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CFI Increases Fine in Cartel Case.

Introduction.

In a judgment issued on 12th December the European Court of First Instance for the first time increased the fine imposed on an undertaking for participating in a cartel.[1] The case concerned an appeal by BASF against a Commission decision of 9th December 2004 which found that BASF and a number of other undertakings had participated in a complex of agreements and concerted practices consisting of price fixing, market sharing and agreed actions against competitors in respect of choline chloride.[2] The Commission had originally imposed a fine of €34.97m on BASF for its part in the cartel. Although the CFI has unfettered discretion to review fines imposed by the Commission, up to now it has largely confined itself to checking that fines imposed by the Commission are in line with the latter's 1998 Guidelines on Fines and the 1996 Leniency Notice.

Background.

The Commission initiated its investigation into the global choline chloride industry after receiving a leniency application in April 1999 from a US producer, Bioproducts. The investigation covered the period from 1992 to the end of 1998.[3]

The Commission concluded that a number of firms including BASF had participated in the cartel which it stated had operated at both a global and a European level. At a global level the North American producers agreed to withdraw from the European market while the European firms agreed to withdraw from the North American market. The European firms were found to have operated a cartel from March 1994 to October 1998.

The Appeal.

BASF advanced five arguments challenging the level of fine imposed by the Commission. These related to:

1. The deterrent effect of the fine;
2. The increase in the amount of the fine for repeated infringement;
3. Its cooperation during the administrative procedure;
4. The overall reduction which ought to be granted independently of the 1996 Leniency Notice; and,
5. The characterisation of the global and European arrangements as a single and continuous infringement.

The Commission had increased the fine imposed on BASF in order for it to constitute a sufficient deterrent on the grounds of the size of BASF. BASF argued that the Commission should have

taken its conduct and the likelihood that it might re-offend into account in deciding whether or not there was a need to increase the fine to provide an effective deterrent. The Court rejected this argument noting that "that the failure to evaluate the likelihood of repeated infringement on BASF's part does not in any way affect the lawfulness of the increase."[4] It noted that there was established case law that the size of an undertaking was a relevant factor to be taken into account when setting a fine. It also took into account the fact that BASF had a much higher turnover than a number of the other parties involved. The Court also stated that "the adoption of a compliance programme by the undertaking concerned does not oblige the Commission to grant a reduction in the fine".[5]

BASF claimed that the increase in the level of the fine for repeat infringements breached principles of legal certainty and was incorrectly calculated. The Court rejected BASF's argument that a case of repeated infringements could only arise if the infringements occurred in the same market. Similarly it rejected the claim by BASF that the previous infringements had occurred well in the past and that the Commission consequently should not be entitled to take them into account.

BASF claimed that it should have been granted a greater reduction for cooperation than the 20% reduction it was given by the Commission. Again the Court rejected this claim largely on the basis that information cited by BASF as having been provided to the Commission was insufficient to justify a higher reduction.

The CFI also rejected the fourth ground advanced by BASF that it should have received a greater reduction in its fine on the basis of its cooperation independent of the Leniency Notice. The Court ruled:

> "The information which BASF provided voluntarily about the global cartel was of minor importance and utility, while it submitted no substantial information on the European cartel, the extent of which was revealed by UCB and Akzo Nobel. Accordingly, the fact that BASF was the first European producer to have cooperated cannot lead to a reduction in the fine."[6]

Both BASF and UCB, which also appealed the Commission decision, claimed that the Commission erred in law in characterising the global and European arrangements as a single continuous infringement.

First, BASF claimed that the Commission did not suggest in the statement of objections that the global and European cartels formed a single infringement so far as the EEA market was concerned. BASF claimed that the difference between the statement of objections and the Decision amounted to a breach of the rights of the defence, since BASF would have defended itself against that incorrect legal description of the facts had it appeared in the statement of objections.

