Competition Law
Compliance – The Management’s Role

Rules of Competition – Risks and Opportunities
Sofia, 12 June 2012

Thomas Wessely
Overview

1. Recent enforcement trends in EU antitrust law & policy
2. Preparing your company for dawn raids
3. Leniency applications – potential pitfalls
4. Recent developments in damage claims
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Dirty Secrets In Soap Prices

By MAX COLCHESTER And CHRISTINA PASSARIELLO

PARIS—For nearly a decade, executives from consumer goods giants including Procter & Gamble Co. secretly met in discreet restaurants around Paris, allegedly to fix the price of laundry detergent in France.

On Thursday, the country’s antitrust watchdog handed them the check.

E.U. Fines 11 Airlines Over $1 Billion in Cargo Cartel

By JAMES KANTER
Published: November 9, 2010

Mercedes executive arrested in cartel case
Air freight forwarding cartel

• EU Commission imposed total fines € 169 million in March 2012
• Forwarders colluded on surcharges and charging mechanisms in particular the Europe-USA and the China/Hong Kong-Europe lanes
• Four distinct cartels from 2002 to 2007:
  - new export system
  - advanced manifest system
  - currency adjustment factor
  - peak season surcharge
• DHL received full immunity from fines for all four cartels

Joaquín Almunia: "In times of crisis, it is all the more important to stamp out the hidden tax that cartels impose on our economy. ... Companies should be aware that crossing the line and colluding on prices comes at a high price, as today's decision illustrates."
Window mountings cartel

- EU Commission imposed total fines €86 million in March 2012
- Duration from November 1999 to July 2007
- Every year parties set a price increase for the following year or to agree on a surcharge for raw material costs.
- Cartel affecting the EU as a whole (size of the market estimated to be at least €1 billion)
- Fine on one participant (confidential) cut by 45% for inability to pay
- Discretionary reduction of penalties in consideration that the companies only produce one type of product

<table>
<thead>
<tr>
<th>Company</th>
<th>Leniency reduction</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roto</td>
<td>100%</td>
<td>€0</td>
</tr>
<tr>
<td>Gretsch</td>
<td>45%</td>
<td>€20.5 m</td>
</tr>
<tr>
<td>Maco</td>
<td>25%</td>
<td>€18.5 m</td>
</tr>
<tr>
<td>6 others</td>
<td>0%</td>
<td>€46.5 m</td>
</tr>
</tbody>
</table>
Fridge compressors cartel

- EU Commission imposed total fines € 161 million in December 2011
- Duration from April 2004 until October 2007 (15 November 2006 for Panasonic)
- Bilateral, trilateral and multilateral meetings
- Companies colluded to fix prices throughout Europe and keep their market shares stable
- For one participant (confidential) further reduction for inability to pay
- Fifth settlement by EU Commission since introduction in 2008

<table>
<thead>
<tr>
<th>Company</th>
<th>Leniency reduction</th>
<th>Settlement reduction</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tecumseh</td>
<td>100%</td>
<td>-</td>
<td>€ 0</td>
</tr>
<tr>
<td>Panasonic</td>
<td>40%</td>
<td>10%</td>
<td>€ 7.6 m</td>
</tr>
<tr>
<td>ACC SpA</td>
<td>25%</td>
<td>10%</td>
<td>€ 11 m</td>
</tr>
<tr>
<td>Embraco</td>
<td>20%</td>
<td>10%</td>
<td>€ 54.3 m</td>
</tr>
<tr>
<td>Danfoss</td>
<td>15%</td>
<td>10%</td>
<td>€ 90 m</td>
</tr>
</tbody>
</table>
Cathode Ray Tubes (CRT) glass cartel

- EU Commission imposed total fines €128 million in October 2011
- Duration from February 1999 until December 2004
- Bilateral, trilateral and multilateral meetings coordinating prices for the EU as a whole
- Fine on Asahi and Schott reduced since not involved in all aspects of the cartel
- Fourth settlement by EU Commission since introduction in 2008

<table>
<thead>
<tr>
<th>Company</th>
<th>Leniency reduction</th>
<th>Settlement reduction</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Samsung</td>
<td>100%</td>
<td>-</td>
<td>€0</td>
</tr>
<tr>
<td>Nippon</td>
<td>50%</td>
<td>10%</td>
<td>€43.2 m</td>
</tr>
<tr>
<td>Schott</td>
<td>0%</td>
<td>10%</td>
<td>€40.4 m</td>
</tr>
<tr>
<td>Asahi</td>
<td>0%</td>
<td>10%</td>
<td>€45.1 m</td>
</tr>
</tbody>
</table>
Being small and inexperienced is no excuse

