Market
Intelligence

CARTELS 2022

Global interview panel led by Hengeler Mueller

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Publisher
Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Head of business development
Adam Sargent
adam.sargent@gettingthedealthrough.com

Business development manager
Dan Brennan
dan.brennan@gettingthedealthrough.com

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Europe–US Overview

Elvira Aliende Rodriguez, a partner in the antitrust practice of Shearman & Sterling's Brussels office, focuses on Spanish and EU competition law. Elvira advises clients across a range of sectors, including air transport, chemicals, telecommunications, energy, pharmaceuticals, steel, hotel accommodation, textiles and financial services. She has extensive experience in advising clients on article 101 of the Treaty on the Functioning of the European Union (TFEU) (restrictive agreements) and the equivalent provisions under Spanish law. She has also participated in state aid procedures and in article 102 TFEU (abuse of dominance) cases before the EU competition authorities. She has in-depth knowledge of working before the European Commission and the European courts.

John F Cove, Jr, a former trial attorney with the Antitrust Division of the United States Department of Justice, is of counsel in Shearman & Sterling's San Francisco office. John's practice focuses on representing clients in price-fixing, boycott and monopolisation cases, direct and indirect purchaser class actions, and unfair competition actions in US federal and state courts. He has also represented clients in federal grand jury investigations of alleged cartel activity and other criminal offences, in pre-merger reviews before federal and state antitrust authorities and in investigations and proceedings by competition authorities outside the US.

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Introduction

This chapter discusses a number of significant developments in cartel enforcement practice in the past year in the European Union and the United States.

First, while the European Commission's (EC) dawn raid activity is still largely dependent upon the pandemic, it revealed that it will follow the US in taking action against buyer cartels and agreements between employers not to solicit or hire each other's employees ('no-poach' agreements) or to fix terms of employment. As to the United States antitrust agencies, the Department of Justice (DOJ) has continued to maintain a strict approach to cartel enforcement through criminal prosecution of naked agreements to restrict competition for employees. At the same time, the Federal Trade Commission (FTC) has indicated that it will also focus on restrictive practices in the employment context. And a US federal court has also endorsed a view that naked no-poach agreements can be per se illegal and subject to criminal liability, further buttressing the agencies' enforcement efforts.

Second, the European Court of Justice (ECJ) has recognised in its *Sumal* decision that a subsidiary can be sued in a private damages claim for the conduct of its parent company, which should make private damages actions easier for claimants.

Third, the EU hybrid settlement procedure is undergoing significant judicial scrutiny from both the General Court (GC) and the ECJ. While the possibility for the EC to initiate hybrid staggered settlements is backed by the courts as a matter of principle, the legal analysis around whether the EC has correctly operated such procedures to safeguard settling parties' procedural rights may continue to evolve in forthcoming judgments.

Finally, the EC's sustainability objectives in the framework of the Green Deal are slowly being incorporated into the EC's competition law analysis. The upcoming revision of the horizontal guidelines will likely clarify how agreements pursuing sustainability objectives have to be analysed under EU competition law, possibly widening the scope of article 101(3) of the Treaty on the Functioning of the European Union (TFEU). In parallel, the EC fined car manufacturers solely for a restriction of technical development in the area of nitrogen oxide cleaning.

Enforcement actions

US: continued criminal enforcement for no-poach agreements

In the US, the efforts to prosecute no-poach agreements, broadly defined as agreements between employers not to compete to recruit or hire each other's workers, or other wage-fixing agreements have been the biggest recent development in cartel enforcement. While the effort to take a hard look at hardcore collusive arrangements in labour markets began under the previous administration, the Biden administration has made clear that it intends not only to aggressively prosecute

naked agreements between employers to restrict competition for employees, but to take a searching look at other types of agreements affecting competition for labour that traditionally had been evaluated under the rule of reason.

In October 2016, the DOJ and FTC announced a 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 that the DOJ would prosecute them criminally. Consistent with existing DOJ policy and practice, this would mean prosecuting both the corporate employer and the culpable individuals. 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 particularly on alert for employers who engaged in anticompetitive conduct, such as agreements to restrict competition in wages or salaries, in the midst of the covid-19 pandemic.

