded according to the FCO’s findings. In addition, the duration of the non-compete obligation exceeded five years.

The FCO established restrictive effects on competition, in particular as many important distributors of chain saws and other outdoor power tools factually were not available for the distribution of the products of competing suppliers. The Stihl brand is important for such distributors and the high market share of Stihl also attracts them to this supplier. Accordingly, other suppliers were found to likely have difficulties to find distribution partners.

The FCO did not see the conditions for an individual exemption being fulfilled in this case. The FCO did not assess the individual conditions in detail but mainly referred to the argument, that the non-compete obligation in any event was not indispensable to achieve any alleged efficiency gains as Stihl gave up these obligations in the course of the procedure. No fine was imposed but the FCO formally declared the clauses to have violated competition law in the past. The decision is not final as Stihl filed an appeal against it.

A summary of the case is available here.

Commentary

The decision is one of the very few cases where a competition authority reviews a non-compete clause in a distribution agreement under Artcile 101 TFEU and the related national provisions. These clauses are included in many distribution agreements and usually do not give rise to enforcement activity as the 30% market share threshold is not exceeded and the duration is limited to five years. However, in the case at hand both limitations were exceeded.

The FCO's assessment is not entirely sound as it focuses very much on establishing the restrictive effects of the non-compete clause. The discussion of the conditions for an individual exemption is rather short and superficial. It mainly relies on the fact that Stihl rescinded the non-compete clauses in the course of the procedure. This was seen as suggesting that the clauses were not indispensable. However, it is very likely that the clauses were rescinded not because they are indispensable but to avoid a fine being imposed by the FCO considering the FCO's legal assessment of the clause which became apparent in the procedure. In this sense the FCO draws conclusions from the behaviour of the undertaking under investigation where it should carry out a more comprehensive legal and economic analysis.

It will be interesting to see whether this overly pragmatic approach will be upheld upon appeal.