Market Intelligence

CARTELS 2021

Global interview panel led by Hengeler Mueller

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Europe-US Overview

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Introduction

Cartel enforcement remains a top priority for competition authorities in the European Union and the United States. While the covid-19 pandemic led the relevant enforcement authorities (namely, the European Commission (Commission), the Department of Justice (DOJ) and Federal Trade Commission (FTC)) to recognise the extreme difficulties faced by companies as a result (with the Commission even going so far as to formally relax certain antitrust provisions regarding competitor cooperation), they nevertheless maintained a strict approach to cartel enforcement.

This chapter discusses a number of significant developments in cartel enforcement practice in the past year.

- First, EU case law has shed further light on the parameters of the Commission's calculation of fines in cartel cases, as well as introducing a new requirement on the Commission to pay default interest when repaying a fine after an annulment.
- Second, in the US, the DOJ has fulfilled its promise to prosecute naked agreements to restrict competition for employees criminally, by bringing its first criminal Sherman Act indictment for a no-poach agreement. The DOJ is expected to aggressively continue enforcement relating to no-poach agreements and other employment-related issues, as well as traditional output-side cartel prosecutions.
- Third, the European Court of Justice (ECJ) confirmed that the traditionally broad approach to establishing the liability of parent companies for the cartel behaviour of their subsidiaries is here to stay, continuing to contrast against the generally narrower approach to establishing such liability in the US.
- Fourth, the ECJ introduced new, strict requirements to the establishment of 'by object' infringements by the Commission and national competition authorities, potentially narrowing the potential for the finding such infringements in the future.
- Finally, the ECJ has issued an important ruling in the area of evidence, holding that there is no absolute right for witnesses to be accepted at hearings before the EU courts and there is no violation of a party's key legal rights in the courts' refusal to hear a witness if the examination is not relevant and necessary for the outcome of the case. This ruling is consistent with US practice, where there is no absolute right for a cartel victim to testify at the liability phase of the trial. Rather, the admissibility of victim testimony is addressed, as with any other witness, on a case-by-case basis under the Federal Rules of Evidence. It should be noted, however, that in the penalty phase of a criminal prosecution, victims typically do have the opportunity to address the court before it imposes a sentence.

Enforcement action

EU: Recent case law on fine calculations

The ECJ has adopted a series of recent judgments setting out the parameters of the Commission's fine calculations.

In its judgment in *NKT* (C-607/18 P), the ECJ partially annulled the judgment of the General Court (GC), including part of the single and continuous infringement (SCI) found against NKT, and exercised its unlimited jurisdiction to reduce the fine imposed (by €200,000). This was based on the applicant's lack of awareness of all aspects of the infringement (such awareness otherwise being the basis for the applicant's liability for the conduct of other undertakings, as part of the Commission's SCI construct in accordance with *Infineon Technologies v Commission*, C- 99/17 P). Specifically, the ECJ held that the GC did not verify whether the Commission had sufficiently proved that NKT had been aware of the collective refusal to supply accessories and technical assistance to competitors not participating in the cartel, or that NKT could reasonably have foreseen such conduct. The ECJ also annulled parts of the infringement involving conduct related to sales in non-EU and European Economic Area countries and conduct within a certain time period.

"Recent judgments provide some clarity on the Commission's cartel fine calculations."

The ECJ clarified that the impact on the fine calculation of such partial annulment of the SCI, on the basis of NKT's lack of awareness, did not undermine the other aspects of the Commission's fine calculation (namely, the 19 per cent gravity percentage and the 10 per cent reduction on account of NKT's limited participation as a 'fringe player' in the cartel). In the ECJ's view, the reduction of the fine in line with its unlimited jurisdiction was related to a partial annulment concerning only limited aspects of the SCI and therefore did not call into question other elements of the Commission's fine calculation.

Separately, the ECJ dismissed an appeal by Silver Plastics against the Commission's decision imposing fines for its participation during certain periods of the infringement in the retail food packaging cartel (*Silver Plastics*, C-702/19). In particular, the ECJ rejected Silver Plastics' argument that the GC had failed to demonstrate an 'overall plan' in order to validly establish an infringement for the period from June 2002 to August 2004 and that, as a result, an incorrect duration multiplier had been used to calculate the fine. In the ECJ's view, the two products subject to the infringement were both included within an established 'overall plan' and therefore formed part of one SCI, which commenced in June 2002. Therefore, despite the fact that the first meeting specifically concerned the second product that took place later (in August 2004), the Commission was nonetheless correct in taking the earlier June 2002 date as the infringement start date in light of: (1) evidence illustrating Silver Plastics' participation in an anticompetitive meeting on this date; and (2) the established 'overall plan' in respect of both the products, and therefore the one SCI. The duration multiplier applied to calculate the fine was therefore correct.

