Competition Law – Recent Developments and Practical Guidance for In-house Counsel

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So Why Does Antitrust Matter To Me?

- Increasing level of enforcement across the EU
- Increasing personal enforcement across the EU
- Private damage litigation – possibility of follow-on action
- Higher expectations regarding compliance programmes and resources
  - UK and French regimes take into account existence of compliance procedures
- Dawn raids present increasingly complex challenges
  - Off-site inspections
  - Smartphones, home offices, work done “on the move”
- Industry consolidation presents additional compliance challenges, e.g., deals with competitors
Red Flags

1. Oligopoly or Concentrated Markets
2. Trade Association Activity
3. Commoditized or Transparent Markets
4. Markets Subject to Heightened Enforcement Scrutiny
5. Compliance-light countries
Generally, cartel enforcement remains top priority

- EU cartel fines among the highest worldwide
- 2011 was a “blip”

Level of individual fines tremendous in 2012

- Cathode ray tubes (CRT) cartel fine highest EU fine for a cartel ever (€1.47b)
- 9 out of the 10 highest ever EU fines per case were imposed in the last six years
- Individual fines for Philips (€705m) and LG Electronics (€688m) in 2012 were second and third highest ever EU fines per individual company

US: FY 2011 criminal fines exceeded $1 billion (48% increase from 2010)

Joaquin Almunia, EC Competition Commissioner: Total fines have dropped from record level two years ago, but figures are expected “to pick up again this year and in the more distant future” (June 2012)
Cartel Enforcement

- **Globalization** of cartel enforcement: over 100 countries employ cartel laws

- **Increasing global coordination amongst enforcers**: e.g., marine hose, air freight cargo, auto-parts, CRT cartels
  - New: EU cooperation agreements with Switzerland (2013) and South Korea (2009) / Memoranda of Understanding with China (2013) and Brazil (2009)

- **Wider jurisdictional reach of the EC?** - Optical disk drive (ODD) manufacturers, autoparts cartels: *indirect* sales = sufficient link?
Cartel Enforcement

- Fines Increasing
- Settlements
  - Since June 2008 six EU cartel cases have been settled: (i) Dynamic Random Access Memory cartel, (ii) Animal Feed Phosphates cartel (both 2010), (iii) Detergents cartel, (iv) CRT glass cartel, (v) refrigeration compressors cartel (all 2011) and (vi) Water Management Products cartel (2012), more to come

  - 10% fine reduction, swift conclusion of case
  - EC typically only offers settlement procedure where all companies involved are willing to settle

- Inability-to-pay procedure
  - “Requests for a reduction of our fines on grounds of inability to pay increased during the crisis”. (EC Competition Commissioner Almunia)

Novelty
- Fine reduction for mono-product companies
Don’t Forget Info Exchange…

- **Exchange of commercially sensitive information** illegal “per se” in the EU, with varying degrees of enforcement by national authorities
  - March 2013: German Federal Cartel Office (FCO) concluded proceedings resulting in total record fines of **€63m** against 15 manufacturers of drug store products (and their trade association) for sharing information on prices and negotiations with retailers
  - Aug 2012: FCO fined confectionary producer Haribo **€2.4m** for informing its competitor Mars about its negotiations with supermarket chains (Mars as whistleblower received immunity)
  - Jan 2012: Spanish CNC imposed fines of **€4m** against Suzuki and Honda because two employees exchanged their motorbike price lists in **two emails sent on one day**
  - Dec 2011: Dutch authority fined 3 mobile phone operators **€16m** for exchanging information on commissions to be paid to retailers in **one meeting** (following preliminary ruling by ECJ)

- “Easy” to commit (“water cooler event”) & easier to prove than other infringements
- Compliance in M&A context (clean teams) ↔ in day-to-day operations
... Nor RPMs...

**Resale Price Maintenance (RPM)**

- Illegal “per se” in the EU, with varying degrees of enforcement by national authorities

  - **Expedia/Bookings.com** (2012 – ongoing): UK Office of Fair Trading (OFT) alleged that RPMs with hotel chain IHG restricted online travel agents’ ability to discount the price of room-only hotel accommodations; OFT also investigated other infringements

  - **Tooltechnic Systems** (August 2012): FCO fined electronic tools manufacturer TTS €8.2m for illegal RPM. TTS had sought to enforce strict adherence to the “recommended” resale price by threatening unfavorable conditions or termination in case of non-compliance

  - **Husky CZ** (2011): Czech Competition Office fined outdoor clothing producer Husky ca. €90k for RPM practices in relation to sales made over the internet

  - **UK Tobacco Case** (2008 - 2010): OFT imposed a record total fine of £225m on two tobacco manufacturers and 10 retailers for anti-competitive retail pricing practices (reduced on appeal to £62m in December 2011); OFT also investigated other infringements
... Nor MFNs

- **Most Favored Nations clauses (MFNs)** - contractual obligations on a seller to offer customer the best price it offers to any other customer
  - Challengeable?
  - Defensible?

