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Utilities & Cartels

Cartels in the utility sectors: An overview of EU and national case law

ANTICOMPETITIVE PRACTICES, BID RIGGING, CARTEL, EXCHANGE OF INFORMATION, JOINT-VENTURE, UTILITIES, SANCTIONS / FINES / PENALTIES, FOREWORD, JUDICIAL REVIEW, PRICE INCREASE

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I. Introduction

As the impact of liberalisation in most utility sectors has taken hold across most EU Member States, a gradual shift has occurred from markets dominated by concerns about unilateral effects (driven by incumbent operators with market power) to more mature markets where coordinated effects are assuming equal importance in terms of antitrust enforcement activity. This is reflected in the steady stream of cases brought over the past decade at EU and Member State levels under Article 101 TFEU and its national equivalents.

In this compendium of cases, the author has examined those antitrust investigations based on allegations of cartel-like behaviour or concerted practices brought over the past few years by the European Commission and the National Competition Authorities or Courts of Italy, Denmark, Romania, Poland, Belgium, and Spain, and we even non-EU jurisdictions such as Turkey and Russia.

II. Emerging Themes

Aside from side traditional cartel investigations involving prices or market sharing, the cases configure around a number or recurring themes:

- the identification of common incentives among manufacturers to have their distributors reduce price competition downstream;
- the indirect application of Resale Price Maintenance policies;
- the impact of sector-specific regulation on Parties' ability to engage in concerted practices;
- bid-rigging practices, whether or not facilitated by the actions of clients organising the tender process or because prices or tender allocations were agreed in advance by the parties engaging in public bids;
- the complexities of Competition Authorities being able to sustain actions for longstanding "single and

continuous" antitrust infringements; and

- whether a bidder in an auction procedure can be excluded from that auction by virtue of its prior involvement in cartel activity.

II.1 *Traditional cartel enforcement*

The past few years have seen a number of cartel investigations concluded in relation to the air transport and maritime transport sectors, prompted essentially by the Parties' desires to manage capacity. For example:

- In relation to the European Commission's protracted **air cargo** investigation, the Commission's Decision to fine 11 eleven air cargo carriers in 2010, which was in turn annulled by the General Court but then re-adopted, is again being appealed to the General Court. [***1***]

- The Commission has declined to pursue its investigation into a particular code-sharing agreement between two major **airlines**, Lufthansa and Turkish Airlines. According to the Commission, the Parties would not realistically be able to achieve price coordination through such code sharing arrangements in the absence of achieving *full marketing rights* in relation to each affected airlines' seats. By contrast, the Commission has taken the preliminary view that the code sharing arrangements entered into by two other airlines, Brussels Airlines and TAP Portugal, do appear to result in price coordination and a restriction of capacity on a particular city pair route within the EU. [*2*]

- With respect to **maritime car carriers**, the European Commission in February 2018 fined five carriers for engaging in a hard-core cartel involving the inter-continental maritime transport of vehicles. Through a variety of meetings and communications between the carriers' sales managers, the Parties were found to have engaged in price coordination, customer allocation and the exchange of commercially sensitive information about key elements of pricing policy. In the view of the Commission, these exchanges between horizontal competitors led to the sharing of transportation routes and customers through the quoting of artificially high prices in response to tenders issued by vehicle manufacturers. [*3*]

Finally, as regards the appeal of **Toshiba** to the Court of Justice [*4*] in relation to the fine imposed on it for its participation in the *Gas Insulated Switchgear Cartel*, [*5*] the key issue which arose in the appeal brought by Toshiba was the extent to which the Commission is obliged, when calculating administrative fines for a cartel offence, to reduce the level of the fine on a given Party because they had only participated in a designated global cartel rather than in the cartel that was specific to the European territory. In the view of the Court of Justice, the Commission was not obliged to reduce the fines merely because Toshiba had participated only in the world-wide cartel. The global market sharing cartel necessarily meant that Toshiba stayed out of the European market, and as such was not less serious than that of the European producers.

