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# Kluwer Competition Law Blog

## Chaos theory

Max Findlay (Max Findlay Associates, United Kingdom) · Sunday, July 17th, 2011

Naturally, we all want change to be orderly. This is particularly true when something goes wrong and someone official has to come in and sort it out.

Take, for instance, the heat stabilisers cartel case. Earlier this month, the European Commission revoked the €101m fines it had originally imposed on Ciba / BASF and Elementis way back in November 2009. This volte face by the Commission followed the recent decision by the Court of Justice (ECJ) in the unrelated ArcelorMittal legal action, “clarifying” the rules about limitation periods for the imposition of fines.

In the heat stabilisers case – which involved 10 companies and resulted in total fines of €173.9m – the Commission had acted on the basis that the 10-year limitation period was suspended for all the cartelists involved, even though only some of them had challenged the Commission’s cartel investigation in court. Ciba /BASF and Elementis had not mounted any such challenge.

However, in ArcelorMittal, the ECJ ruled that the limitation period is only suspended in respect of parties that actually take such court action. As neither Ciba /BASF nor Elementis had done so, the limitation period was not suspended in their case and, consequently, had expired by the time the Commission imposed its fines. So, to quote the Commission’s press release, “it was clear that the Commission decision of 2009 was incorrect” as regards Ciba /BASF and Elementis, although the decision remains valid for the other cartelists.

Now this is the sort of incorrect decision that every rational person can understand. An official body does something. A higher authority later says that it was wrong. The official body then admits it made a mistake and things are put right. It is almost an Agatha Christie / Hercule Poirot moment: a golden world of method and order that is kept going by the exercise of the little grey cells of professional advisers. The trouble is that it is not how big changes always occur.

Look at the News Corp/ BskyB merger that is still dominating the headlines in the UK. This is a story of chaos defeating the professionals. When, in December 2010, the European Commission cleared the competition aspects of the merger, competition lawyers ticked the competition aspect of the deal off the to-do list. The only hurdle left was the UK media plurality test.

This would be easy, they said. For one thing, the media plurality test isn’t statutorily defined. It hinges simply on the general principle that it is dangerous for one person to control too much of the media because of the power they’d have to influence opinions. For another, the culture secretary Jeremy Hunt would do whatever News Corp’s chief executive wanted in exchange for the support

of his newspapers.

But then, irony of ironies for lawyers, a wholly unrelated criminal trial kickstarted a process that booted order and method out of the window. (With apologies to British readers who already know these details, it's worth explaining what has happened for the benefit of everyone else.) Last month, Levi Bellfield was convicted of the 2002 murder of 13-year-old Milly Dowler. The trial was overshadowed, though, by the hostile publicity given to the brutal questioning of the dead girl's family by Mr Bellfield's barrister, Jeffrey Samuels QC.

Less than a fortnight later (and while Ms Dowler's name was still fresh in the public consciousness) the Guardian newspaper reported that, shortly after her disappearance, News Corp's News of the World had hacked into Miss Dowler's voicemails in such a way as to give her family false hope that their daughter might still be alive. Public fury ignited and has led directly to the collapse of the News Corp/BSkyB bid, the severe curtailment of Mr Rupert Murdoch's political influence in the UK, headline resignations of senior personnel, the threat of extensive US investigations into News Corp's behaviour and the public humiliation of a very arrogant newspaper proprietor. In other words, a whole lot more than any bunch of professionals could have achieved in a month of Sundays.

There is an important lesson here. The rage generated by the News Corp scandal has led to clamorous demands for radical reform of every institution and profession connected with the row. Indeed, so frequent and changing are the demands that even the internet has trouble keeping up. It is just possible, though, that right at the end of this story, the lawyers can do something useful by ensuring that the change begun in the furnace of public fury cools into an intelligent and orderly regime.

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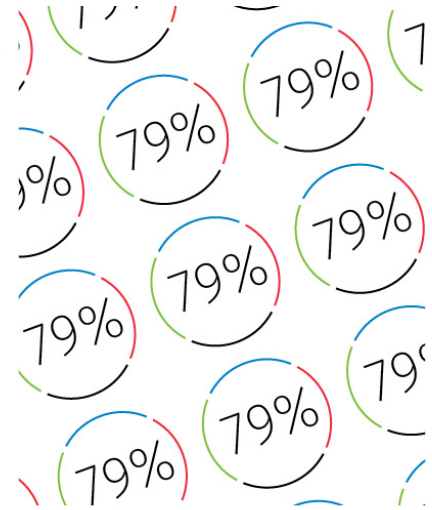
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