The DOJ brought its first criminal wage-fixing case in late 2020 and its first no-poach case in January 2021. The DOJ's indictment alleges that the defendant surgical outpatient 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. The DOJ's enforcement efforts have gained additional traction as a federal district court recently denied a motion to dismiss the prosecution, endorsing the DOJ's view that no-poach agreements can constitute criminal antitrust violations. This appears to have been the first judicial approval of a criminal prosecution of an alleged no-poach agreement. Since bringing this first no-poach case in 2021, the DOJ has gone on to bring several new indictments against executives in a range of industries, including healthcare and engineering.

In addition to the DOJ's activity, plaintiffs continue to file private lawsuits and class actions based on alleged collusive agreements not to hire or recruit other firms' employees or otherwise limit competition for employees. These lawsuits have targeted a broad swathe of employers, including those in technology, industrials, animation, healthcare, education and food service. Various state attorneys general 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 it is not necessary that the firms are competitors in sales of their output for such agreements to violate the law.

Most recently, in July 2021, the Biden administration published an executive order focused on increasing competition in labour markets. Among its directives was to encourage the FTC to consider whether non-compete agreements, that is, agreements that restrict an employee's ability to compete with an employer after the employee leaves the employer, should be curtailed. While these agreements are already generally unenforceable in some states such as California, they are widely used in other states, so an FTC challenge to them would have important consequences.

EU: resuming dawn raids, pursuing no poach and buyers' cartels

In an October 2021 speech, Vestager identified cartels as 'the supreme evil of antitrust', announcing the EC's commitment to resume dawn raids that had been put on hold due to the pandemic. For almost two years, the EC has been limited to sending written requests asking undertakings to send all documents matching a certain search query as a substitute for on-site information gathering. Now, dawn raids are likely to resume full speed as the pandemic recedes and companies go back, at least partially, to working in the office. Recently, the EC has raided companies active in the wood pulp industry, the Belgian animal health sector (both in October 2021) and the defence sector (November 2021).

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As part of its ambition to deter cartels and following the long-standing example of the US, the EC has also announced its intention to investigate no-poach agreements, which it considers an indirect way to keep wages down and restrict talent from moving where it serves the economy best, as well as chilling innovation. In the meantime, some national competition authorities have already started to pursue enforcement action against these types of agreements: for example, in January 2022, the Romanian authority carried out a dawn raid and opened an investigation against Renault Technologie Roumanie and six other companies supplying components and systems for motor vehicles that allegedly avoided recruiting each other's staff.

Cartel liability

EU: Suing a subsidiary for its parent company's cartel conduct

In October 2021, the ECJ decided in *Sumal* (C-882/19) that, under certain conditions, a private damages action can be directed against the subsidiary of a parent that has been found to have participated in a cartel. In a request for a preliminary ruling issued by the Provincial Court of Barcelona (Spain), Sumal, a Spanish buyer, had purchased two trucks from Mercedes-Benz Trucks España, a Spanish subsidiary of Daimler, which was fined in a 2016 EC cartel decision. The question asked by the Spanish court was whether the doctrine of the single economic unit, which has historically been used to extend liability from subsidiaries to parent companies (ie, 'upward liability') (*Akzo Nobel*, C-97/08 P) could also be extended to assign the parent companies' liability to one of its subsidiaries (ie, 'downward liability'). After recalling that the concept of 'undertaking' in EU law does have a similar scope in public and private enforcement (*Skanska Industrial Solutions*, C-724/17), the ECJ clarified that where an undertaking, defined as a single economic unit, infringes article 101(1) TFEU, it is that unit that is held liable. However, single economic units can also be 'conglomerates' – active in several economic fields – and for such cases, *Sumal* confirmed that a victim of anticompetitive practices can in an action for damages invoke the liability of a subsidiary based on the infringement of its parent provided that (i) the subsidiary forms part of the same economic unit with the parent companies that perpetrated the cartel infringement, and (ii) there is a 'specific link' between the economic activity of the subsidiary and the subject matter of the infringement (ie, they relate to the same products).