- **Recent Cases**
  - **Expedia/Bookings.com**
  - **E-books**
  - **Universal/EMI** (2012) – merger proceeding
Trade association meetings – where it all began...

Agencies are taking a hard look at competitors’ interactions at trade association meetings

- **French Water Sector** (2012 - ongoing): EC is investigating whether French water suppliers coordinated their behaviour together with (and using as platform) their trade association, Fédération Professionnelle des Entreprises de l'Eau

- **Washing Powder cartel** (2011): Suppliers of household detergents fined total of **€315m**. EC found that cartel started when the companies implemented an initiative through trade association to improve environmental performance of products. Although no anticompetitive practices took place at this point, three suppliers subsequently coordinated prices

- **McWane/Star Pipe Products** (2012): FTC alleged that a price fixing conspiracy among pipe fitting suppliers was allegedly facilitated through the companies’ public communications with distributors at the industry’s trade association meetings (May 2013: court dismissed price-fixing charges, but found McWane had illegally excluded competitors)

- Compliance strategies and awareness vary across industries
Antitrust laws prohibit abuse of dominant position, monopolization and attempted monopolization

- “Special responsibility”: Typically, a market share of 40% or more is required, BUT
  - US: also attempted monopolization covered
  - EU: national laws may extend rules (e.g., Germany: rules extend to certain non-dominant companies)

- Examples of conduct that may be considered “abusive”
  - Tying & Bundling – Agreements to sell one product, but only if the purchaser agrees to buy another; offering discounts to customers who buy across multiple product lines
  - Refusals to Deal – Refusing to deal with a customer or supplier
  - Predatory Pricing – Pricing below cost
  - Conditional rebates/exclusive purchasing obligation – Rewarding particular purchasing behaviour
  - Access to associations/societies/essential patents – Refusing access to markets and essential technology

- Check: Identify and monitor whether for any business activity you enjoy a market position that gives rise to “special responsibility“
Top Dogs & Special Responsibility

26 EU commitment decisions
“Voluntary” undertaking offered by company / No fine being imposed

15 EU prohibition decisions Fines being imposed
Last major case: Telekomunikacja Polska (2011) – fine of €127m

- Recently: EC favours commitments in abuse cases → so no fine/compliance risk?
  - Limits flexibility/reputational risk
    - Failure to comply I (March 2012): EC fined Microsoft €561m for not complying temporarily with commitment (i.e., to let users pick their preferred browser through choice screen)
    - Failure to comply II (?) (April 2012): EC is investigating, inter alia, whether Motorola failed to comply with its commitments to license its standard essential patents on FRAND terms by seeking and enforcing injunctions against Apple and Microsoft
    - Failure to cooperate (March 2012): EC fined Czech energy companies €2.5m for obstruction during an investigation (having failed to block one(!) email account and having diverted incoming emails for at least one blocked email account)
Top Dogs & Special Responsibility

- June 2011: EC imposed fine of €127m on Polish telecoms operator TP for refusing/restricting access to competitors on downstream broadband markets in relation to TP’s network and wholesale broadband services.

- December 2012: EC preliminary finding that Samsung abused its dominant position by seeking injunctions against Apple in various Member States on basis of its mobile phone standard-essential patents (SEPs). EC considered enforcement of injunctions illegal in relation to SEPs where licensee is willing to negotiate on FRAND terms.

- April 2013: Google offered commitments to alleviate EC concerns that it had abused its dominant position in online search advertising by (i) treating favourably Google’s own specialized web search services, (ii) use of content from third party websites, (iii) obligating publishers to obtain all/most of their online search advertisements from Google, and (iv) restricting ability to transfer online search advertising campaigns to rival search advertising platforms.

- August 2011: OFT fined Reckitt Benckiser £10.2m for abuse of dominance in relation to its heartburn medicines for limiting choice and hindering competition from generic medicines.
The Merger Context

Failure to Notify

- **Electrabel/Compagnie Nationale de Rhône** (Dec 2012) – EU General Court upheld EC’s €20m fine, even though no competition concerns arose from the transaction.

- **KHTG/Karlovarska Teplarenska** (Feb 2013) – Czech Competition Office fined solid fuels provider KHTG. Although KHTG notified (and obtained clearance) for the transaction in 2010, the Czech regulator found that the transaction had been consummated in 2002.