No exception for small and medium enterprises

- 7 March 2012: French Competition Authority fined an endive cartel €3.65 million
- 6 June 2012: Dutch Competition Authority fined two cartels in the pepper and onion sectors €23 million

No exception on account of recent accession to the EU

- 29 March 2012: EU Commission imposed €2.5 million fine on Czech energy company Energetický a průmyslový for obstructing raid in 2009
- Declaration by Energetický: “[the company] admitted that certain inexperience with this area of European law and a lack of knowledge of the commissioners’ procedures during this type of investigation were reflected in the course taken by the inspection. The fact that because of its size at that time the company did not even expect that it could be subjected to such inspection, also played its role.”
Conduct pre-accession to the EU may still matter

Slovak Telekom GC judgment (23 March 2012)

- EU Commission could order Slovak Telekom to disclose information predating Slovakia’s accession to the EU in its abuse of dominance investigation against the company Follow-up on objections made during the raid

Toshiba ECJ judgment (14 February 2012)

- The fact that the European Commission had initiated an investigation and sanctioned the cartel did not prevent the Czech Competition Authority from sanctioning the effects the same conduct produced in the Czech Republic prior to its accession to the EU on 1 May 2004
Steady flow of dawn raids in 2011 and 2012

(selected public cases only)
Recent EU dawn raids more in detail

- **Energy exchanges dawn raids (February 2012)**
  - Raided offices of Europe’s largest electricity exchanges (Nord Pool and Epex)

- **Ball bearings (November 2011)**
  - Raided offices of SKF (in Sweden and Germany), Schaffler, Jtekt and Nachi-Fujikoshi

- **Gas (September 2011)**
  - Raided offices 20 companies active in the supply, transmission and storage of natural gas across 10 EU member states
  - Raided companies included Russia’s Gazprom, RWE and Eon Ruhrugas in Germany, OMV in Austria, SPP in Slovakia as well as PGNiG and Gaz System in Poland
Recent case-law on cartels (1/2)

- Close scrutiny on facts
  - Reductions in the fines connected with a reduction in duration
  - GC industrial bags judgments of 6 March 2012 (T- 53/06, T- 64/06, T-65/06)
- In order to be held liable, not necessary to be active on cartelised market
  - GC Deltafina judgment of 8 September 2010 (T-29/05)

“Where an undertaking tacitly approves an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, the effect of its behaviour is to encourage the continuation of the infringement and to compromise its discovery”

“These principles apply mutatis mutandis in respect of meetings which are attended not only by competing producers, but also by their clients”

An undertaking can be held liable when “the purpose of its conduct [...] is to restrict competition on a specific relevant market [...], and that does not mean that the undertaking has to be active on that relevant market itself”
Recent case-law on cartels (2/2)

- Evolving case-law on parental liability
  - GC chloroprene rubber judgment of 2 February 2012 (T-76/08 and T-83/08)
  - 50/50 parent companies of JV can be held liable for JV’s cartel conduct

“Although a full function joint venture is deemed to perform on a lasting basis all the functions of an autonomous economic entity...that autonomy does not mean...that the joint venture enjoys autonomy as regards the adoption of its strategic decisions and that it is not therefore under the decisive influence exercised by its parent companies for the purposes of [Art.101]”

“Regarding the argument that the Commission's approach is inconsistent with its previous decision-making practice...the applicant cannot invoke a legitimate expectation that a previous decision-making practice ... will be maintained, when the Commission has reasoned its decision explicitly by reference to the file of the case in question'
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What are the trends in antitrust enforcement?

More co-ordination between regulators
- Cross-border co-ordination
  - EU Commission and US DoJ
  - EU negotiating exchange of cartel information with Switzerland
- Co-ordination between regulators (e.g. competition and financial services regulators)

More simultaneous raids in multiple locations

More sophisticated and IT-centric raids
- Focus on maintaining live systems while dealing with broad IT requests

More aggressive officials
- Increase in allegations of obstruction
- Use of exceptionally large requests for information

Antitrust compliance programmes: an effective instrument in the hands of the management
Dawn raids training: why it matters to get it right

Avoid allegations of obstruction – some recent examples:

- Polkomtel – €33m fine for delaying start of raid, refusing to provide hard disk and providing incomplete set of documents (Polish competition authority)
- Spanish ferries – €2m fine for delaying start of raid and access to personnel/documents (Spanish competition authority)
- E.ON – €30m fine for breaching seal (European Commission)

Maximise chances to benefit from leniency and other co-operation discounts

- Laundry detergents – Procter & Gamble saved over €200m in 2011 through 50% leniency discount and 10% settlement discount (Henkel had reported the cartel and obtained immunity from fines)

<table>
<thead>
<tr>
<th>Brand</th>
<th>Reduction under the Notice (%)</th>
<th>Reduction under the Leniency Notice</th>
<th>Reduction under the Settlement</th>
<th>Fine (EUR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Henkel</td>
<td>100%</td>
<td>N/A</td>
<td></td>
<td>0</td>
</tr>
<tr>
<td>Procter &amp; Gamble</td>
<td>50%</td>
<td>10%</td>
<td></td>
<td>211 200 000</td>
</tr>
<tr>
<td>Unilever</td>
<td>25%</td>
<td>10%</td>
<td></td>
<td>104 000 000</td>
</tr>
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</table>
## Day 1 of a typical dawn raid

| Start of day | Officials arrive, announce the inspection and will wait a short period of time for a senior company representative to arrive.  
Officials discuss the decision authorising the inspection with the company's representatives.  
Officials may be willing to wait a short period of time (<1 hour) for external lawyers to arrive.  
Officials commence discussions about IT extraction with the company. |
| --- | --- |
| Middle of the day | Officials demand access to the desks, filing cabinets, etc, of relevant employees.  
Officials may wish to interview employees about the documents.  
Officials expect access to email and other IT systems (possible debate around imaging) to be provided on Day 1.  
Officials review documents and make copies of those they wish to remove. |
| End of day | Officials indicate whether they will be coming back the next day.  
If so, officials may seal relevant spaces and/or materials. |
What should you be doing during the dawn raid?

**With the raid team**

Shadowing the raid team
- Are the documents copied within scope?
- Are any of the documents being copied privileged (brown envelope procedure for arguably privileged documents)?
- Are any questions asked of employees permissible?
- Make notes of search terms run across IT systems

Relationship with the raid team
- Provide a private room for their use
- Provide lunch, refreshments, etc.

**Behind the scenes**

Internal investigation
- Interviewing employees
- Limited document review
- Urgent – is there any basis for a leniency application?

Internal communications
- Are other company’s sites being raided?
- Communication with employees
- Reporting to senior management / Board

External communications
- Media strategy/dealing with customers
- Stock exchange notifications?
- Notification to insurers?

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Hot topics & likely flash points during dawn raid

Imaging of IT systems

- Commission’s recent practice is to ask to image large portions of IT systems for subsequent review at the Commission premises

Disputes about privilege

- Commission: only legal advice of external, EEA qualified lawyers are protected
- NCAs: matter of local law
- “Brown envelope” procedure where privilege is in dispute

Right to interview employees

- Just because regulators ask for something, does not necessarily mean they are entitled to it
- Criminal cases – do individuals need their own legal advice?
Lessons from a recent raid

Access to electronic data
• EU Commission threatened allegations of obstruction

Imaging of hard disks
• Commission transferred data on its own storage devices

Privacy issues
• Company had precedents of being fined under German privacy law

Effective shadowing is key
• Ability to identify keywords used by Commission in order to carry out in parallel internal investigation

Appropriate cautions to preserve seals
• Commission’s seals very sensitive to vibrations
Potential conflicts of interest company vs. employee

<table>
<thead>
<tr>
<th>Company</th>
<th>Employee</th>
</tr>
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<tbody>
<tr>
<td>If applicant granted immunity…</td>
<td>…employees might become subject to criminal prosecution</td>
</tr>
<tr>
<td>Provision of evidence to authority / admission of guilt…</td>
<td>…employees may not accept this</td>
</tr>
<tr>
<td>Proving guilt of the other cartelists..</td>
<td>…employees remain concerned about personal reputation, future employment prospects</td>
</tr>
<tr>
<td>Board wants to demonstrate to shareholders that they have taken action…</td>
<td>…employees unwilling to be seen as “scapegoats” for senior management</td>
</tr>
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</table>

- Clear risk of divergent interests
- Responsibility of company’s external counsel is solely to shareholders of the company
- Important to warn individual employees that external counsel is not representing them
- Consider paying for separate legal representation for employees?
How to prepare for a dawn raid