There are two practical implications of the *Sumal* judgment. First, where both of the *Sumal* conditions are met, bringing a follow-on private damages action will be easier, particularly where the company found liable of infringing EU competition law is located outside the EU but has a subsidiary based in the EU. Allowing a claimant to sue a local subsidiary rather than the parent company abroad not only saves costs, but could also significantly shorten the litigation process, given the lengthy

and complex service requirements in certain jurisdictions. Second, the requirement of a link between the economic activities of the subsidiary and the subject matter of the infringement effectively limits liability for subsidiaries of conglomerates that are active in differing products. This requirement creates an additional criterion when applying the notion of the single economic unit to conglomerates and begs the question whether the same requirement could be extended to other aspects of cartel law. For instance, conglomerates could now argue that only the turnover related to subsidiaries with a specific link to the matter of the infringement should be considered by the EC when calculating the fine, However, in practice, the EC is unlikely to change its traditional approach of considering group turnover in order to impose the highest possible fine.

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Settlement procedure

EU: hybrid staggered settlement procedure under judicial review

The EC settlement procedure has also been subject to major developments in the past year. Under the 2008 Commission Notice on Settlements, a company can obtain a 10 per cent fine reduction by entering into a settlement with the EC, which

includes accepting liability for the infringement. Where only some of the undertakings facing an EC investigation enter into the settlement procedure or where some of the settling parties withdraw from it, the EC is most likely to adopt a staggered approach, concluding the accelerated settlement procedure first and subsequently adopting a standard infringement decision for the non-settling parties. In its 2017 *ICAP* decision (T-180/18), the GC found that the EC's settlement decision violated the non-settling party's presumption of innocence in that it mentioned ICAP in its factual section and described its role as a 'facilitator' in the infringement, even though ICAP was not a party to that decision and could, therefore, not defend itself properly. However, even though the EC breached ICAP's presumption of innocence in the settlement decision, the GC found that this did not impact the legality of the standard decision addressed to *ICAP* (which was the object of the GC's review). It concluded that the standard decision addressed to ICAP could only be annulled if ICAP could prove that the breach of the presumption of innocence in the settlement decision had led to a lack of objective impartiality by the EC during the standard procedure, which it found ICAP did not prove.

The ECJ judgment in *Pometon* (C-440/19 P) subsequently clarified the requirements to uphold a non-settling party's presumption of innocence in a hybrid staggered settlement procedure. First, attention must be given to whether the settlement decision did not contain a premature judgment as to the non-settling parties' participation in the cartel (ie, there must be no legal qualification of the non-settling party's behaviour). Second, any explicit reference made to the non-settling parties in the settlement decision must be necessary (ie, there cannot be any superfluous reference to the non-settling parties). This seems to suggest that the EC's hybrid staggered approach to settlement faces a case-by-case review process by the courts.

Following *Pometon*, in its *Scania* judgment (T-799/17) the GC refined its reasoning as to whether references to a non-settling party in the factual part of a settlement decision violated that party's presumption of innocence. In this case, a statement of objections was sent to all companies, but while others settled, Scania did not. Scania argued that the settlement decision was a 'disguised verdict' against it, since the EC had to decide on Scania's liability (i) on the same facts, (ii) using the same evidence and (iii) on the basis of the same objections raised in the statement of objections addressed to both the settling and non-settling parties. Given the settling parties had acknowledged their involvement in the infringement and admitted their guilt, Scania argued this constituted an implicit acknowledgement of its liability. The GC, however, rejected all three arguments. It found that in the standard procedure against Scania, the EC was bound solely by the statement of objections issued to Scania (not by the settlement decision), and took into account the arguments put

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forward by Scania in the course of the procedure. In doing so, the EC sufficiently separated the facts admitted by the settling parties from those concerning Scania, and fully and properly examined the latter. Thus, the GC found that the legal classification of the facts in the settlement decision did not in itself presuppose that the same legal classification would necessarily be adopted as regards Scania, and that Scania's presumption of innocence was therefore not violated.

Two pending cases before the GC should further inform the courts' approach on this point, namely *Canned Vegetables* (AT.40127) and *Bioethanol* (AT.40244). In both, the EC took a staggered approach to a hybrid settlement procedure and both have pending applications for annulment lodged by non-settling parties (Conserve Italia and Lantmännen and Alcogroup respectively); Alcogroup specifically has challenged the EC's alleged failure to uphold its fundamental procedural rights. Another pending judgment on staggered hybrid settlements is HSBC's appeal in the *EIRD* case (C-883/19 P), where it claims, inter alia, that the bilateral nature of the exchanges that were covered in the settlement decision necessarily entailed a bias towards the non-settling party. The judgment might also clarify to what extent non-settling parties are required to separately prove a lack of impartiality in the standard infringement decision, including the proof that such decision would have been different save for the irregularity (in line with the requirements set out in *ICAP*).

