Westlaw Journal
ANTITRUST

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

VOLUME 22, ISSUE 1 / MAY 2014

EXPERT ANALYSIS

2013 Antitrust Enforcement Update: Part 2 (Europe)

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This article is part two of a two-part update covering significant developments in antitrust enforcement in the United States and Europe in 2013. Part one covered developments in the United States, while this part will focus on developments in Europe.

In 2013, European competition agencies continued to focus on global cartel investigations, imposing higher monetary penalties for comparable activities than other jurisdictions. From the London Interbank Offered Rate to the auto parts industry and various segments of international shipping, competition law is increasingly being enforced on a worldwide basis. When collusion is suspected with respect to products sold worldwide, it is no longer surprising to see investigations and possible fines in a dozen or more countries.

In addition, 2013 saw several important judicial decisions as well as substantial legislative developments on the international and domestic levels. At the European Union level, significant progress was made in the adoption of legislation aimed at making it easier to bring private causes of action against cartel operators. At the domestic level, a number of member states have recently reformed their enforcement regimes to optimize resources and increase efficiencies.

EUROPEAN ENFORCEMENT TRENDS

Criminal fines and other monetary assessments

The European Commission followed its bumper 2012 year with another year of vigorous antitrust enforcement. 2013 saw the EC levy fines in excess of €2.1 billion ($2.8 billion) in seven separate cases covering a wide range of industries (see Figure 1).

In the first half of the year, the commission imposed €367 million ($488 million) in cartel fines involving the pharmaceutical, wire harness and Iberian telecommunications industries. It followed with a very active second half of the year, which saw four decisions, by imposing fines totaling €1.71 billion ($2.3 billion) in the Libor investigation as well as additional hefty fines involving the shrimping industry and the pharmaceutical sector.

Furthermore, throughout 2013 the EC continued to use the negotiated settlement procedure introduced in 2008, reaching its seventh, eighth, and ninth settlements — relating to wire harnesses, Euro Interbank Offered Rate and yen Libor, respectively.

Libor and other interest-rate benchmarks

In December, the EC issued the largest fine in its history — €1.71 billion ($2.3 billion) — in two decisions against eight international financial institutions in connection with manipulation of interest rate benchmarks.[1] According to the commission, the financial institutions colluded to manipulate Libor and Euribor benchmarks that are used to calculate the value of interest rate derivatives. Four of the institutions participated in conduct relating to interest rate derivatives denominated in Euro, while six participated in one or more bilateral arrangements relating to interest rate derivatives denominated in Japanese yen. Commission Vice President Joaquín Almunia said the fines would send a clear message that the EC is determined to fight collusion in the financial sector.[2]

Both decisions were adopted under the EC's settlement procedure. Almunia said these are two of the swiftest settlements the commission has reached since the introduction of the settlement procedure in 2008. Four targets of the investigation (Credit Agricole, HSBC, JPMorgan Chase and ICAP) did not settle, and the commission's probe against those companies will continue.[3] The move has led some commentators to question the efficiency of the so-called hybrid-settlement process — in which some, but not all, suspects settle.[4]

The Libor fines were set on the basis of the EC's fining guidelines. Factors taken into account included the bank's value of sales within the European Economic Area, the severity of the infringements, their geographic scope and their respective durations. In addition to the reductions granted under the commission's leniency program, the companies received a 10 percent reduction in fines for agreeing to settle the case. The fines ranged from €247,000 to more than €465 million. As immunity applicants, no fines were imposed on Barclays (euro interest rate derivatives) and UBS (yen interest rate derivatives).[5]

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COURTS' VIEWS ON THE EC'S FINES

In 2013, the Court of Justice of the EU upheld a number of significant fines. However, the Court of Justice also upheld the General Court's previous annulment of the EC's fine on Dutch company Aalberts for collusion with respect to copper fittings.

In these cases, the European courts also clarified a number of important principles with regard to enforcement. They confirmed that EU competition procedures are compatible with the protections of the European Convention on Human Rights, addressed applicable standards for parental liability, and considered the scope of rights and protections applicable to a dawn raid.

In Case C-287/11 P, *Commission v. Aalberts Industries NV & Others* (E.C.R. 2013,) the Court of Justice delivered one of its most important rulings in recent years by upholding the General Court's decision to annul the penalty on the Aalberts parent company. The Court of Justice agreed that although the company's subsidiaries participated in meetings during which companies colluded to restrict competition, there was not enough information on file to justify the imposition of a fine against the parent company. The decision is noteworthy because it reduces the EC's ability to impose fines on parent companies for actions taken by their subsidiaries.

