Kluwer Competition Law Blog

Fining provisions for worldwide cartels

Mark Wagh (Sidley Austin LLP) · Tuesday, September 26th, 2017

Being a policeman is a difficult job at the best of times. Suspects inevitably think that they are innocent and resent the perceived unjustified intrusion on their law-abiding activities. At least the policeman can take some satisfaction from looking the victim in the eye and knowing that they have improved that person's lot.

One may think, therefore, that it must take a particularly strong sense that justice should be served for a policeman to go beyond his or her usual stomping ground; especially if the suspect has not actually set foot on the policeman's turf; and if, to make matters worse, the policeman doesn't even get a thank you from the supposed victims for his or her trouble.

Arguably, this has been the role the European Commission (the "**Commission**") has adopted in the fight against global cartelists. So, in a world where the number of active antitrust authorities is growing, should we applaud or admonish the Commission?

This question was brought into focus once again by a recent decision of an Australian court in an action related to the Power Cables case. The decision highlighted the substantial difference between the fines imposed by the local authorities and those imposed by the Commission on the same parties. This follows on from the ECJ's decision in the Power Transformers case, published earlier this year. In this case, the cartel consisted of a number of producers and distributors of power transformers, auto transformers and shunt reactors, who were based in Europe and Japan. According to the Commission's decision, the parties agreed that the Japanese members would not sell power transformers in Europe, and that the European members would not sell power transformers in Japan. The Commission fined seven producers, with the General Court and the ECJ later upholding these fines. Three of the fined parties were Japanese companies that were not active, and made no sales of the cartelised products, in the EEA.

In calculating the fines for the Japanese manufacturers, the Commission relied on point 18 of the Fining Guidelines ("**Point 18**"), which provides that, where a cartelist does not have sales in the EEA during the period of the cartel, its worldwide share can be applied to the EEA sales of the cartelised product to derive a value of sales for the purposes of the Fining Guidelines.

The Commission's approach raises two questions. First, should the Commission's jurisdiction extend beyond the EEA when a party is not active in that area? Second, if it does have jurisdiction, is Point 18 the most appropriate manner by which the Commission should calculate a fine?
On the first question, the ECJ in a recent judgment (Case C-413/14 P, para. 49) held that "*the qualified effects test allows the application of EU competition law to be justified under public*

international law when it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union." In principle, a refusal to compete in the EEA by a cartelist may have a foreseeable immediate and substantial effect in the EEA. However, this can only be true if, but for the cartel agreement, the cartelist would have been a competitive rival to the locally active manufacturers. In practice, this may not be straightforward to ascertain. Indeed, one of the Japanese power transformer producers argued that high entry barriers meant that it would not have been a competitor in the EEA, even in the absence of the cartel agreement. While the producer's argument was unsuccessful in this instance, it does not invalidate the principle.

In the event that the Commission does have jurisdiction, is the Point 18 methodology the most appropriate means to calculate a fine? It seems to me that the application of Point 18 conflates two aims. First, a need to generate a value of sales, to which the fining mechanic can be applied, for a party which has no sales in the EEA. As this requires producing a number out of thin air, no method is going to be perfect, but it should lead to a fair and proportionate outcome. Where a group of cartelists agree to stay out of the others' home markets, it would seem appropriate to use sales in the home market of the non-EEA participants, given that these sales benefitted from reduced competition which resulted from the *quid pro quo* of staying out of the EEA. Taking into account sales in the rest of the world, not affected by the home market allocation, stretches the scope of an infringement which had an effect in the EEA too far in my opinion, and leads to an unfair and disproportionate outcome.

The second aim of Point 18 is to ensure that the resulting fine is a sufficient deterrent to that party. However, I do not think the calculation of the value of sales is the stage to do this. The Fining Guidelines specifically allow for an increase in the fine to ensure deterrence at a later stage of the calculation, if such an adjustment is necessary.

While it is in the abstract in the public interest for the Commission to promote consumer welfare through its legitimate fights against cartels, the Commission is required by law to conduct that fight in a fair and proportionate way. Whether Point 18 is the way to do this is, I think, questionable.

Mark Wagh is an associate, at Sidley Austin LLP. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP and its partners. This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers. Please let us know if you have any questions or comments.

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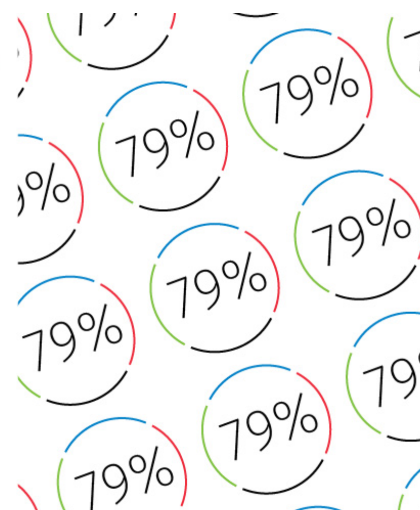

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