Competition law and sustainability

EU: a new competition policy approach

In its 'Competition Policy in Support of Europe's Green Ambition' brief of September 2021, the EC announced upcoming changes in relation to how competition policy should assess sustainability enhancing behaviours. The brief explicitly mentions envisaged changes as regards cooperation agreements that pursue sustainability objectives. The Dutch and Greek competition authorities have already amended their competition policy enforcement to accommodate sustainability objectives, and so has the Austrian legislator by broadening the scope of the national equivalent of article 101(3) TFEU to encompass significant contributions 'to an ecologically sustainable and climate neutral economy' within the notion of a fair share to consumers. In comparison, the EC's approach seems to be more prudent. While the EC clarifies in its brief that 'out-of-market' efficiencies (ie, benefits on a separate market) should be taken into account to the extent that 'the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same', the restrictive approach to the 'fair share to consumers' condition under article 101(3) TFEU will not be altered. The most notable evolution seems to be (i) the possibility to request individual guidance by asking the EC for comfort letters in relation to sustainability initiatives that raise novel issues and (ii) the issuance

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of article 10 of Regulation 1/2003 decisions finding that competition rules are not applicable to a sustainability initiative when in the public interest. These changes will be incorporated in the horizontal guidelines currently under review and scheduled to enter into force at the end of 2022 at the latest. A draft of the revised guidelines is expected for March 2022 and will be open to stakeholder consultation.

EU: enforcement actions against cartel on car emissions cleaning technology

In the *Car Emissions* (*AdBlue*) decision, the EC signalled that it is ready to broaden the scope of cartel exemptions for certain types of sustainability enhancing cooperation, but also clarified that it will take a hard stance against cooperation that aims at restricting developments of more sustainable technology. In this case, car manufacturers held technical meetings to coordinate the development of a system reducing NOx emissions of new diesel cars. Although most of the discussions between the parties were considered compatible with competition law, agreements on AdBlue tank sizes and ranges as well as reaching a joint understanding on the average estimated AdBlue-consumption were found to be a limitation of technical development prohibited by article 101 TFEU, and amounted to an infringement 'by

> "Multinational companies should therefore be alert to no poach agreements, given the possibility for them to be captured in antitrust enforcement procedures in the US and also the EU."

object' regardless of the concrete anticompetitive effects of such cooperation. By reducing uncertainty about NOx-cleaning beyond regulatory requirements and the customer-friendliness of AdBlue refills, the competitors substituted competition by cooperation in a way that was not justified by legitimate goals and infringed competition law.

Conclusion on sustainability

This new EC approach to sustainability-enhancing agreements will create room for companies to cooperate within such a framework. However, companies should be conscious of the potentially stricter stance the EC could take towards cooperation that is detrimental to sustainability. Collaboration on sustainability goals will therefore need to be closely scrutinised and appropriate compliance tools put in place for companies to safely navigate tomorrow's EU competition law.

Conclusion

As set out in this chapter, cartel enforcement of both EU and US authorities has seen some significant evolution over the past year.

In light of this enhanced scrutiny, multinational companies should therefore be alert to any agreements between or among competitors that restrict competition for employees. To the extent that limited agreements are necessary for particular purposes, such agreements ancillary to a joint venture or the sale of a business, it is vital to review these agreements carefully to ensure compliance with the law in the relevant jurisdictions and to avoid potential exposure to criminal liability in the United States.

The EU's most notable cases include parent group liability, where a subsidiary can now be sued for damages as a result of an infringement committed by its parent company, potentially paving the way for increased damages actions. Judicial clarification on the EC's hybrid staggered settlement procedure has also emerged and is likely to continue to evolve.

Finally, the novel policy change in relation to sustainability enhancing cooperation among competitors is likely to increasingly factor into the EC's article 101 TFEU assessment and potentially contribute to fine reductions or substantive defences in cartel cases. This should also be clarified in the EC's upcoming revised horizontal guidelines.

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Elvira Aliende Rodriguez
elvira.alienderodriguez@shearman.com

John F Cove, Jr
john.cove@shearman.com

Shearman & Sterling
Brussels and San Francisco
www.shearman.com

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