II.2 *Common incentives to reduce price competition downstream*

In November 2016, the Danish Competition Council adopted a Decision holding that four upstream gas suppliers had engaged in a concerted practice by agreeing upon the standard conditions which one of them would use in its standard distribution contracts with its downstream distributors. The facts suggested that the remaining upstream suppliers could take advantage of this situation by extracting similar terms and conditions for their downstream distribution. This had the effect of dampening price competition between the upstream gas suppliers, resulting in a number of instances of price increases for the ultimate end users downstream. [*6*]

II.3 *Indirect RPM*

The Polish Competition Authority adopted a Decision in December 2016, fining a manufacturer of gas boilers and water heaters for the imposition of RPM obligations indirectly on its distributors through a policy of "recommended prices" which was translated into mandatory minimum prices because of the combination of a number of policies, including: (i) the mandatory listing if catalogue prices in a visible place; (ii) the systematic identification of distributors not respecting recommended prices; and (iii) the refusal to supply distributors not pricing in accordance with the recommended prices. The cumulative effect of these arrangements was that the defendant manufacturer was able to implement an indirect RPM strategy by monitoring whether its distributors and retailers followed its pricing policy and restricting supplies in the case of non-compliance. [*7*]

II.4 *Impact of sector-specific regulation*

Two cases demonstrate the ways in which regulatory obligations might shape certain types of concerted practices. For example:

- The Board of the Turkish Competition Authority adopted a non-infringement Decision in November 2016 in relation to RPM claims made in relation to the distribution of liquified petroleum by the defendant's dealers. According to the Board, the discussions on pricing with retailers in relation to discounting practices and dealers' margins reflected common commercial practice and appeared to be in accordance with sector-specific regulation. In those circumstances, the Board did not consider that certain isolated incidents were sufficient to suggest that the manufacturer had implemented a systematic unlawful RPM policy. [*8*]

- In Italy, the National Competition Authority in March 2018 ordered interim measures against four major telecommunications operators so that they would suspend their updates for their respective billing periods, pending the outcome of the Authority's investigation of whether those operators had engaged in a concerted practice that had been facilitated by their trade organisation. The Authority's interim order was the result of its investigation into whether the operators had coordinated their commercial strategies regarding certain recent changes in their regulatory obligations, which required them to change their billing practices from their usual billing period of four weeks. [*9*]

The impact of sector-specific regulation on the dynamics of collusion can also be evidenced in a major legislative initiative adopted by the Commission on 7 May 2018, when it re-issued the *SMP Guidelines*, drafted originally in 2002 to govern the identification of individual or joint market power in electronic communications markets. [*10*] The revised Notice seeks to amplify *inter alia* those economic and legal conditions which will be necessary for sector-specific regulators in the electronic communications sector to apply when determining whether a situation of tight oligopoly is likely to generate the sort of commercial incentives that would encourage the parties in that oligopoly to engage in tacit collusion (in a manner comparable to firms being held to be jointly dominant under the jurisprudence of the European Courts in applying merger policy and Article 102 TFEU).

II.5 *Bid-rigging*

Investigations into a range of bid-rigging practices continue to be a focus of enforcement strategy by competition regulators. For example:

- In May 2017, the Belgian Competition Authority fined five energy firms for their coordinated bids practices in relation to responses to public tenders issued by the Belgian national railway infrastructure manager. However,

the level of fines was reduced after the Authority took into account the fact that the Belgian national railway infrastructure manager had inappropriately disclosed sensitive commercial information to the energy firms in question, thereby inadvertently facilitating their bid-rigging. [***11***]

- The Romanian Competition Council adopted a number of Decisions in January 2018 in the context of bid-rigging practices, including:
  - The fining of three companies for market sharing when participating in a public tender for electricity measuring equipment, according to which a Romanian supplier would be the only party participating in the tender, while competitors from the US and Germany would supply the Romanian bidder with the contract goods to allow it to fulfil its procurement obligations. [***12***]
  - The fining of six companies for their coordinated bids to ensure that each of them would win their share of contracts (at minimal administrative cost) for the provision of meters and related equipment for electricity measurement. This led to inflated contract prices, which were ultimately passed on to consumers. In addition, the organiser of the tender auctions was also prosecuted for being a facilitator of the cartel, as it had actively consulted with the companies in relation to the drafting of the auction documents and had played a significant role in the exchange of commercially sensitive information among the cartel participants. [***13***]