Second BASF argued that the characterisation of the cartel as a single infringement was incorrect, because the participants in the two cartels were different. It claimed that some recitals to the Decision acknowledged that there were two separate infringements. Furthermore, it claimed that the global cartel had as its objective market-sharing at global level, whereas the European cartel was primarily aimed at price-fixing and customer-allocation in the EEA, which was a different objective. BASF further argued that the

Commission's assertion that the sole objective of the conduct in question was to increase prices, while all the other objectives were deemed to be ancillary and contributory, did not reflect the findings made in the Decision. It cited the different duration of the two infringements and the fact that there was a break between them, since the global price agreement remained in force from January 1993 to January 1994, whereas the European cartel lasted from March 1994 to October 1998. It claimed that the European cartel was of no interest to the North American producers, since they were required to stay out of the European market and exports to North America were insignificant.[7] BASF therefore claimed that the Commission could not impose a fine on it in respect of the global cartel as this was time barred.

The Court found in favour of BASF on the second point that the Commission had failed to show that the global and European arrangements had constituted a single continuous violation. It did not therefore need to address the rights of the defence issue.

Level of Fine.

In considering the appropriate fine, however, the CFI decided that the Commission had not increased the fine sufficiently to take account of the duration of the offence. The Commission had increased the base fine by 10% for each full year of the infringement and by 5% for each additional six month period. The infringement in the case of BASF had lasted for 3 years and 10 months and the Court decided that applying an additional 5% for the 10 month period would ignore the four additional months. Consequently it decided to apply an increase of 38% to take account of the duration of the infringement.

In addition the Court noted that BASF had received a reduction of 10% in its fine from the Commission for cooperation in not substantially disputing the accuracy of the facts as set out by the Commission and a further 10% for supplying additional information. The Court noted, however, that where an undertaking makes available to the Commission information concerning actions for which it could not have been required to pay a fine, that does not amount to cooperation falling within the scope of the 1996 Leniency Notice. The Court decided that the information supplied related primarily to the global arrangement, which it found to be time-barred, and was only of minimal value in respect of the European cartel. It therefore decided that BASF could no longer benefit from the 10% reduction it had received for supplying information.

Comment.

The level of fines imposed by the Commission in cartel cases has increased substantially over the past decade. The CFI judgment confirms that the need to deter such behaviour was one of the factors to be taken into account in the setting of fines. A number of authors argue that despite their increased levels, fines imposed in EU cartel cases are still too low to represent an effective deterrent.

In its judgment the CFI confirmed that it "is empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment

imposed where the question of the amount of the fine is before it."[8]

An empirical review of Commission and Court decisions in the years following the adoption of the 1998 fining Guidelines found that the CFI essentially confined itself to checking whether the 1998 Guidelines and the 1996 Leniency Notice had been followed by the Commission in setting fines and had rarely endeavoured to clarify the principles behind Commission fine decisions. It suggested that appeals against cartel decisions were essentially aimed at securing reductions in fines rather than demonstrating that firms had been wrongly convicted of cartel behaviour.[9] As long as the Court had eschewed the option of imposing a higher fine, such appeals could be regarded as something of a one-way bet. The fact that the Court increased the fine imposed in this case may cause firms to pause for thought before lodging appeals in respect of the level of fines in future.

[1] Joined Cases T-101/05 and T-111/05, *BASF AG and UCB SA v Commission of the European Communities.*
[2] Choline chloride is a member of the B-complex group of water-soluble vitamins (vitamin B4) and is mainly used in the animal feed industry (poultry and swine) as a feed additive.
[3] The Commission Decision notes that the Canadian producer Chinook had already approached it about the cartel on 25 November and 3 and 16 December 1998 but that it had not opened an investigation at that time.
[4] Para 47.
[5] Para 52.
[6] Para 130.
[7] Paras 133 and 134.
[8] Para 213.
[9] D. Geradin and D. Henry, (2005): *The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission's Decisions and Practice and the Community Court's Judgments*, Global Competition Law Centre Working Paper 03/05.

UK Competition Commission Removes Bank Price Controls.

Introduction.

