Identifying the Cartel Infringer – The Difficulties of the Commission

INTRODUCTION

27 March 2014 saw the announcement of two thought-provoking EU cartel judgments. Firstly, the General Court decided to reduce the fine imposed on Saint-Gobain by the Commission on 12 November 2008 for participating in a car glass cartel, from €880 million to €715 million (18.75% reduction). The fine remains, despite the reduction, to this day the largest individual fine ever handed down in an EU cartel case. Secondly, the Court of Justice (“ECJ”) reduced Ballast Nedam’s fine imposed on it for participation in a Dutch road bitumen cartel, from €4.65 million to €3.45 million (25.8% reduction). This is the first time since 9 July 2009 that the ECJ has seen fit to directly set a reduction on an appellant in a cartel case, and only the second time for any appellant involved in a cartel this century.

SAINT-GOBAIN: REASONS FOR THE REDUCTION

The car glass cartel consisted of a series of anti-competitive agreements and concerted practices in the automotive glass industry, in particular the supply of automotive glass to car manufacturers and their network of authorised dealers, that lasted from 10 March 1998 to 11 March 2003. The Commission fined three companies a total of €1,354,896,000, which at the time was the highest amount ever imposed on a single cartel.

In the appeal before the General Court, a key argument for Saint-Gobain centred around the fact that the Commission had wrongfully considered it to be a repeat offender on two separate occasions, in 1984 and 1988. Firstly, the 1988 decision was ruled out due to the fact that it was another subsidiary of Compagnie de Saint-Gobain SA (“Compagnie”), the parent company of the Saint-Gobain group, that was at fault. This subsidiary, Fabbrica Pisana, was charged by the Commission in 1988, but at no stage were either Compagnie or Saint-Gobain the recipients of any investigation nor final decision by the Commission.
Under the Fining Guidelines, it is stated that the Commission may increase the basic amount of the fine where there are aggravating circumstances, such as where an undertaking continues or repeats the same or a similar infringement after the Commission or a National Competition Authority has made a finding that the undertaking infringed Article 101 or 102 TFEU. As the basic amount will be increased by up to 100% for each such infringement established, it is clearly vitally important to establish to what extent a party can be considered to be a repeat offender.

As the Commission cannot merely presume but rather has to demonstrate that an offence committed by a subsidiary was done in its capacity of forming an economic unit with its parent company, it could not rely on the 1988 decision as evidence that Saint Gobain was a repeat offender. This was crucial with regards to setting the amount of the fine, as instead of the Commission being able to point to both the 1984 and the 1988 decision as evidence of a concerted practice of infringement, it only had one decision some 13 years prior to its current decision.

The Commission sought to argue that it was still entitled to consider the 1984 decision with the same degree of severity pointing to the precedent of Groupe Danone v Commission (Case T-38/02, 25 October 2005), where the Commission had been allowed to take into account an offence committed by the infringer almost 18 years before. The General Court distinguished this decision on the basis that whilst in the Danone decision there was a further offence committed by Danone in the middle of this 18 year period, whereas in the present case (with the 1988 decision discounted), there was no such link, and therefore the Commission had erred in using the 1984 decision in combination with the 1988 decision as a justification for fining Saint Gobain so heavily.

As only the 1984 decision stood as an infringement that can be used by the Commission to increase the fine imposed on Saint-Gobain, the General Court therefore reduced the amount of the fine set by the Commission. As the Commission had not sought at the time to demonstrate Saint-Gobain's participation in the 1988 decision, it could not rely on this for setting the amount of the fine. The General Court therefore reduced the fine to take into account this discrepancy.

**BALLAST NEDAM: REASONS FOR THE REDUCTION**

The Dutch road bitumen cartel consisted essentially in price fixing practices for road pavement bitumen in the Netherlands between suppliers, purchasers, and between the suppliers and purchasers, that lasted from 1 April 1994 to 15 April 2002. The Commission issued its decision on 13 September 2006, fining 13 companies a total of €266.7 million. Ballast Nedam appealed the decision, and this appeal was dismissed by the General Court on 27 September 2012.

The key argument for Ballast Nedam in this case was that its defence rights were not respected by the General Court. European competition law implementation regulations make it clear that the Commission is meant to only base its decisions on objections on which the parties concerned have been able to comment.

The corporate structure of the companies involved from the Ballast Nedam Group was as follows: Ballast Nedam owned Ballast Nedam Infra BV ("BN Infra"), which in turn owned Ballast Nedam Grond en Wegen BV ("BNGW"). Between 1995 until 1 October 2000, the Group’s road construction activities were carried out by BNGW, at which point BN Infra was held liable for the infringement (until 15 April 2002). Where the issue arose during the
enforcement of the cartel was that the Commission, in its statement of objections ("SO"), failed to make it clear that BNGW was an offender, and furthermore failed to send it a separate SO to BNGW.

The General Court agreed with the Commission that despite these facts, sufficient information was given to Ballast Nedam in the SO to identify BNGW, as Ballast Nedam were stated to have participated in the cartel through the managing director of BNGW, and that there was a presumption of influence of Ballast Nedam over its subsidiaries. The ECJ however rejected this argument, stating that, as in Paperfabrik v Commission (Case C-322/07, 3 September 2009), it was necessary for the SO to indicate in which capacity an undertaking is called upon to answer the allegations. It also underlined the fact that a separate SO had not been sent to BNGW, stating that this exacerbated the ambiguity of the wording in the statement.

The ECJ therefore refused both the Commission’s and the General Court’s arguments on a more flexible interpretation of the right of parties to be informed of, and be able to comment on, the objections put against them by the Commission.