- In February 2018, the Danish Competition Council fined a trade association for passenger airlines for its coordination of its members' bids with respect to certain tenders. The trade association's own constitution prohibited members from competing against the trade association in relation to tenders, and it ensured that its members would abide by this rule by informing its members of the tenders in relation to which it would bid and the price at which it would bid. This policy had the inevitable effect of reducing competition among the association's members in response to any bid. [***14***]

- In January 2018, the Russian Competition Authority ruled that two competitors had engaged in bid-rigging by coordinating their bids for a government contract for the provision of gas chromatographs to the Federal Russian Drug Control Service, effected through an electronic auction. This resulted in the maximum contract price being lowered by only 1.5%, whereas Russian consumers could have benefited from significantly better prices had the parties engaged in independent bidding.

II.6 *Investigations of multi-party concerted practices*

The difficulties inherent in prosecuting multi-party allegations of a concerted practice surfaced yet again in Spain, where Spain's Competition Authority re-opened a cartel investigation in May 2018 into the alleged market sharing practices of 51 waste management companies and their trade association. The new investigation follows from the Spanish Appeal Court's Judgment overturning the Authority's original Decision in the matter, on the ground that the Authority had failed to produce sufficient evidence to prove that the agreements in question had an overall common objective that was consistent with a finding that the parties had engaged in a "single and continuous infringement". [***15***]

II.7 *Exclusions from merger bids for cartel behaviour*

As a result of the Opinion issued by Advocate-Général Sanchez-Bordona in May 2018, the Court of Justice was advised – in the context of a Reference for an Advisory Opinion requested by the Procurement Supervisory Committee of South Bavaria in Germany – that a Party that was refused permission to take part in an auction

because it had been found to have participated in cartel activities in the past, was *entitled* to participate in the auction if it could be demonstrated by that Party that it had taken "all the necessary steps to eliminate the wrongdoing" in accordance with the requirements of the German procurement rules. Although the Advocate-General took the view that a public tenderer for rail track procurement was normally entitled under the governing procurement rules to exclude a Party found to have participated in a rail track bidding cartel, the Party had indeed "*eliminated the wrongdoing*" by having fully cooperated with Germany's Federal Cartel Office when it disclosed fully the activities of the bidding cartel in question. [***16***]

III. Conclusions

The patterns of antitrust enforcement in relation to cartel-like behaviour in the utility sectors that were identified in the previous two case-law compendia have continued over the past few years. The risks posed by competitors tempted to manipulate bidding situations continues to attract major enforcement activity across the EU, but especially in national jurisdictions from the CEE region. A qualitative difference from previous years, however, is the extent to which trade associations have been increasingly embroiled in cartel-like activity as facilitators of information exchange, and the increasing vigilance required of those parties responsible for the running of tender or auction procedures, given the risks involved in them being characterised as facilitators of collusive outcomes.

By the same token, the more traditional hard-core cartel investigations are still not commonplace across the utility sectors beyond transport and transport-related industries; these industries have a greater commercial imperative towards the management of capacity or under-used capacity, which will often be a necessary commercial concern but which is viewed suspiciously by antitrust regulators. [***17***]

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Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

[*1*] Case T-338/17 *Air France v Commission* (not yet decided).

[*2*] European Commission Press Release IP/16/3563, 27 October 2016, available at: *http://europa.eu/rapid/press-release_IP-16-3563_en.htm* ↗, see ***European Commission***, *The EU Commission sends a statement of objections against two airlines concerning a potentially anticompetitive codeshare agreement (Brussels Airlines / TAP Portugal), 27 October 2016, e-Competitions Bulletin November 2016, Art. N° 81869.*

[*3*] European Commission Press Release IP/18/962, 21 February 2018, available at: *http://europa.eu/rapid/press-release_IP-18-962_en.htm* ↗, see ***Miguel Troncoso Ferrer, Sara Moya Izquierdo, Clara García Fernández***, *The EU Commission fines two maritime car*

carriers and four car parts suppliers EUR 546 million in three separate cartel settlements (MOL / NYK / "K" Line / Wwl-Eukor / Csav, Denso / Bosch / NGK / TRW / Continental), 21 February 2018, e-Competitions Bulletin February 2018, Art. N° 86417.