Conversely, in Case C-179/12 P, *Dow Chemical Co. v. Commission* (E.C.R. 2013), the Court of Justice held that Dow Chemical and DuPont were jointly liable for the conduct of their 50/50-owned subsidiary, DDE, in the rubber cartel of 2007. It was the first time the EC applied the rules on parental liability to owners of a fully functioning joint venture. In another Court of Justice judgment in July 2013, Dow Chemical lost its appeal arising out of the EC's butadiene rubber decision, again on the basis of parental liability. The Court of Justice agreed with the General Court that there was no reason to depart from the well-settled principles of imputed liability. The fact that Dow Chemical faced the possibility of civil action in the U.S. was irrelevant, it concluded.

In Case C-501/11 P, *Schindler Holding v. Commission* (E.C.R. 2013,) the Court of Justice addressed the compatibility of EU competition enforcement procedures with "fundamental rights" under the European Convention on Human Rights. The ruling settles the question of whether the EC may serve as both prosecutor and enforcer in competition law cases. The court confirmed that the principle of effective judicial protection was upheld through the unlimited jurisdiction of the EU Courts. It emphasized that EU courts "cannot use the commission's margin of discretion … as a basis for dispensing with the conduct of an in-depth review of the law and of the facts." The *Schindler* case may have sweeping consequences regarding the deference traditionally accorded by the European courts to assessments by the EC "of an economic nature."

The EC also received a boost to its antitrust enforcement capabilities when the General Court upheld its right to inspect corporate premises. In T-289/11, T-290/11 and T-521/11, *Deutsche*

Bahn AG & Others (E.C.R. 2013), Deutsche Bahn challenged raids carried out in relation to abusive pricing in the locomotive electricity sector. It argued that the EC was required to obtain judicial authorization before conducting an inspection. Deutsche Bahn further argued that the EC exceeded the limits of its search powers by obtaining documents that fell outside the scope of its investigation. Agreeing with the EC, the General Court decided that inspections do not require prior judicial authorization and that inspectors may conduct a wide and thorough search for evidence.

RAIDS AND ONGOING INVESTIGATIONS

The EC has actively pursued new investigations this year, conducting unannounced inspections at companies' premises in the sugar, oil, biofuel, cargo train transport, telecommunications and consumer electronics industries. The commission also issued statements of objections or opened formal proceedings in the smart card chips, container liner shipping and financial-sector industries.

EU LEGISLATIVE DEVELOPMENTS

The hotly debated Directive on Antitrust Damages Actions aims to harmonize national regimes. If the measure is adopted, it will become easier to bring private claims against antitrust infringers in EU member state courts. Further, the draft directive proposes safeguards to protect leniency applications and settling parties from the disclosure of key submissions made to antitrust authorities, including leniency statements and settlement submissions.

Although the draft directive faced some initial difficulties, in early December the Council of the European Union adopted a compromise proposal put forward by the European Parliament. Importantly, the compromise proposal retains absolute protection from disclosure for leniency statements and settlement submissions. The proposal differs from the original draft in two significant ways. First, it is less prescriptive as to how member states can secure protection against disclosure of documents that have been obtained through access to the file.

Second, it amends the EC's proposed protections for immunity applicants with respect to exposure to damages claims. The compromise proposal maintains the limitation on the application of joint and several liability in subsequent civil litigation for immunity applicants. Immunity applicants would be liable to their own direct or indirect purchasers or providers, but not to other injured parties unless full compensation cannot be obtained from other infringing undertakings. It also eliminates the cap on contributions that can be claimed against the immunity applicant by another infringer. The cap would have limited their exposure in this respect to the harm caused by their share of sales.

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CONCLUSION: EU MEMBER STATES

The European financial crisis has continued to affect national competition law enforcement, with many jurisdictions tightening the purse strings and saving resources where possible.[6] Several countries, including Austria, Belgium, the Czech Republic, Finland, Germany, Greece, the Netherlands, Spain and the U.K. have recently reformed, or are in the process of reforming, their competition law agencies to expedite procedures, reduce costs and increase effectiveness with the aim of optimizing resource allocation.

In addition, changes have been made at the national level with respect to issues such as leniency, *de minimis* thresholds and information gathering. In December the European Competition Network published the ECN recommendations on key investigative powers for competition authorities in the network. The recommendations addressed inspection powers, requests for information, priority setting, and interim measures to commitments and structural remedies. During 2013, new or revised guidance on leniency or penalties was published by Malta (draft leniency guidance), Germany (penalties guidance), Portugal (penalties guidance), Hungary (leniency guidance), and the U.K. (leniency guidance).