The ECJ in *Silver Plastics* also held that the GC had correctly included in the fine calculation the turnover generated by its parent entity, despite such turnover being related to a business activity that was subsequently transferred to a third party a few days before the adoption of the Commission's decision. From a practical perspective, the ECJ considered that, in order to maintain the effectiveness of the Commission's penalties, it could not be accepted that an infringing undertaking could significantly reduce the 10 per cent cap on the fine amount imposed simply by transferring the sector of its business subject to fine to a third party.

Overall, while earlier EU Court judgments such as *HSBC* (T-105/17), *Icap* (C-39/18) and *Pometon* (T-433/16) serve as important reminders of the Commission's obligation to provide sufficient explanations to support its cartel fine calculations, the above judgments provide some clarity on the parameters of the specific elements of such calculations. In particular, while *NKT* illustrates that the Commission must validly establish a party's awareness for the purposes of adequately calculating its fine, Silver Plastics highlights that the Commission still

retains some leeway in continuing to capture wider infringements under its SCI construct, leading to the possibility of continuing to impose high fine amounts in cartel cases.

EU: The Commission's obligations in repaying annulled fines

The Commission will now also need to be aware of its obligations in repaying subsequently annulled fines, following the ECJ's January 2021 judgment in *Printeos* (C-301/19 P).

In *Printeos*, the ECJ held that the applicant was entitled to a repayment of the annulled fine amount together with the following amounts, in line with the Commission's obligations to adhere to court judgments annulling fines under article 266 of the Treaty on the Functioning of the European Union (TFEU):

- interest generated at the European Central Bank refinancing rate in the month of the adoption of the Commission's decision (ECB Rate) plus 2 per cent per annum, for the period between the payment of the fine by Printeos and the Commission's repayment thereof (Default Interest); and
- additional compound interest on the Default Interest, at a rate of the ECB Rate plus 3.5 per cent per annum, for the period from the date of Printeos' action before the GC until the date of payment of the Default Interest.

By simply reimbursing the €4.7 million fine amount Printeos had paid without the payment of any additional interest, the ECJ held that the Commission had breached its duty under article 266 TFEU, clarifying that the payment of interest was an absolute and non-discretionary part of the Commission's obligation under this provision. While the exact practical impact of the *Printeos* judgment is yet to be seen, the ruling has the potential to render the Commission liable for significant amounts of either new, previously unpaid interest payments or additional interest payments where the Commission previously repaid some minor guaranteed investment returns, if cartel fine amounts imposed by the Commission are successfully annulled.

US: First criminal prosecution for no-poach

In the US, the biggest recent development in cartel enforcement relates to no-poach agreements, broadly defined as agreements between employers not to compete to recruit or hire each other's workers or to otherwise collude on the terms and conditions of employment (such as fixing wages). In October 2016, the DOJ and FTC had announced a new and more aggressive approach to no-poach agreements between employers, stating that naked no-poach agreements would be treated as per se violations of the antitrust laws and the DOJ would prosecute them criminally in appropriate cases. Consistent with existing DOJ policy and practice, this would

mean prosecuting both the corporate employer and the culpable individuals at the employer. The agencies reiterated this position in April 2020 when they released a joint statement on competition in labour markets. In that statement, the agencies noted that they were on alert for employers who engaged in anticompetitive conduct, such as agreements to lower wages or to reduce salaries, amid the covid-19 pandemic.

After years of foreshadowing its concern and convening several grand juries to investigate these employment-related allegations, the DOJ brought its first criminal no-poach case in January 2021, charging an outpatient clinic with criminal violations of the Sherman Act. The DOJ's indictment alleges that the clinic conspired with other healthcare facilities to suppress competition for senior employees, citing several emails between the executives at the companies discussing the terms of the agreement and executing the agreement by rejecting candidates who were deemed to be off-limits. The companies face up to US$100 million in fines under the Sherman Act.