On 21st December, the UK Competition Commission announced that it had decided to remove price controls in respect of SME banking services. These controls, which required banks to offer an account for SME customers that paid a minimum interest rate of 2.5 percentage points below base rate or free money transmission or both, had been imposed on a temporary basis in 2003, following an inquiry by the Commission into SME banking services. This report found that there was a lack of competition in the SME banking market. It also concluded that a number of banks had charged excessive prices for SME banking services.

In addition to the temporary price controls, the Commission accepted behavioural undertakings designed to increase competition in SME banking services from a number of banks.[1] The price control provisions were introduced as a temporary measure to safeguard SME customers until the market became more competitive.[2] The Commission's decision to lift price controls follows a review by the OFT of the impact of the behavioural and price control measures adopted in 2003.

Background.

In November 1998 the UK Chancellor established the Cruickshank Inquiry into the banking sector as a result of concerns

about lack of credit for SMEs. The Inquiry, which finally reported in March 2000, found no problems in the market for personal banking services. It concluded, however, that the market for SME banking services was much more problematic. In particular it found that the market dynamic evident in the personal banking market was absent and concluded that there was little prospect of effective competition. The Cruickshank Report made a large number of recommendations in relation to banking, the regulatory framework, bank profits and developments in personal banking. It concluded that structural remedies might be needed in the case of SME banking and recommended that a complex monopoly investigation of SME banking services be undertaken by the Competition Commission.

The Commission's 2002 Findings.

The Competition Commission's subsequent report did not adopt the Cruickshank proposal for structural remedies of SME banking services. The Report did, however, conclude that there was a lack of competition in SME banking.

According to the Commission, the market in SME banking services was highly concentrated. There was very limited switching of banks by SMEs. It went on to state:

> "In such a concentrated structure, it is to be expected that there will be a recognition, however independently, on the part of the companies concerned that price competition is likely to be damaging to them. A price cut that generates little or no increased sales would not be profitable. One that does increase sales, at competitors' expense, is likely on that account to trigger price cuts by competitors, such that all would end up less profitable than they previously were. In such circumstances there would be a strong disincentive to price cutting. In consequence price competition will be weakened, and largely limited to any segment of the market where such considerations do not apply."[3]

The Report found that the banks had earned excess profits on SME business and that prices were therefore excessive. It identified a number of specific practices which appeared to restrict and/or distort price competition, namely:

(a) the requirement of some clearing banks that SMEs wishing to borrow or use business deposit accounts have a business current account;

(b) the similarity of price structures between the main clearing banks, including in general not paying interest on current accounts while also levying money transmission and other charges, and payment of relatively low rates of interest in relation to the value of funds to the bank on smaller short-term deposit accounts;

(c) the similar pattern of differentiation in money transmission charges between the main clearing banks, by generally confining free banking services to certain categories of SMEs, in particular start-ups and some switchers;

(d) giving discriminatory discounts through negotiation, making price comparisons more difficult and reducing the benefit for customers of competition;

(e) lack of transparency of actual charges to SMEs, because of failure to distinguish between interest

charged on authorized and unauthorized overdrafts;

(f) the differential in terms between personal and business accounts, and encouraging or requiring most SME customers to have business current and deposit accounts; and

(g) relatively little promotion of the scope for savings from use of set-off or sweep facilities to SME customers who could benefit from them.

Remedies.

The Competition Commission recommended that banks should be obliged to pay interest on SME current accounts or to offer SMEs the option of free banking services. It argued that such measures were required because it was "necessary to give the level of prices a decisive and significant shift toward what we considered to be competitive levels".[4]

In 2003 the Competition Commission introduced "behavioural undertakings" aimed at making switching easier and faster, prices more transparent and preventing the banks from making the supply of SME banking services conditional on taking other services (such as loans or personal current accounts) from the same bank. To safeguard SME customers until the market became more competitive, the Commission also put in place the 'transitional undertakings' relating to interest on current accounts and free money transmission.

The OFT Review.

