

# European Competition Law Update

Cartels

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## EU cartel enforcement: “*plus ça change...*”

- 7 cartel decisions in 2009 – similar enforcement rate to recent years: e.g. 7 decisions in 2006; 8 in 2007; 7 in 2008.
- 2009 fines – total of €1.6 billion, down from the high of €3.3 bn (in 2007) and €2.2 bn (in 2008).
- But Commission not getting soft:
  - E.ON/GDF Suez market sharing – 2<sup>nd</sup> largest cartel fine ever at €1.1 bn (and the first in energy sector).
  - Cf Belgian and Dutch beer cartel cases (only 6 years apart): €46 million for Interbrew in 2001; €219 million for Heineken in 2007.
  - Recidivism – in *Calcium Carbide* Akzo would have received 100% uplift (due to four previous cartels); a pattern seems to be emerging: 50% uplift for one previous case; 60% for 2; 90% for 3 and 100% for 4.

## A new DG Comp...

- New Competition Commissioner Almunia
- Monti the *reformer*, Kroes the *enforcer*, Almunia the ...?
- Key issues:
  - excessive fines and inability to pay
  - due process/ECHR – inc. call for separation of investigative and decision-making functions within the Commission

# EU cartel settlements

- For the defendants:
  - A way to reduce fines
  - A way to limit damages actions because you might be able to “improve” facts?
  - A way to reduce uncertainty and cost associated with appeals

## For the regulators:

- A way of getting backlog dealt with
  - Particularly true where leniency process has been successful e.g. EU
- A way of eliminating burden of appeals
  - Because of size of fines, and high likelihood of some reduction, EU cartel decisions are appealed

## A “typical” case

- A limited number of participants
- A global cartel
- Single immunity applicant
- Treble damages actions underway in the US
- Some (most?) have made leniency applications
- Evidence against all is, on balance, strong

## Does this typical case looks right for settlement? If so, who wants what?

- All defendants, except any immunity applicant, want reduction in fine
  - For leniency applicants, it is a windfall
- All defendants want to limit treble damages exposure
  - All leniency applicants will have made statements that raise likelihood of successful damages action
  - Non-lenieny applicants will not have
    - Can they “improve” facts?
- Regulator wants to get rid of case and have no appeal
- Regulator wants to avoid hybrid procedure?

How does this map to  
current procedure?



# The EC

- 2008 Notice, and Amending Regulation
- No settlement yet completed, “several” underway, (DRAM, phosphates) one failed (reputed to be Transformers)
- Process currently is “feeling its way”, and many issues need to be worked through

## The EC – how does it work? What are the issues?

- EC system envisages “three meetings”
  - Preliminary discussions, with sight of evidence (if necessary, e.g. normally non-leniency defendant needs this), and broad parameters of fine (but not multiplier . . . )
  - Second meeting where reaffirm interest after which case statement provided
  - Third meeting where delivery of paperless settlement statement is agreed

# What actually happens? A timeline

- Pre-discussions about settlement
- Letter requesting confirmation of interest, and response
- First meeting
- Access to file if desired
- Second meeting
- Delivery of paperless summary of case by case-team
- Production of paperless draft settlement submission by defendant
- Case team gets provisional “buy in” from College, including sum
- Third meeting, delivery of paperless settlement submission
- Short form SO
  - Parties can object to SO, and go “long-form”
  - Commission can change SO, and go “long-form”
- Short form Decision, effective rubber stamp by College
- Press release

# What are the issues?

- Complete disregards of US proceedings which can be the most significant driver for the defendant
- Does Commission do “hybrid” cases? Will it do one in your case?
- Wanting to settle with all subsidiaries? Current obsession with having EU entity “on deck”
- Wanting single SO and single Decision that gets everyone agreeing to everything? What about non-leniency applicants? Can they “carve out” parts of the case?
- Can statement of acceptance to Commission and short form SO be paperless to try to limit discovery?
- How non-specific is decision? What will help damages actions? Will Commission be willing to help? E.g. names of “victims”? Legal Service wants decision to be motivated – is this rational?
- Everything only comes into focus when you know amount from Commissioners, but not knowing multiplier allows you to produce tight range