• Front counter staff – do they know who to call if regulators arrive?
• Are there several people at every site who could take charge and deal with the regulators?
• Are there sufficient staff to shadow officials until external lawyers arrive?
• Is the IT department (on site or over the phone) able to answer questions about IT systems and grant access to officials?
• Is there a document retention and general employee communication email ready to be sent out?
• Is there a central person to be notified of a raid so that the company will know quickly if raids are being conducted at multiple sites / in multiple countries?
• Is external support in place and ready to be called on: lawyers for the company, lawyers for employees (in a criminal investigation)
• Is there a system to protect seals overnight?
Challenging the raid – a growth area?

Follow-up on objections made during the raid
• Recovering evidence once it has been seized
• Correcting evidence given in interviews

Use of separate judicial review proceedings (or threat of them)
• EU Commission’s raiding methods under scrutiny:
  - Submarine cable appeals (Nexans and Prysmian)
  - Deutsche Bahn dawn raids

Challenges on human rights grounds
• A consequence of Lisbon Treaty
• *Menarini* ECtHR judgment
• *KME* ECJ judgment: expected increased scrutiny by EU Courts
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Lessons from leniency applications (1/4)

No one-stop-shop at EU level: immunity applicant at EU level not necessarily considered first-in at national level

• DHL immunity applicant to the EU Commission for freight forwarding cartel and puts “markers” at national level
  - DHL obtains immunity at EU level for air freight forwarding cartels
• …but Italian Competition Authority investigates road freight forwarding cartel
  - DHL has provided no evidence of road freight forwarding cartel to the Italian Competition Authority: fined € 6.6 million
  - Schenker considered first-in in Italy and obtained full immunity
Lessons from leniency applications (2/4)

Another case where immunity applicant at EU level not considered first-in at national level

- Henkel immunity applicant to the EU Commission for detergents cartel and puts “markers” at national level
  - Henkel obtains immunity at EU level for washing powder cartel
- …but French Competition Authority investigates laundry detergent cartel to the detriment of French supermarkets
  - Henkel has provided no evidence on the French-specific cartel to the French Competition Authority: fined € 92 million
  - Unilever (fined € 104 million at EU level) considered first-in in France and obtained full immunity
Lessons from leniency applications (3/4)

It is essential to ensure that internal investigation covers all cartel conduct (including in neighbouring markets)

- In January 2007 ABB obtains from EU Commission full immunity for Gas insulated switchgear cartel (competitor Siemens fines €418 million)
- ... but in October 2009 is fined by €33.7 million for Power transformers cartel (Siemens first-in and obtained full immunity)
- In February 2007 ThyssenKrupp fined for separate Elevators and escalators cartels in four EU Countries:
  - Leniency discount granted for cartels in Belgium and the Netherlands (discount of €34 million in total)
  - No leniency discount for Germany and Luxembourg: cartels not uncovered during internal investigation
Lessons from leniency applications (4/4)

Timing is of essence!

• Oxygen peroxide cartel
  - 3 April 2006 (9:30) Solvay calls EU Commission, admits participation in the infringement and requests an urgent meeting to provide oral evidence
  - 3 April 2006 (13:24) Solvay sends fax to EU Commission and asks for meeting
  - 3 April 2006 (15:50) Arkema sends by fax leniency application to EU Commission
  - 3 April 2006 (17:24) Solvay indicates by fax that it is ready to provide oral information to the Commission immediately
  - 4 April 2006 Solvay submits leniency application to EU Commission

• Arkema considered third-in and obtains 30% discount
• Solvay considered fourth-in and obtains 10% discount
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Steady flow of damage claims

- EU Commission’s press releases always mention the possibility to recoup damages
- The English Court of Appeal has set an October 2012 date on Ryanair’s sue against ExxonMobil for damages caused by company’s Esso unit in Italy
- Sasol and Shell are facing damage claims from 64 companies, seeking redress in an English court for higher prices charged as a result of a cartel in paraffin wax
- CDC (specialising in damage claims) filed €114 m claim against cement cartel in Germany
- National Grid (Britain’s electricity transmission network) seeks £108 m damages from members of a switchgear cartel
- EU-Commission to recoup damages from lift cartel
- 9 May 2012: HUK-Coburg challenges EU Commission refusal to disclose car-glass cartel details (EU Courts more and more open to disclosure)
Access to leniency materials: evolving case-law