CONCLUSION

We can see that in both of these cases, the downfall of the Commission’s, and in the case of Ballast Nedam, the Commission and the General Court’s, decision, is linked with the right of all of the accused parties to have the adequate ability to defend themselves against the Commission’s accusations. This can place a heavy burden on the Commission, especially in complex cartel cases where multiple subsidiaries can be involved and it can be difficult to ascertain where it is necessary to ensure that it is carried out (especially as in the Ballast Nedam case the ECJ refused to allow any leeway on this aspect despite the General Court seeking to do so). In the case of Saint-Gobain, it was the failure of the Commission to pursue the parent company in a decision a decade ago. In the case of Ballast Nedam, it was the failure of the Commission to identify at what point the nexus of the cartel at shifted from one company in the group to another. Ascertaining such distinctions can therefore be the key to achieving successful prosecutions and successful defences.

SOURCES

Joined Cases T-56/09 and T-73/09, Saint-Gobain Glass France SA and Others v Commission, and Compagnie de Saint-Gobain v Commission, judgment of 27.03.2014 (not yet available in English)
Press Release

Case C-612/12P, Ballast Nedam NV v Commission, judgment of 27.04.2014
Press Release
Merger Control

NOTIFICATIONS

1. **Simplified procedure cases**
   - La Banque Postale/SNCF/SOFIAP (Case M.7149, 01.04.2014).
   - Lenovo/IBM x86 Server Business (Case M.7200, 28.03.2014).

PHASE I CLEARANCES

2. **Unconditional clearances: simplified procedure**
   - Extra Holding/Dolphin/IDBD (MEX/14/0331, 31.03.2014).
   - Varo Energy/Bayernoil Package (MEX/14/0331, 31.03.2014).

PROCEDURE

3. **Commission sends Statement of Objections to Marine Harvest for early implementation** – The European Commission has issued a Statement of Objections to salmon farmer Marine Harvest ASA in respect of the alleged early implementation of its acquisition of competitor Morpol ASA. Marine Harvest, which notified this transaction to the Commission in August 2013, had acquired a 48.5% stake in Morpol in December 2012 and, in the Commission’s preliminary view, implemented its project to acquire Morpol prior to notification and in breach of the EU Merger Regulation. If this infringement is confirmed, the Commission may impose a fine of up to 10% of the company’s annual worldwide turnover (IP/14/350, 31.03.2014).

Antitrust

4. **Commission fines producers of high voltage power cables €302 million for operating a cartel** – The European Commission has found that 11 producers of underground and submarine high voltage power cables, including some of the world’s largest high voltage power cable producers, namely ABB, Nexans, Prysmian, J-Power Systems, VISCAS, EXSYM, Brugg, NKT, Silec, LS Cable and Taihan, operated a cartel, and has imposed fines totalling €301,639,000. ABB received full immunity from fines under the Commission’s 2006 Leniency Notice after revealing the cartel to the Commission (Case 39610, IP/14/358, 02.04.2014).

5. **Commission fines producers of steel abrasives €30.7 million in cartel settlement** – Ervin, Winoa, Metalltechnik Schmidt and Eisenwerk Würth have been found to have participated in a cartel to coordinate prices for steel abrasives in Europe for over six years. The European Commission has imposed reduced fines, totalling €30,707,000, as all four undertakings agreed to settle the case. Ervin was not fined as it benefited from immunity under the Commission’s 2006 Leniency Notice having revealed the existence of the cartel to the Commission (Case 39792, IP/14/359, 02.04.2014).

State Aid

6. **Court confirms the partial annulment of the European Commission’s decision relating to aid granted to ING because of the financial crisis** – The Court of Justice has upheld the partial annulment of the Commission’s decision on State aid implemented by the Netherlands for ING’s Illiquid Assets Back Facility and Restructuring Plan, holding, *inter alia*, that the private investor test is one of the factors which the Commission must to take into account for the purposes of establishing the existence of State aid. The Court rejected the Commission’s contrary position on this
point together with its other grounds of appeal, including grounds relating to the factual analysis made by the General Court, the claim that the Commission was not in a position to affect the commitments offered by the Netherlands and ING and the claim that the General Court unlawfully expanded the scope of the case (Case C-224/12 P, Commission v Kingdom of the Netherlands and ING Groep NV, Press Release No 49/2014, judgment of 03.04.2014).

7. **Court confirms that the implied unlimited guarantee granted by France to La Poste constitutes unlawful State aid** – The Court of Justice has upheld the European Commission’s finding that the French State’s implied and unlimited guarantee improved La Poste’s financial position by reducing charges which would otherwise have encumbered its budget and was incompatible with the internal market. The guarantee granted an immediate advantage to La Poste and constituted State aid, in so far as it was granted without requiring anything in return and allowed better financial terms for a loan to be obtained than those normally available on the financial markets (Case C-559/12, France v Commission, Press Release No 48/2014, judgment of 03.04.2014).

8. **European Commission consults on new State aid de minimis Regulation in fishery and aquaculture sector** – The Commission has published a formal consultation notice on a draft revised Regulation on de minimis State aid in the fishery and aquaculture sector. The aim of the revision is to align the new text with the new general State aid de minimis block exemption Regulation (Regulation 1407/2013). The current de minimis threshold of EUR 30,000 per beneficiary over any period of three years, subject to national caps for all aid granted, will however be maintained. The Commission has invited comments on the draft revised Regulation to be submitted by 23 May 2014 (Notice of consultation and Draft Regulation, OJ C92/22, 29.03.2014).