Germany

The German Act against Restraints of Competition was significantly amended in 2013. Importantly, cartel infringers must now report their turnover to the Federal Cartel Office for fine calculation purposes. Additionally, the FCO published new fining guidelines that focus on the size of the company. As a consequence, large conglomerate companies may face higher fines in the future.

U.K.

In July 2013, the Office of Fair Trading published its revised leniency guidance.[7] Significantly, the OFT confirmed that it will not require waivers of legal privilege as a condition of leniency in either civil or criminal investigations. However, it will require a review by independent counsel of material over which privilege is claimed unless the position is clear and uncontroversial. The OFT may also inquire whether an immunity applicant may be prepared to waive privilege voluntarily during the course of a possible criminal cartel prosecution. The OFT stressed that any decision taken with respect to this request would be treated "neutrally" (*i.e.*, without either adverse consequences or additional advantage being tied to the waiver decision).

2013 also saw the U.K. adopt the Enterprise and Regulatory Reform Act 2013, which merged the current Competition Commission and OFT to create a new single Competition and Markets Authority. The CMA is independent of ministerial control. It will have increased investigative powers compared to the OFT, including compulsory interview powers for current and former employees of companies under investigation and the ability to impose financial penalties for failure to comply with investigative steps.

The U.K.'s Enterprise and Regulatory Reform Act also strives to make it easier to prosecute individuals under the criminal cartel offence. Critically, it eliminated the requirement to prove that the individual acted "dishonestly." To alleviate concerns that this change would criminalize legitimate conduct, the act provides for a number of specific defenses and excludes arrangements that are made known to customers or published in the prescribed way.

More broadly on the legislative front, the U.K. government's reform of the private actions regime continued in 2013 with the June publication of a draft Consumer Rights Bill. The bill includes provisions on private actions in competition law. It also extends the jurisdiction of the Competition Appeal Tribunal to hear stand-alone claims and creates a limited opt-out regime for collective claims (with safeguards, including a prohibition on exemplary or treble damages-type collective claims). In this respect, the U.K. measure goes significantly further than the EC proposed directive. The bill is currently going through the parliamentary process.

June also saw the U.K. government launch a consultation on streamlining regulatory and competition appeals. This consultation raised the possibility of significant changes to the competition appeals regime, including potentially reducing the review standard from "full merits" to "judicial review" and limiting the grounds of appeal or circumstances under which new evidence can be admitted on appeal. The consultation has provoked a lively debate, with the Competition Appeal Tribunal strenuously objecting to any changes to the standard of review. A government response is expected to be published in early 2014.

NOTES

[1] Press Release, European Comm'n, Antitrust: Commission fines banks €1.71 billion for participating in cartels in the interest rate derivatives industry (Dec. 4, 2013), available at http://europa.eu/rapid/press-release_IP-13-1208_en.htm.

[2] Joaquín Almunia, Vice President, European Comm'n, Introductory remarks on cartels in the financial section (Dec. 4, 2013), *available at* http://europa.eu/rapid/press-release_SPEECH-13-1020_en.htm.

[3] Press Release, *supra* note 1.

[4] *See, e.g.,* Nicholas Hirst, *Bank cartel fines of €1.7bn will not resolve all questions,* European Voice (Dec. 5, 2013), *available at* http://www.europeanvoice.com/article/imported/bank-cartel-fine-of-1-7bn-will-not-resolve-all-questions/78949.aspx.

[5] Press Release, *supra* note 1. In relation to euro interest rate derivatives, Barclays received full immunity for revealing the existence of the cartel and thereby avoided a fine of around €690 million ($918 million). The EC has opened proceedings against HSBC, Credit Agricole and JPMorgan. In relation to yen interest rate derivatives, UBS received full immunity for reporting its conduct, and thereby avoided a fine of approximately €2.5 billion ($3.3 billion). Citigroup received immunity for one of the infringements, thereby avoiding a fine of approximately €55 million ($74.7 million). The commission has opened proceedings against the broker, ICAP.

[6] In parallel, the EU has recently consulted on raising its *de minimis* threshold for its state aid jurisdictions in order to avoid wasting resources on minor cases. See Public Consultation, European Comm'n, Competition: Consultation on the first draft of the new de minimis Regulation replacing Regulation No 1998/2006 (Aug. 7, 2013), *available at* http://ec.europa.eu/competition/consultations/2013_de_minimis/index_en.html.

[7] U.K. Office of Fair Trading, Applications for Leniency and No-Action in Cartel Cases (July 2013), *available at* http://www.oft.gov.uk/news-and-updates/press/2013/51-13.

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