SLAUGHTER AND MAY

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Buyer(s) beware – the European Commission imposes fines of €68 million on participants in a car battery purchasing cartel

On 8 February 2017 the European Commission **announced** that it has fined three car battery recycling companies[1] a combined total of €68 million for their participation in a cartel that fixed prices for the purchase of scrap automotive batteries. A fourth company[2] was found to have infringed competition law, but its fine was reduced by 100% under the Commission's Leniency policy as it had revealed the existence of the cartel to the Commission.

The automotive battery industry

Automotive batteries are the world's most recycled product, with almost 99% of car batteries in the EU recycled; 58 million batteries are recycled in the EU each year.

When automobiles reach the end of their usable life, they are typically broken down for scrap and their parts sold. Battery recycling companies, such as those subject to the Commission's decision in this case, purchase used lead-acid batteries from scrap dealers and collectors operating out of garages, repair shops, scrapyards etc. These recycling companies undertake the treatment and recovery of the scrap batteries and extract lead. This recycled lead is, generally, sold on primarily to battery manufacturers who use it to make new automotive batteries.

The cartel

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

The cartelists were found to have colluded to fix the purchase prices of scrap automotive batteries in Belgium, France, Germany and the Netherlands from 2009 to 2012.

Unlike a conventional cartel arrangement, where companies agree to increase their sale prices, the four recycling companies in this case were found to have colluded to reduce the purchase price they paid to scrap dealers and collectors

[1] Campine, Eco-Bat Technologies and Recylex.
[2] Johnson Controls.

for used automotive batteries. In particular, the cartelists exchanged information and agreed on target prices, maximum prices and volumes to be bought from suppliers. They also sought to limit the bargaining power of suppliers by sharing the prices these suppliers offered and the final prices agreed with them following negotiations.

The cartelists communicated mostly on a bilateral basis, mainly through electronic means. There were also meetings in person, either bilaterally or less frequently, multilaterally. The Commission found that the parties were well aware of the illegality of their contacts, noting their attempts to disguise them through coded language (for example, one executive tried to disguise the signalling of price levels as a comment on the weather).

The Commission viewed the cartel to be anti-competitive because it disrupted the normal functioning of the market and prevented competition on price. The scrap dealers and collectors (many of whom are SMEs) selling the used automotive batteries to the recycling companies were paid less than they would have been if the market was truly competitive, and more generally, the cartel disrupted the 'circular economy' around battery recycling because there was no real competition on the merits for used automotive batteries.

The fines

The Commission fined three of the four cartelists.[3] Johnson Controls, Eco-Bat Technologies and Recylex all benefitted from reductions in their fines under the Commission's 2006 Leniency Notice[4] of 100%, 50% and 30% respectively. Campine had its leniency application rejected by the Commission on the basis that it had failed to disclose its participation in the infringement. Its fine was, however, reduced by 5% as it played a more minor role in the cartel than the other participants.

The nature of the cartel required the Commission to take a novel approach to the setting of the level of fines. Under the Commission's 2006 Fining Guidelines[5], the basic amount of a fine should be "related to a proportion of the value of sales…multiplied by the number of years of infringement". This basic amount is then subject to aggravating and mitigating factors, and the legal maximum limit.[6]

However, in the immediate case this approach was considered to be inappropriate as the aim of the cartel was to fix the prices at which the members purchased products, not sold them.

In its decision, the Commission, relying on a methodological exception in the 2006 Fining Guidelines[7], for the first time focussed on the amount of purchases affected by the cartel.

However, as the cartel behaviour was aimed at lowering the value of purchases, the Commission expressed concern that any fines would be set at a level below the economic significance of the infringement. Thus, in order to avoid under-deterrence and prevent the cartelists from benefitting from

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[3] Campine – €8,158,000; Eco-Bat Technologies – €32,712,000; and Recylex – €26,739,000. Johnson Controls avoided a fine of €38,481,000.

[4] **Commission's Leniency Notice**.

[5] **Commission's Fining Guidelines.**

[6] 10% of total turnover in the preceding business year of the undertaking, as per Article 23(2) Regulation 1/2003.

[7] Article 37 of the Fining Guidelines provide that, "*Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21*".

their behaviour, the Commission used its discretion under Article 37 of the 2006 Fining Guidelines to increase the fines for all parties by 10%.

The full text of the Commission's decision has not yet been published but it is likely to provide further details into the approach to fining purchasing cartels.

Other developments

Antitrust

European Commission opens three investigations into suspected anti-competitive practices in e-commerce

The European Commission has **announced** that it is opening three separate investigations into suspected anti-competitive e-commerce practices in the cross-border sale of consumer electronics, video games and hotel accommodation. The Commission will assess whether these practices breach antitrust laws by limiting cross-border choice and restraining competitive pricing to the detriment of consumers. The investigations will focus on retail price restrictions, discrimination on the basis of location and geo-blocking. These practices are being addressed as part of a wider concern regarding e-commerce, further to the Commission's ongoing e-commerce sector enquiry.