## Conclusions on process

- Unlikely to be a flood of settlements
- Those there are will probably benefit defendant
- Set strategy and stick to it
- Commission will be “inflexible” and will obsess about seemingly irrelevant details – defendant needs to appreciate this and be relaxed about the long-haul
- Don’t forget: the choice is not “settle on these terms with 10% discount, or without discount” but “settle on these terms with 10% discount, or face having book thrown at you” – there can be a huge difference!

What's your strategy?

# It all depends

- Are you an immunity applicant in the EU?
  - If so, protect leniency rate, and limit damages
- Are you a leniency applicant elsewhere?
  - Can you reasonably separate that case from EU for general liability and for damages? Probably not.
- If not a leniency applicant anywhere, will Commission do hybrid case?
  - If yes, little or no leverage
  - If no, high leverage
- Have you already settled damages actions in the US? Are they on a global basis?
  - If yes, EU proceeding unlikely to harm position (but note claim for contribution by non-settling)
  - If no, EU proceedings may cause significant harm



# UK cartel enforcement

- *Bid-rigging in UK construction industry*
- Cover-pricing plus some compensation payments
  - >1000 firms >4,000 tenders
  - on-site inspections at >50 firms
  - 103 firms fined a total of £130 million
- OFT flexibility
  - 33 leniency cases; fast-track offer: further 41
  - Inability to pay
- 25 appeals clogging the system...





# UK cartel enforcement

- *Construction Recruitment Forum*
- 6 recruitment agencies fined total of £40 million
- “Margin protection initiative” aka Operation Wipeout
  - collective refusal to supply
  - price fixing
- Points of interest:
  - Inability to pay: 30-40 % reduction
  - Compliance programme put in place 0-10% reduction
  - Involvement of senior management...



# Carrot vs sticks

- OFT research paper: *assessment of discretionary penalties regime*
  - UK fines 65% lower than EU fines
  - 76% lower than EU when applying 2006 guidance
  - 50-75% lower than US guidance
- But complementary tools needed:
  - individual sanctions
  - leniency
  - settlement
  - private actions



# Director disqualification

- Competition Disqualification Orders - up to 15 years
- Proposed changes:
  - available in more situations
  - applicable to more people: the '*ought to have known*' standard
- Why the change?
  - to drive positive compliance and accountability
  - consistency: avoid unfair burden on smaller companies
- "*Ought to have known*":
  - Consider director's role, position, skill, experience, access to information, general knowledge – including what director should have known
  - Sliding scale of exposure - a poisoned chalice?
- Implications:
  - compliance message
  - info requests



# Criminal cartels

- *Marine Hoses* but more in the pipeline...?
  - *British Airways* - airline fuel surcharge
  - *JJB/Sports Direct*
- Extradition:
  - *Norris*: Supreme Court judgment dismissing appeal
  - Extradition based around competition law facts



# OFT consultation on compliance

- The drivers of compliance:
  - ethics
  - empowering employees to compete?
  - discounts from penalties
- Improve OFT guidance?
  - Budget and certainty
  - Rogue employee
- A middle way?



## *Safeway vs. ex-employees*

- OFT *Dairy* investigation - ongoing
- Safeway damages claim
- Survived strike out application
  - S's liability not sufficiently primary to stop S from claiming damages
  - not fundamentally inconsistent with CA98
- Only preliminary issue and subject to appeal
- However...compliance implications:
  - for employee
  - for employer



# Employee-cooperation

- Personal liability - diverging employer/employee interests
- Co-operation - for fact-finding and defence
- High risk individuals and tipping off
- Separate and independent legal representation
- Handling employees
  - disciplinary proceedings v keeping employees on-side
- Structured exit:
  - ongoing co-operation
  - pay legal fees? waive right to sue employee?