[4] Case C-180/16 P *Toshiba Corp v Commission* EU:C:2017:520. See ***Richard Burton***, *The EU Court of Justice dismisses appeal in gas insulated switchgear cartel case (Toshiba), 6 July 2017, e-Competitions Bulletin July 2017, Art. N° 84749.*

[5] Case COMP/F/38.899 *Gas Insulated Switchgear*, 24 January 2007. See ***María Luisa Tierno Centella, Maurits Pino, Jindrich Kloub***, *The European Commission fines a cartel in the gas insulated switchgear sector, 24 January 2007, e-Competitions Bulletin January 2007, Art. N° 36175.*

[6] Danish Competition Council, *HMN Naturgas I/S et al*, 30 November 2016. See ***Danish Competition Authority***, *The Danish Competition Council considers that agreement between service providers on their subscription price for service on natural gas boilers is anticompetitive (HMN), 30 November 2016, e-Competitions Bulletin November 2016, Art. N° 82429.*

[7] Polish Competition Authority, Decision RKT-08/2016, 19 December 2016. See ***Tomasz Feliszewski, Kamil Klopocki***, *The Polish Competition Authority fines gas boilers and water heaters producer for vertical price fixing (Termet), 19 December 2016, e-Competitions Bulletin December 2016, Art. N° 83700.*

[8] Turkish Competition Authority, Decision No 16-39/659-294, 16 November 2016. See ***Gönenç Gürkaynak, Ceren Özkanlı***, *The Turkish Competition Board publishes its reasoned decision on the investigation conducted against upon allegations of resale price fixing on the auto gas market (Aygaz), 16 November 2016, e-Competitions Bulletin November 2016, Art. N° 84888.*

[9] Italian Competition Authority, Press Release I820, 21 March 2018, available at: *http://www.agcm.it* ↗ (not available in English).

[10] European Commission, *Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services* (2018) OJ C 159/1.

[11] Belgian Competition Authority, Press Release No 7/2017, 3 May 2017, available at: *http://www.belgiancompetition.be* ↗.

[12] Romanian Competition Council, Press Release, 22 January 2018, available at: *http://www.consiliulconcurentei.ro* ↗, see ***Romanian Competition Authority***, *The Romanian Competition Authority fines companies selling equipment for electricity measurement for cartel (ARC BRAŞOV), 22 January 2018, e-Competitions Bulletin January 2018, Art. N° 86009.*

[13] Romanian Competition Council, Press Release, 12 January 2018, available at: *http://www.consiliulconcurentei.ro* ↗.

[14] Danish Competition Council, Press Release, 28 February 2018, available at: *https://www.en.kfst.dk* ↗, see ***Danish Competition Authority***, *The Danish Competition Authority fines an association of passenger carriers for bid rigging (ØFP), 28 February 2018, e-Competitions Bulletin February 2018, Art. N° 86545.*

[*15*] Spanish Competition Authority, Press Release, 3 May 2018, available at: *https://www.cnmc.es* ↗. At the EU level, the most spectacular failure of a large multi-party concerted practice action can be seen in the *CDS Case* where, after more than four years of investigations into the credit default swaps market, the Commission terminated its infringement action against 13 investment banks because the evidence was not sufficiently conclusive to confirm the Commission's concerns that the banks acted collectively to shut out two exchanges, Deutsche Börse and the Chicago Mercantile Exchange, from the market: European Commission Press Release MEX/15/6254, 4 December 2015, available at: *http://europa.eu/rapid/press-release_MEX-15-6254_en.htm* ↗.

[*16*] Case C-124/17 *Vossloh Laeis EU:C:2018:316* (not available in English).

[*17*] Refer to discussion in *Section II.1*.