The first investigation – concerning consumer electronics manufacturers Asus, Denon & Marantz, Philips and Pioneer – will investigate whether these companies have constrained competitive pricing by restricting retailers from setting their own prices for consumer electronics.

The second investigation concerns suspected geo-blocking practices in bilateral agreements between Valve Corporation (owner of the Steam game distribution platform) and five PC video game publishers (Namco, Capcom, Focus Home, Koch Media and ZeniMax). The Commission is concerned that the 'activation keys' on the Steam system (used to confirm that a user's copy of a game is not pirated) only allow consumers in certain Member States to access certain purchased games. The Commission is investigating whether this would restrict parallel trade by preventing consumers from buying cheaper games that may be available in other Member States, therefore discriminating against consumers on the basis of their location or country of residence.

The third investigation will consider whether agreements between some of Europe's largest hotels (Meliá Hotels) and tour operators (Kuoni, REWE, Thomas Cook and TUI) contained clauses that discriminate between consumers on the basis of their nationality or country of residence. The Commission is investigating whether such clauses would prevent consumers from certain Member States from seeing full hotel availability or from booking hotels at the best price.

The Commission clarified that it is carrying out the consumer electronics and video games investigations "on its own initiative", but did not say the same of the hotel accommodation investigation, which appears to have been prompted by complaints.

China's Shandong provincial branch of NDRC fines a pharma firm RMB 120,000 for obstructing antitrust investigation

On 13 February 2017 China's National Development and Reform Commission (NDRC) published a **statement** about a fine of RMB 120,000 (around US$17,400) imposed by the Shandong Price Bureau against Weifang Longshunhe Pharmaceutical Company Limited (Longshunhe) in December 2016 for obstructing an investigation into price monopolistic conduct. When Longshunhe's offices were raided in August 2016, a company business manager threw a USB flash disk containing the evidence collected by the officials out of the window and another manager obstructed the subsequent search for the disk. This was the first penalty imposed by the NDRC for obstructing its antitrust investigation pursuant to Articles 42 and 52 of the Anti-Monopoly Law of China (AML).

Under Article 52 of the AML, concealing, destroying and removing evidence and refusing and obstructing an investigation in other ways are expressly prohibited. Antitrust agencies may, in the most serious cases, impose fines of up to RMB one million (around US$145,600) for enterprises and RMB 100,000 (around US$14,600) for individuals. This NDRC penalty decision came more than one year after the State Administration for Industry and Commerce fined Sunyard System Engineering Co. RMB 200,000 (around US$29,100) in October 2015 for refusing to cooperate with its investigation and to provide the requested documents.

The recent NDRC decision highlights the real risk that the actions of employees during antitrust investigations could attract fines if they obstruct an antitrust investigation. It would be prudent to conduct competition compliance training to ensure employees are appropriately prepared for potential dawn raids and investigations.

State aid

German court rules that national courts are not fully bound by EU decisions to start a State aid investigation

On 9 February 2017 the German Federal Court of Justice (FCJ) **announced** its ruling that national courts are not fully bound to follow a European Commission decision to open an in-depth State aid investigation. The case concerns a contract between Ryanair and the city of Lübeck which, Air Berlin alleged, enabled Ryanair to receive more favourable fee arrangements than those published under the regulation on airport charges. Having progressed through the German court system, the FCJ has now ruled that the fee discounts given to Ryanair by Lübeck Blankensee airport did not amount to State aid. The Commission **opened** its own State aid investigation into the arrangements in 2007, and on 7 February 2017 it **concluded** that the terms of the agreement would have been acceptable to a profit-driven airport manager and involved no State aid.

The FCJ has held that although national courts must consider the Commission's preliminary decision that a company may have received State aid, the opening of an in-depth investigation does not compel them to order the recovery of the State support in question.

The German Higher Regional Court (HRC) had referred several questions to the European Court of Justice (ECJ) about the extent to which national courts were bound by the opening of Commission investigations.

Although unclear in parts, the ECJ's **preliminary ruling** of November 2013 was widely considered to hold that Commission decisions to open in-depth State aid investigations placed certain binding obligations on national courts, which might include ordering the suspension of the measure in question and repayment of the aid already granted. The HRC followed this interpretation when it upheld Air Berlin's claims in its 2015 decision.

However, the FCJ decision questions this conclusion, suggesting that a national court is not absolutely bound by the opening of a Commission investigation and can therefore take an opposing view to the Commission on whether arrangements constitute State aid. Although it must consider the Commission's assessments, a national court is able to seek clarification from the Commission or refer the case to the ECJ, if necessary to resolve any doubts the national court may have or to assess circumstances not addressed in the Commission's decision.

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