The OFT found that the transitional undertakings had been successful in changing SMEs' expectations of what constitutes competitive pricing by a bank. It also concluded that a combination of general trends in the market and the impact of the behavioural undertakings had increased the level of competition in the SME banking market, although levels of switching remain low (around four per cent per year – similar to the rate in 2002). It found evidence that SMEs were now more likely to consider a move to one of the smaller banks, and were more price sensitive than was apparent at the time of the Competition Commission report. Greater use of automated payments technology has encouraged banks to develop new tariffs offering cheaper rates for use of automated payments which had contributed to greater variation in tariffs now than was the case in 2002.

The OFT also pointed out that price controls themselves distort competition, particularly if maintained for an extended period. They affect the competitive incentives for firms to invest in markets, to attempt to gain market share, and to produce innovative products and services. It concluded that the cost of retaining the transitional undertakings would outweigh the benefits. The OFT also rejected the option of varying the transitional undertakings.

The OFT concluded that the behavioural undertakings should remain in place as they facilitated the development of competition in the market. It claimed that the benefits they provided in relation to supporting switching and transparency were necessary to further improve competition in the market for SME banking services. The Competition Commission has now accepted these recommendations.

Comment.

The Competition Commission inquiry into UK SME banking services and the

various measures imposed on certain UK banks highlight illustrate the rather unique provisions (at least in an EU context) of UK competition law with respect to oligopolistic behaviour.

The Commission, in its 2002, report found that, because of the highly concentrated nature of the UK SME banking market, in which four banks had a combined share of 90%, the banks must inevitably independently come to the conclusion that price competition was not in their individual interest and that competition would be reduced as a result.

It should be stressed that the Commission did not find evidence of actual collusion either tacit or explicit, merely that the concentrated nature of the market meant that firms, acting independently, would face a reduced incentive to compete. The Commission sought to tackle this by imposing a range of behavioural remedies, designed to increase competition and reduce the level of market concentration, allied to price controls, designed to give "the level of prices a decisive and significant shift toward what we considered to be competitive levels".

In general evidence of parallel behaviour on its own, is insufficient to prove collusion. Firms' in concentrated markets inevitably recognise that competitive behaviour on their part will trigger a response from others and they will therefore take account of the likely response of their rivals when making decisions. It would clearly be irrational for firms not to consider the likely responses of their rivals and the impact of such responses on their business when taking decisions.

There are similarities between the "complex monopoly" concept contained in UK law and the EU concept of joint dominance. Under EU law, however, a finding of joint dominance requires the existence of tacit collusion which is something more than mere recognition of mutual interdependence.

It is also worth noting that the behaviour of UK banks was not in any way unique. A study of pricing behaviour of UK firms indicated that a significant proportion were reluctant to cut prices for fear of triggering a price war.[5]

Imposing measures to make markets "more competitive" not because of anti-competitive actions by market participants, but because they have failed to compete strongly enough in the eyes of a regulatory authority raises a number of fundamental questions. Not least among these is whether competition policy should be confined to preventing anti-competitive behaviour, or whether it should extend to restructuring markets in order to make them more competitive. Similarly, what yardstick is to be applied in deciding whether or not a market is sufficiently competitive? From an economics perspective, the idea of a competition agency deciding what the level of prices would be, assuming a more competitive market is strange to say the least.

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[1] Behavioural undertakings were given by nine banks: AIB Group (UK) Plc, Bank of Ireland, Barclays Bank Plc, Clydesdale Bank Plc, HBOS Plc, HSBC Bank Plc, Lloyds TSB Bank Plc, Northern Bank Ltd, and the Royal Bank of Scotland Group Plc.

[2] The transitional undertakings were given by HSBC Bank Plc, Lloyds TSB Bank Plc, Barclays Bank Plc and the Royal Bank of Scotland Group Plc.

[3] Competition Commission, (2002): *The Supply of Banking Services by Clearing Banks to Small and Medium-sized Enterprises*, London: HMSO, para 2.141.

[4] Para 1.13.

[5] S. Hall, M. Walsh and T. Yates: How do UK Companies Set Prices, *Bank of England, Quarterly Bulletin* May 1996.