In addition to the DOJ's activity, there has been a flurry of private lawsuits and class actions based on alleged collusive agreements not to hire or recruit other firms' employees or otherwise limit competition for employees. For example, after the DOJ settled allegations that six major technology companies restrained

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"No-poach and other antitrust issues involving employment will continue to be a focus of both governmental and private enforcement in the US."

competition through agreements not to recruit employees from each other, private class action lawsuits followed in this and several other sectors, including technology, industrials, animation, healthcare, education and food service. Various state attorney generals have also brought a number of no-poach lawsuits in different areas. One important point to note is that these cases are based on restraints on competition for employees, so the firms do not need to be competitors in sales of their output for such agreements to violate the law.

There is every indication that the DOJ under the Biden administration and the FTC will continue to push in this area. If anything, the new administration can be expected to be even more aggressive. For example, the DOJ in the previous administration submitted several amicus briefs or statements of interests in private no-poach litigation involving franchises that argued that the rule of reason standard, rather than the per se rule, should be applied to no-poach agreements between franchisors or franchisees. As a practical matter, the rule of reason standard can make it more difficult to certify a class of allegedly affected employees. It is unlikely that the current administration will continue this line of advocacy in private cases. In any event, no-poach and other antitrust issues involving employment will continue to be a focus of both governmental and private enforcement in the US.

The sanction of no-poach agreements still remains unchartered territory for the Commission and other national competition authorities in the EU – the most recent prominent sanction for no-poach arrangements in the EU is a €302 million fine imposed on three PVC and linoleum floor covering manufacturers by the French Competition Authority in 2017. However, it would not be surprising if these authorities looked to the US's lead in more aggressively pursuing these issues.

Parental liability

Contrasting approaches in the EU versus the US

The scope of a parent company's liability for cartel infringements committed by its subsidiaries vary greatly between the EU and the US. Traditionally, the US treats different legal entities even within the same corporate group as distinct for the purposes of antitrust liability and only holds parent companies liable for the conduct of their subsidiaries in exceptional circumstances. By contrast, the EU has consistently taken an expansive approach to parental liability for antitrust infringements, using the notions of 'single economic entity' and 'single undertaking' to presumptively establish such liability – a presumption that has become increasingly difficult to rebut.

The EU uses the concept of 'undertaking' in its enforcement against cartel activity under article 101 TFEU, a construct defined by reference to an entity's economic activity rather than its legal or corporate status. As a result, multiple entities may

be legally separate, but considered to form one and the same 'undertaking' under EU competition law if they form an economic unit within which a subsidiary has no real freedom to determine its course of action on the market. In the US, by contrast, the general principle in *Bestfoods* recognises that a parent company is generally not regarded as liable for the acts of its subsidiaries and that the 'corporate veil' can only be pieced in exceptional circumstances (eg, where fraud is committed).

EU cases have historically taken a broader approach – the ECJ in Stora (C-286/98 P) established that a parent company of a wholly owned subsidiary is presumed to exercise decisive influence over the commercial policy of its subsidiary and that influence (among other circumstances) is what determines the existence of parental liability. The ECJ went further in *Akzo Nobel I* (C-97/08 P) and held that decisive influence, and therefore parental liability, could be presumed in cases of whole ownership, without the Commission needing to prove any actual exercise of decisive influence by the parent over the subsidiary. Even more expansively, in *Goldman Sachs* (T-419/14), the GC confirmed that the presumption of decisive influence could apply to financial investors if they hold more than a 'pure financial investment' in the subsidiary and held the parent company satisfied this threshold

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by virtue of exercising voting rights over strategic decisions of the subsidiary, despite owning between 32 per cent and 91 per cent of the shares during the infringement period.

Recent developments in the EU

The parent company appealed the GC's finding to the ECJ, which was rejected in January 2021 (C-595/18 P). The ECJ confirmed that the Commission was entitled to rely on the presumption of decisive influence to establish the parent company's liability on the basis that it held 'all the voting rights associated with its subsidiary's shares'. Such voting rights essentially rendered the parent company like a parent company holding all or virtually all of the share capital of its subsidiary, even though it did not have such interest in the shares themselves. The ECJ held that the parent company had not validly rebutted the *Akzo Nobel I* presumption by virtue of arguing it was simply a 'pure financial investor', but upheld the Commission's finding of decisive influence based on the parent company's appointment of virtually the whole board of the subsidiary (even when its shares had reduced to 32 per cent). The ECJ rejected the parent company's arguments that their appointed directors were 'independent', instead holding that there were sufficient links between the board members and the parent company such that the members' presence was sufficient to illustrate the parent company's decisive influence over the board and therefore the subsidiary.