Courts more and more open to disclosure

• 14 June 2011 *Pfleiderer* preliminary ruling
  - ECJ indicates that national courts should decide on a case-by-case basis whether leniency documents should be disclosed
  - 18 January 2012 Amtsgericht Bonn refuses access to leniency statements

• 4 April 2012 *National Grid v ABB* and others damage claim
  - English High Court carries out balancing exercise for the first time

• 22 May 2012 *EnBW v EU Commission* access to file litigation
  - General Court annulled Commission’s refusal of access to immunity documents and Commission internal documents under Reg. 1049/2001

• Pending case C-536/11
  - Preliminary ruling: does EU law allow for national legislation that restricts disclosure for cartel documents so that judge is unable to balance interests of both sides?
Access to leniency materials: proposed policy action

• European Union:
  - EU Commission work programme 2012: “…ensure effective damages actions before national courts for breaches of EU antitrust rules and to clarify the interrelation of such private actions with public enforcement by the Commission and the national competition authorities, notably as regards the protection of leniency programmes, in order to preserve the central role of public enforcement in the EU”

• European Competition Network: resolution of 23 May 2012 on protection of leniency material in the context of civil damages actions

• Germany: FCO is pushing for inclusion of explicit protection of leniency document in bill amending the competition legislation.

• United Kingdom: ongoing consultation on new regime for private damages actions (published 26 April 2012)
Discussion and questions
Tailor compliance strategy to your needs

Sector of activity
• Is there an history of previous infringements?
  - Particular caution due to increase in fine up to 100% for repeated infringement
• Is it a sector the spotlight of the authorities?
  - European Parliament has asked for sector-wide inquiry in the food sector
  - In May 2012 European Competition Network (ECN) published report on antitrust enforcement in food sector (>180 cases from 2004 to 2011)
  - Current focus on consumer and retail products

Frequency/type of interaction with competitors
• Participation to industry meetings or within trade associations
• Supply relationships with competitors

Characteristics of the market
• Cartel and/or dominance risk?

Remember…
Effective compliance programmes (1/3)

Compliance guidelines
• Enacted and backed by the board
• Concise and clear: DO’s and DON’Ts
• Should condemn clearly any anti-competitive behaviour and briefly indicate the grounds and the consequences
• Should contain concise procedural rules, i.e. on communication and the involvement of the legal department

Compliance manual
• Describe basic rules of competition law
• Recommended behaviour in cases of investigations by the competition authorities (“Dawn raids guidelines”)
• Possibly: internal Leniency Programme

Training of employees
• Seminar for employees at all levels
• Reinforce training through e-learning
• Organise tests and obtain subsequent declarations of compliance
Effective compliance programmes (2/3)

Rules on involving the legal department

• Employees should contact the legal department with regard to:
  - contacts with competitors: competition rules apply everywhere (at fairs, at meetings of trade associations, during casual contacts)
  - discuss agenda and make employees aware about risks: they should leave any meeting and terminate any discussion relating to anti-competitive behaviour
  - dealings with competitors: make employees aware of risky clauses in contracts
  - drafting of e-mails and other written documents to costumers (or competitors): avoid ambiguous statements
  - potential infringements: initial contact with legal department by phone
    - consider hotline circumventing company hierarchy
Effective compliance programmes (3/3)

Antitrust audits and evaluation programmes
• Periodically check books, contracts etc. by internal or external lawyers
• Verify company’s own behaviors in the competitive process in bidding markets
• Simulation of a dawn raid
• Periodic risk assessment based on audits

Employment law and organisational measures
• Member of senior management to oversee programme
• Designated individual ("compliance officer") responsible for the day to day operation of the programme
• Integration of “compliance clause” in employment contracts
EU Commission’s view on compliance programmes

EU Commission’s antitrust compliance booklet (November 2011)

• Need for a clear strategy: “Companies should think ahead, develop an approach tailor-made for their particular situation and set it out in writing, rather than react to problems when they occur”

• Visible and lasting commitment: “The message that compliance with the law is a fundamental policy of the company needs to be clearly endorsed”

• Tailor-made approach: “A company should devote sufficient resources – appropriate to its size and the risks it faces – to ensure that it has a credible programme”

• Proper internal reporting mechanism: “Staff must not only be aware of potential conflicts with EU competition law, but also need to know whom to contact when concrete situations of conflict arise”

• …but “the mere existence of a compliance programme will not be considered as an attenuating circumstance”
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