Incomplete Information

- **Danish Agro** (April 2012) – Danish Competition Authority fined chemicals and feeds provider for not disclosing, during merger notification, that a potential competitor was in distress.

- **German meat manufacturer** (Jan 2013) fined by FCO for failing to submit information on the majority stakes held by its principal shareholder in a major downstream player.

Ancillary Non-Competes

- **Siemens/Areva** (Oct 2009 - ongoing): EC concerned about length and nature of parties’ non-compete agreement post-JV. Parties reduced the duration of the agreement to 3 years (initially 11 years) and limited it to the JV’s core products.

Increased Administrative Burden on Notifying/Third parties in Merger Proceedings
Have you thought about this?

Dawn Raids

- March 2013: EC issued revised guidance on the conduct of inspections at business premises of undertakings suspected of anticompetitive behaviour
  - Companies need to cooperate fully and actively on a number of IT environment obligations: e.g., temporarily block email accounts, disconnect running computers from the network, remove and re-install hard drives from computers and provide 'administrator access rights' support
  - EC can search electronic information within the undertaking’s entire IT environment and storage media, including laptops, desktops, tablets, mobile phones, CD-ROM, DVD and USB-keys
- November 2012: The European Court of Justice (ECJ) upheld a €38m fine imposed on E.ON Energie for breaking a seal during EC dawn raids
  - Invoking the possibility that the seal could have been defective was not sufficient to undermine the EC’s case
  - Ensure that seals are not broken, even accidentally. Have sealed premises guarded, if necessary
- Following a dawn raid – what next?
- Legal privilege
Across The Pond

- Even if you Have Never Lived nor Worked in the US, you may be Prosecuted
  - March 2010: Ian Norris, a retired UK executive, was extradited to the US on charges related to price fixing of carbon brushes and obstruction of justice. He was imprisoned for 18 months
  - Jan 2009: Keith Packer, UK manager of BA World Cargo, served eight months in a US Federal Prison Camp for involvement in anti-competitive conduct in relation to fuel surcharges
    - “I could fight the extradition via a slow and expensive route through the House of Lords and the European Court of Human Rights, but I was unlikely to win and, in failing, it would mean US marshals would fly to the UK to escort me to America” (Keith Packer, September 2011)

- Mistakes can put you in Jail
  - Over 280 executives have been sentenced to prison in the U.S. since 2000; jail sentences averaged 26 months in 2012
  - U.S. has “eliminat[ed] ‘no-jail’ deals for any defendant, regardless of whether the defendant [is] a foreign national or a U.S. citizen or whether the cartel [is] international or domestic.” DOJ Statement 2009
## Across The Pond

### Top Historical DOJ Criminal Antitrust Fines

<table>
<thead>
<tr>
<th>COMPANY</th>
<th>PRODUCT</th>
<th>FINE ($ MILLIONS)</th>
</tr>
</thead>
<tbody>
<tr>
<td>AU Optronics Corporation</td>
<td>Liquid Crystal Display (LCD) Panels</td>
<td>$500</td>
</tr>
<tr>
<td>F. Hoffman-La Roche, Ltd.</td>
<td>Vitamins</td>
<td>$500</td>
</tr>
<tr>
<td>Yazaki Corporation</td>
<td>Automotive Parts</td>
<td>$470</td>
</tr>
<tr>
<td>LG Display Co., Ltd.</td>
<td>Liquid Crystal Display (LCD) Panels</td>
<td>$400</td>
</tr>
<tr>
<td>Société Air France and Koninklijke Luchtvaart Maatschappij, N.V.</td>
<td>Air Transportation (Cargo)</td>
<td>$350</td>
</tr>
<tr>
<td>Korean Air Lines Co., Ltd.</td>
<td>Air Transportation (Cargo &amp; Passenger)</td>
<td>$300</td>
</tr>
<tr>
<td>British Airways PLC</td>
<td>Air Transportation (Cargo &amp; Passenger)</td>
<td>$300</td>
</tr>
<tr>
<td>Samsung Electronics Company, Ltd.</td>
<td>DRAM</td>
<td>$300</td>
</tr>
<tr>
<td>BASF AG</td>
<td>Vitamins</td>
<td>$225</td>
</tr>
<tr>
<td>CHI MEI Optoelectronics Corporation</td>
<td>Liquid Crystal Display (LCD) Panels</td>
<td>$220</td>
</tr>
<tr>
<td>Furukawa Electric Co. Ltd.</td>
<td>Automotive Parts</td>
<td>$200</td>
</tr>
</tbody>
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