

Kluwer Competition Law Blog

When business gets personal

Max Findlay (Max Findlay Associates, United Kingdom) · Sunday, May 8th, 2011

Business executives like to stress the impersonality of their work. If things go wrong, then, sure, there are commercial consequences but that's usually where it ends. Things have to be pretty gross before people start paying any serious attention to personal consequences – and very bad indeed before they recognise a genuine loss of integrity or professional standing. On this view, competition is a kind of shoot-'em-up computer game where no-one really dies or ends up looking a complete fool.

But sometimes there are very big consequences. Take, for instance, Tony Blair's speaking tour in Australia and New Zealand a little later this year. The tour is being sponsored by Visy, which is reputedly the world's biggest privately owned producer of corrugated cardboard boxes. Four years ago, Visy (along with its former owner Richard Pratt) was fined \$36m for fixing corrugated fibreboard packaging prices, in collusion with fellow cardboard box giant Amcor. The fine was the largest one in Australian history.

Things didn't stop there. Following the case, Mr Pratt felt sufficiently ashamed to return his decoration as an Officer of the Order of Australia. In June 2008, he was charged with four criminal charges based on the lies he allegedly told the Australian Competition and Consumer Commission about the Visy/Amcor price-fixing. On 27 April 2009, the prosecution was abandoned on account of Mr Pratt's poor health. The following day, he died. This was hardly an impersonal consequence.

Sometimes it's a regulator who pays a very high price for their actions. A case in point is the collapse last year of the OFT's prosecution of four BA executives for dishonestly conspiring with Virgin Atlantic to fix the price of fuel surcharges. This followed the sudden emergence of 70,000 emails on Virgin Atlantic computers that should have been disclosed to the defence. One of these emails revealed that Virgin had decided to increase its fuel surcharge to £6 instead of £5 before speaking to anyone from BA, thereby contradicting suggestions of price-fixing between the two companies. Ultimately, the prosecution offered no evidence and the defendants were acquitted.

The defence lawyers went to town with their criticism of the OFT. Ben Emmerson QC in particular laid into the regulator good and proper. He said that the OFT had "ruined the lives" of the defendants "by mounting and then insisting on a ludicrous prosecution doomed to failure from the start". The OFT had been "guilty of incompetence on a monumental scale"; and its chief executive John Fingleton and its cartel director Ali Nikpay should "shoulder the personal responsibility for this fiasco". Although a junior barrister was subsequently sent into court to withdraw these remarks, Mr Emmerson's criticisms have been widely remembered and believed in legal and

political circles.

Now, on the face of it, the OFT just lost a case – an unfortunate but professional hazard. But the scale of its humiliation and the mauling it got from legal commentators inflicted considerable long-term damage to its standing (with many people still wondering if it's up to the job of criminal cartel enforcement) that goes way beyond the normal impersonal consequences of work-related activity.

Looking on the bright side, though, at least Mr Fingleton – unlike E.ON Energie, following the European Commission's dawn raid on its Munich premises five years ago – didn't make a series of pathetic excuses for what had gone on. As doubtless many people will remember, documents uncovered during the raid were stored in a room provided by E.ON. The room was then locked and sealed. The following day, it was obvious that the seal had been broken.

E.ON proffered several reasons for what had happened. The seal had been broken by vibrations or by the locked door being shaken. It had been accidentally displaced by a cleaner. It had been affected by humidity in the air. It had been badly stuck on. It had deteriorated because it was past its guarantee date. The Commission said rubbish and last December the General Court upheld the Commission's €38m fine for breach of the seal. The business world still hasn't stopped laughing at E.ON's schoolboy explanations.

And the point of all this? The first is to remember that competition isn't a computer game where no-one gets injured in real life. And the second is that if you do something that actually brings an organisation into disrepute – even if it's just because you're not very good at your job rather than because you're a bad person – then no-one will care if you are seriously hurt.

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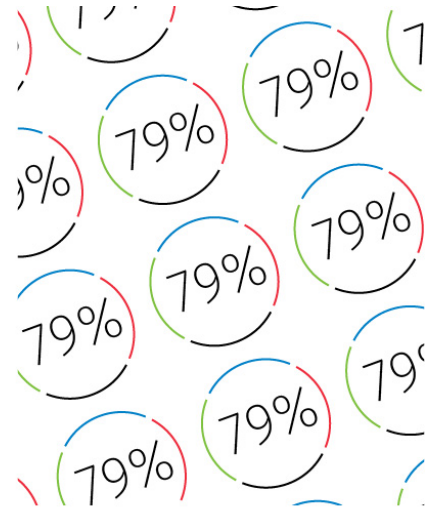
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