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E.U. Targets Cartels

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With just three decisions adopted since Jan. 1, and with another seven months to go before the end of the year, the amount of fines imposed on cartels by the European Commission has already equaled the amount of fines imposed in 2006 and broken all previous commission records. And yet, this may only be the tip of the iceberg.

In January, February and April, the commission imposed heavy fines on the members of three large cartels: the "gas insulated switchgear cartel," the "lift cartel" and the "Dutch beer cartel," totaling 750 million, 990 million and 273 million euros respectively, i.e. more than 2 billion euros total. This article does not discuss the specific findings of each of these cases, because the commission claims to have gathered compelling evidence, largely on the basis of its successful leniency program.

What is really worth highlighting in these three recent cases is the fact that the commission imposed record fines on the ground of its *existing* guidelines on fines. These existing guidelines are due gradually to be replaced by new, far tougher guidelines, adopted in September 2006. The commission couldn't send a clearer message to companies engaged in illegal cartel practices: If very significant fines can be imposed on the basis of "old" guidelines, it does not require much imagination to understand that future fines could be much higher, on the basis of tougher guidelines.

Commission has impressive record in confirming fines

For more than a decade, countless decisions imposing fines in cartel cases have been challenged before E.U. courts, but the commission's track record in obtaining confirmation of its decisions is impressive. Only in some rare cases were the fines reduced, and even more rarely annulled. The validity, enforceability and proportionality of the commission's main tools (fining guidelines and leniency programs) have been confirmed by the courts.

To mention only two recent examples, on Feb. 8, the Court of Justice of the European Communities confirmed that the commission was not bound by any statute of limitation in applying the criterion of recidivism ("repeat offence") as an aggravating factor in the determination of the fine. ECJ, *Danone v. Commission*, Feb. 8, 2007, case C-3/06 P. And on June 7, the Court of Justice allowed the commission to determine the amount of antitrust fines on the basis of turnover (i.e., profit) generated by the company several years prior to the decision imposing fines because more recent turnover did not properly reflect a "full year of economic activity." ECJ, *Britannia Alloys v. Commission*, June 7, 2007, case C-76/06 P. The Court of

Justice thus empowered the commission to dig far into the company's past in order to enhance fines. This approach tackles one of the most commonly used tactics to minimize a company's fines, i.e. to reduce the company's activities and assets prior to a likely penalty.

But new developments in E.U. cartel enforcement go beyond the court's generally flexible case law and the new guidelines on fines. Indeed, the commission has recently strengthened its already powerful arsenal of legal tools and policies to fight against cartels. This article briefly discusses the whole range of new tools that are reshaping the E.U. Commission's policy against cartels — that is, guidelines on fines, leniency, direct settlement and private actions.

The new guidelines adopted on Sept. 1, 2006, will apply only to cases in which a statement of objections was sent after this date. As a result, a large backlog of existing cases will be decided on the basis of the 2002 guidelines. The first decisions adopted on the basis of the 2006 guidelines are not expected before the second half of 2007.

Among the new guidelines' many new features, three main innovations are worth highlighting:

First, in determining the fine's basic amount, the commission will replace the current "forfeit" mechanism by a percentage of the revenues generated by the activities subject to the cartel (up to 30%).

Second, and most important, the aggravating factor resulting from the duration of the cartel jumps from 10% to 100% per year.

Third, repeat offenses ("recidivism") will be punished more drastically, i.e. up to 100% per previous infringement, including infringements of E.U. rules sanctioned by either the commission or national enforcement authorities.

Thus, in the case of a relatively "standard" cartel, for instance, with one previous infringement and a duration of 10 years, the fine can quickly exceed 600% of the annual turnover subject to the cartel.

Last, there is the "butterfly effect": Local, small cartels can have a devastating effect in large groups, because the commission currently enforces a strict parental liability policy. In the commission's view, any infringement by a subsidiary, however local and limited in scope, is attributed to the ultimate parent company. In other words, the parent company is "presumed guilty" for all its subsidiaries' misconduct across the globe, which affects not only the maximum amount of the fine (10% of the group's turnover), but also the consideration of recidivism in calculating the fines.

On Dec. 8, 2006, the commission adopted a new leniency notice that replaced the previous 2002 notice. The 2002 notice has been a clear success for the commission, but required some clarifications designed to tighten the rules applied to acceptable evidence and to avoid unrealistic hopes for an applicant bringing little value in the process.

The main changes introduced by the new notice are the introduction of a discretionary marker system, whereby an application for immunity may be accepted temporarily while the applicant is given some time to gather the necessary evidence; an in-depth description of the level, scope and breadth of information and evidence to be provided, in the form of a detailed corporate statement; procedures to protect these corporate statements from disclosure in civil damages proceedings (mostly U.S.-style discovery); and some clarifications of the eligibility conditions for immunity and reduction of fines.

Full immunity is available only to the first successful applicant and can be obtained in two alternative scenarios, depending on whether the commission already was aware of the cartel. In the first scenario, immunity can be obtained if the applicant provides enough evidence about a cartel when the commission did not previously have sufficient information to carry out a dawn raid (the E.U. equivalent of a search warrant). Under the second scenario, in which the commission has already seized documents, immunity is available to applicants that provide information sufficiently detailed with "significant added value" to enable the commission to establish a violation. The test under the second scenario is far tougher.

For the other applicants, reductions of fines are available if, and to the extent that, they provide information of evidence of "significant added value," and the level of reduction declines with the order of application: between 30% and 50% for the second applicant, between 20% and 30% for the third applicant and no more than 20% for subsequent applicants.

Direct settlement project is still in draft form

The commission's leniency program has been a victim of its own success, and the resources of the Competition Directorate General of the European Commission are strained by an important backlog of pending cases. The commission is therefore considering a new "direct settlement" mechanism, said to be modeled on the French system.

In short, companies could voluntarily enter into a direct settlement procedure by acknowledging the scope, duration and severity of the infringement, and seek a reduction of the fine. But the project, initiated in the spring of 2005, is only in draft form and has not been adopted. As a result, although this project is said to be a high priority within the commission, no draft paper has been published for comment and several questions remain unanswered: Should all cartel members enter into settlement discussions or only some of them? When would the window for settlement be opened — before or after the commission's statement of objection and, if before, to what extent should the commission's initial findings be formalized? How should this procedure be conformed with the leniency program?

The direct settlement initiative is likely to be one of the hot debates in E.U. cartel policy in 2007.

Finally, private antitrust actions should not be forgotten, even though such actions are not part of the commission's legal arsenal. The commission is encouraging development of private litigation

to supplement public enforcement because of significant disparities among the member states' legal systems. U.S.-style private antitrust actions will likely not become a reality in Europe for some time, but the commission's efforts will inevitably result in an increased number of private cases.

The ever increasing severity of the commission's prosecution of cartels has been largely supported by European courts and is being given a new impetus by recent developments. Cartel members are being given a very clear signal.

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