

COMPETITION LAW ENFORCEMENT - RECENT TRENDS

11th BALTIC COMPETITION CONFERENCE

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10 September 2014

COMPETITION LAW ENFORCEMENT - RECENT TRENDS

STRUCTURE OF PRESENTATION

- ◎ CARTELS
- ◎ OTHER HORIZONTAL AGREEMENTS
- ◎ VERTICAL AGREEMENTS
- ◎ ABUSE OF DOMINANCE
- ◎ COMMITMENT DECISIONS
- ◎ PRIVATE ENFORCEMENT

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CARTELS

- ◉ Note the decisions of the European Commission in 2013 and 2014: pages 3 to 6 of Recent Developments: fines in excess of €3bn
- ◉ Note the fine on Goldman Sachs in Power Cables
- ◉ LIBOR is of particular interest - a non-traditional cartel: see later slide
- ◉ Note how many other (alleged) cartels the Commission is investigating, in a wide range of sectors

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CARTELS: LIBOR

- ◉ Note that this is not a ‘traditional’ cartel
- ◉ The agreement is not one to fix the price of a product, but to manipulate a benchmark rate
- ◉ Presumably this would be an agreement that ‘distorts’ competition rather than one that restricts or prevents it
- ◉ The manipulation of benchmark rates may infringe other legal rules, particularly in relation to financial services

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CARTELS: LIBOR

- ◉ Note that the Commission's decisions of 4 December 2013 were **settlements**
- ◉ This means that the decisions, when published, will be relatively short and contain few details of the infringements
- ◉ Settlement decisions differ from fully-contested decisions, which the Commission must fully reason in order to be able to defend itself on appeal to the General Court in Luxembourg

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CARTELS: LIBOR

- ◉ Note that Barclays blew the whistle on the Eurobor rate and was given immunity from a fine that would otherwise have been €690 million
- ◉ And UBS was given immunity in relation to Yenbor from what would otherwise have been a fine of €2.5 billion
- ◉ Note that the Commission is continuing to investigate other alleged agreements by banks (and ICAP) that did not settle

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OTHER HORIZONTAL AGREEMENTS

⦿ Note that there have been three decisions in the pharmaceutical sector on ‘pay-for-delay’ agreements

- Lundbeck (June 2013)
- Johnson & Johnson/Novartis (page 5 of Recent Developments)
- Servier/Perindopril (page 7 of Recent Developments)

⦿ Lundbeck and Servier are on appeal to the General Court

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OTHER HORIZONTAL AGREEMENTS

- ◉ In particular, are such agreements restrictions by object?
- ◉ Note also that there is an Article 102 infringement in Servier - is the acquisition of technology to prevent generics from producing the generic product an abuse of a dominant position?
- ◉ Several cases in other jurisdictions on this topic - UK, Italy etc.

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VERTICAL AGREEMENTS

◉ Commission investigation into cross-border TV services (page 10 of Recent Developments)

- Are restrictions on the supply of subscriptions to consumers outside the territory to which the licence applies caught by Article 101?
- That is to say an unlawful ban on passive sales?
- Note the earlier Murphy case - ban on broadcasting of the Greek signal in the UK held to infringe Article 101 by object

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VERTICAL AGREEMENTS

◉ Note in the UK

- Discounts on hotel rooms - commitments in relation to non-discount policy: on appeal to the Competition Appeal Tribunal
- Mobility scooters - restrictions on online sales unlawful

◉ Both on page 18 of Recent Developments

◉ Note also enforcement in many other Member States in relation to vertical agreements, including e-commerce

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ABUSE OF DOMINANCE

- ◉ See pages 12 to 14 of Recent Developments
- ◉ Note *Motorola Mobility*: it can be abusive to seek an injunction for prevent the use of standard-essential patents where the would-be licensee has agreed to submit the FRAND dispute to third-party determination, for example by a court
- ◉ No fine in *Motorola* as the point novel and there might have been different conclusions in different Member States

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ABUSE OF DOMINANCE

- ◉ Read Motorola in conjunction with the commitment decision in Samsung, page 16 of Recent Developments: example of how such disputes could be resolved
- ◉ Note also Servier (see earlier slide)
- ◉ And note Intel v Commission: Commission decision upheld in its entirety
- ◉ Strong line taken against ‘exclusivity’ rebates - unlawful per se unless there is an objective justification

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ABUSE OF DOMINANCE

- ◉ Note a couple of successful applications to the High Court in the UK for an injunction/declaration in standalone cases (that is to say not follow-on cases): pages 21 and 22 of Recent Developments
 - Dahabshiil v Barclays Bank
 - Arriva The Shires v London Luton Airport

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COMMITMENT DECISIONS

- ◉ Note the increasing use of this type of decision
- ◉ See pages 15 to 16 of Recent Developments
 - Deutsche Bahn
 - Visa Europe
 - Samsung
 - ?Google?
- ◉ And in the UK: pages 19 to 20 of Recent Developments
 - Discounts on hotel rooms and Western Isles fuel

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COMMITMENT DECISIONS

- ⊙ There are arguments for and against commitment decisions
- ⊙ In favour
 - Rapid settlement of difficult cases
 - Less resource-intensive for the competition authority
 - No fine for the undertakings
 - Damages claims against them more difficult

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COMMITMENT DECISIONS

⊙ Against

- The competition authority avoids making difficult decisions
- Conduct that should be punished is not punished
- adverse effect on deterrence
- Lack of decisions undermines the clarity of the law: the Luxembourg courts are excluded from the process

⊙ Note the outcome in *Motorola Mobility* and *Samsung*: an infringement decision and a commitments decision

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PRIVATE ENFORCEMENT

- ◉ A very active area in the EU!
- ◉ Most big cartel cases now lead to damages claims
- ◉ The claims may be standalone, follow-on or a combination of the two
- ◉ There are legislative developments both at the EU level (a Directive is about to be adopted) and in the UK (in particular on collective redress)
- ◉ Note Kone, page 15 of Recent Developments

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PRIVATE ENFORCEMENT

- ◉ See pages 20 to 22 of Recent Developments
- ◉ Note that follow-on actions can go to the CAT
- ◉ Standalone actions (at the moment) can only go to the High Court; the High Court can also hear follow-on actions
- ◉ Note Ministry of Defence v British Airways in the CAT
- ◉ Also DSG v MasterCard

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PRIVATE ENFORCEMENT

- ◉ And note the number of actions in the High Court, including
 - Dahabshiil
 - Arriva (see above)
- ◉ Note National Grid v ABB: settled
- ◉ Several other cases settled
- ◉ And note Martin Retail Group v Crawley Borough Council: restrictive covenant in a commercial lease of retail premises found to infringe the Chapter I prohibition!

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THANK YOU FOR YOUR ATTENTION!