The ECJ also rejected a related appeal brought by the parent company's predecessor in respect of the same subsidiary (*Pirelli*, C-611/18 P), clarifying the position in earlier case law that, when assessing whether a presumption of decisive influence has not been rebutted by a parent company, the Commission need not assess every piece of evidence advanced – rather, it is sufficient that the Commission sets out why the parent company has failed to overturn the presumption.

Practical implications

The ECJ's findings in *Goldman Sachs* illustrate that not only 100 per cent parent companies, but even those parent companies with a lower shareholding in subsidiaries, or those that consider themselves mere 'investors' outside the scope of a subsidiary's business activities, should remain closely aware of their subsidiary businesses' conduct in case of any potential infringement of EU competition law. They should be prepared: (1) to assume responsibility for any subsequent sanction, particularly if they exercise significant voting rights in respect of the subsidiary's strategic operations or board appointments, regardless of the specific shareholding held; and (2) to be faced with a high hurdle to overcome if they wish to rebut any presumption of decisive influence arising by virtue of such rights.

Companies should also be aware of the continually expanding scope of such parental liability in the EU, which now even includes the potential for a subsidiary to be held liable for its parent's conduct (rather than purely vice versa), an issue to be decided by the ECJ in the pending preliminary request in *Sumal* (C-882/19). Multinational corporations, in particular, should remain abreast of such expansive developments in the EU, while also bearing in mind how this differs from the generally narrower approach taken by the US antitrust authorities.

Per object versus per effect infringement

EU: Recent practice

Last year also saw new EU case law related to the assessment of 'by object' infringements, building on the high evidentiary standard set out in the ECJ's landmark *Cartes Bancaires* judgment (C-67/13 P), where the court held that the concept of by object infringements must be interpreted restrictively and that the legal and economic context of conduct must be assessed in detail before a by object infringement is established.

The key judgments from the ECJ in this regard are its judgments in *Budapest Banks* (C-228/18) and *Generics* (C-307/18). Across both cases, the ECJ set out expansive new criteria for the Commission to adhere to when assessing the existence of by object infringements.

- There must be sufficiently reliable and robust prior experience to a finding that a particular agreement is inherently anticompetitive by object. The Commission and other national competition authorities cannot blindly apply precedents to new cases or rely on inconsistent precedents or non-uniform enforcement practices to validly support a by object finding – rather, the specific characteristics of the market in question must be assessed in detail.
- Any pro-competitive effects of the conduct raised by the parties in their defence must be considered when evaluating whether such conduct is by its very nature harmful to competition so as to amount to an infringement by object. Specifically, the Commission cannot ignore 'strong indications' of such pro-competitive effects. In addition, if the pro-competitive effects are sufficiently significant so as to cast reasonable doubt on whether the conduct caused a sufficient degree of harm to competition, the effects of the conduct need to be examined and the Commission cannot make a by object infringement finding.
- The parties' arguments regarding the 'counterfactual' (ie, that the competitive situation would have been worse absent the agreement) must also be considered as part of the by object assessment. This is even the case if there is merely ambivalence about whether the conditions of competition would have been worse absent the conduct in question. Further, although within the context of patent

"Last year saw new EU case law related to the assessment of 'by object' infringements."

settlement agreements specifically, the ECJ in *Generics* even went so far as to hold that the conduct had to have had 'no other explanation' other than the relevant anticompetitive aim in order to validly amount to an infringement by object.

Practical implications

The ECJ's findings in *Budapest Banks* and *Generics* have called into question the Commission's generally broad practice of easily making findings of by object infringements. The ECJ imposes new, strict requirements on the Commission to look more closely at the relevant market, parties' arguments regarding the counterfactual and pro-competitive effects, and the overall circumstances of a case before making a by object finding.