OFT Announces First UK Cartel Criminal Prosecution.

Introduction.

On 19th December the UK Office of Fair Trading announced that three businessmen had been charged with cartel offences under the UK Enterprise Act. This is the first time that individuals have been charged with engaging in a cartel since the cartel offence came into force in the UK in 2003. The three men had already entered guilty pleas and agreed to serve terms of imprisonment as part of a plea bargain agreement with the US authorities. The individuals concerned who have been named by the US and UK authorities are the managing director and sales and marketing director of Dunlop Oil & Marine Limited along with the sole proprietor of a consulting business named PW Consulting (Oil & Marine).

The Alleged Offence.

The three individuals have been charged with dishonestly participating in a cartel to allocate markets and customers, restrict supplies, fix prices and rig bids for the supply of marine hose and ancillary equipment in the UK. The charges relate to the period from 20 June 2003 when the cartel offence came into force, to 2 May 2007. Marine hose is a flexible rubber hose used for transporting oil between tankers and storage facilities.

The men concerned have already pleaded guilty and been sentenced to terms of imprisonment in the US for their participation in a cartel in respect of marine hose in that country. They along with five other non-US nationals were arrested by the US authorities in May 2007 in Houston, Texas, while attending an industry conference. The arrests were timed to coincide with searches carried out by the OFT at locations in the UK, as well as on-site inspections by the European Commission.

As part of plea bargain agreements the three UK individuals agreed to serve sentences of 30 months, 24 months and 20 months respectively.[1] According to the US Department of Justice, these are the longest prison sentences that foreign nationals charged with antitrust offences have agreed to serve in the Division's history. In addition two of the defendants have each agreed to pay a $100,000 fine, while the third agreed to pay a $75,000 fine.

As part of plea bargain agreements the three UK businessmen were allowed to return to the UK to face separate charges there. They were arrested by the Metropolitan Police on their arrival at Heathrow airport and were interviewed by OFT officials before being charged.

Relevant UK Legislation.

In contrast to Ireland's 2002 Competition Act, the UK's Enterprise Act, 2002, created a specific offence in respect of individuals responsible for undertakings participating in a cartel.

Section 188 of the Enterprise Act provides that an individual is guilty of an offence if he or she dishonestly agrees with one or more other persons that undertakings will engage in one or more of the prohibited cartel activities. These are:

- price-fixing
- limitation of supply or production
- market-sharing, and
- bid-rigging.

The offence only applies in respect of agreements between undertakings at the same level in the supply chain. The offence is committed irrespective of whether or not the agreement reached between the individuals is actually implemented by the undertakings and irrespective of whether or not the individuals have the authority to act on behalf of the undertakings at the time of the agreement. If the agreement between the individuals is made outside the UK, however, proceedings may only be brought where the agreement has been implemented in whole or in part in the UK. The maximum penalty upon conviction on indictment is five years and/or an unlimited fine.

Interestingly, prior to the passage of the Competition Act, 2002, the Competition Authority had made submissions advocating the creation of a specific cartel offence along the lines of the UK legislation. Officials of the Department of Enterprise, Trade and Employment advised against this approach in a briefing note on the grounds that the UK system "is different".[2] The UK Government chose to establish a specific offence because it was felt that the bifurcated nature of Article 81 was not well suited to criminal prosecutions and in order to remove the need for juries to have to deal with complex economic evidence. It will be interesting to see how the legislation will work in practice if and when the case goes to trial.

Comment.

This case serves to illustrate the growing international trend towards treating cartels as serious offences which merit custodial sentences. Following last year's Australian election, for example, the incoming Labour administration has indicated that it is considering introducing criminal penalties for those engaged in cartels. It also demonstrates the high levels of cooperation between competition authorities in various jurisdictions in respect of cartel investigations.

[1] While the individuals have pleaded guilty to similar charges in the US, the presumption of innocence applies in respect of the alleged offences in the UK.

[2] See P. Massey and D. Daly, *Competition and Regulation in Ireland: The Law and Economics,* 2003.