In time, it remains to be seen whether the Commission's evolving approach to evaluating by object infringements will bring the EU closer to the more nuanced 'rule of reason' analysis standard that the US applies to restraints that are not presumptively unlawful, rather than the US 'per se' standard that automatically condemns hardcore cartel violations such as price-fixing without a searching examination of market conditions or counterfactuals. In this regard, it should also be kept in mind that

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the EU regime remains distinct in that all infringements under article 101(1) TFEU, including those by object, can theoretically be exempted under article 101(3). In any case, multinational corporations faced with international antitrust investigations should be aware of the differing practice across the EU and US when it comes to the substantive establishment of antitrust infringements.

Witness evidence

EU approach

The ECJ judgment in *Silver Plastics* also has important implications in the field of evidence. As well as raising arguments related to the Commission's fine calculation, the applicants in *Silver Plastics* alleged that, by denying to hear a witness, their procedural guarantees and their rights of defence enshrined in EU law were infringed, emphasising that such rights and principles must be taken into account in cartel proceedings before the EU courts. In particular, the applicants claimed that the GC had infringed both the principle of the right to a fair trial and the principle of the immediacy of the administration of evidence, in choosing not to hear a Mr W in person as a witness and instead taking into consideration only his written statements.

The ECJ rejected the applicants' arguments, holding that the GC retains the discretion to assess the relevance and the need to call a witness and whether this is in line with the relevant fundamental rights under EU law. In particular, the ECJ clarified that such rights, including the right to a fair hearing, do not confer on an accused party an absolute right to require the attendance of witnesses before the EU courts – rather, the aim of such rights is to ensure total equality of arms that provide an adequate and sufficient opportunity for the defendants to challenge the allegations against them. On this basis, an oral examination is not the only way of assessing the credibility of witness statements and judges may rely on other evidence corroborating or contradicting such statements.

This judgment confirms that the GC is not obliged to hear a witness whose examination has been requested by the applicants, where this is not relevant or necessary for the outcome of the case. Most importantly, the ECJ has confirmed that such discretion retained by the GC does not breach either the right to a fair trial or the principle of equality of arms. Equally, however, it does not interfere with the EU courts' obligation to state reasons regarding whether or not the witnesses claims, taken as a whole, are credible, and the courts are still obliged to provide reasons in this regard. In any event, parties should be prepared to be denied their request to call witnesses to give evidence during EU court proceedings when appealing Commission decisions and therefore have to rely on written submissions alone if the court deems this appropriate.

> "Unlike in the EU, there are no strict rules as to whether witnesses will be excluded or admitted in a cartel trial in the US."

US: The admission of witnesses in US court proceedings

Unlike in the EU, there are no strict rules as to whether witnesses will be excluded or admitted in a cartel trial in the US – rather, admissibility is determined by the Federal Rules of Evidence (Federal Rules). Evidence is only admissible if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. Under the Federal Rules, a court may also exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice. However, as a practical matter, although the testimony of a victim witness will not always be strictly necessary for a cartel prosecution, prosecutors typically attempt to present at least one such witness as a matter of jury trial strategy.

Victim testimony may also be required when the prosecution seeks to impose a fine outside the statutory maximum. Under Title 18, Section 3571 of the United States Code, fines in excess of the statutory maximum (currently US$100 million for Sherman Act violations) may be imposed based on the financial loss to the victim or the gain to the defendant. Under US Supreme Court precedent, any contested finding of total loss or gain necessary to impose this enhancement must be made

by the jury, not the court. This typically requires testimony by the victim necessary to establish its loss.

Finally, although victims do not have the absolute right to testify at trial, all victims of federal crimes, including the antitrust violation, are entitled to be given a reasonable opportunity to be heard at any public proceeding in a district court involving release, plea, sentencing or parole under the Justice for All Act. Victims sometimes take this opportunity to argue for a restitution order in connection with sentencing, although they often forgo this in favour of private civil damages litigation, where treble damages and attorney fees may be available.

Conclusion

As set out in this article, the cartel enforcement practice of authorities across the European Union and the United States show no sign of slowing down, even despite the global impact of the covid-19 pandemic.

Most prominently, in the US, while public attention is likely to be focused on the civil enforcement actions and investigations of the tech giants, such as Google and Facebook, cartel enforcement will remain an important priority for the DOJ, including any cartel activity restricting competition for employees. This approach is likely to be followed by authorities in the EU. The EU has also continued to expand its recognition of parental liability for a subsidiary's cartel infringements, while equally putting the Commission on notice of potential liability for significant interest payments in the event of any future fine annulments.

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