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Deposited in DRO:

27 January 2016

Version of attached file:

Published Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Chirita, Anca D. (2014) 'Recent developments in EU cartels.', Oxford competition law. .

Further information on publisher's website:

<http://oxcat.oup.com/page/372/recent-developments-in-eu-cartels>

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Oxford Competition Law

Recent developments in EU cartels



An overview of some of the very recent industrial cartels that harm the welfare of intermediate consumers, previously on appeal before the ECJ, reveals the fantastic work done against evil cartels by the Directorate-General for Competition across various sectors of the economy ranging from electric cables (C-37/13 P, Nexans SA, Nexans France SAS v EC, 25 June 2014), industrial bags (C-243/12 P, FLS Plast A/S v EC, 19 June 2014; Case C-36/12, Armando Alvarez SA v EC, 22 May 2014; Case C-35/12 P, Plásticos Españoles SA (ASPLA) v EC, 22 May 2014), road pavement bitumen (C-612/12 P, Ballast Nedam NV v EC, 27 March 2014), bearings for cars and trucks (EC, Almunia's Speech/14/233, 19 March 2014), Calcium carbide and magnesium cartel (Case C-90/13 P, 1.garantovana s.a. v EC, 15 May 2014), high voltage power cables cartel (EC, IP/14/358, 2 April 2014), gas insulated switchgear (Joined Cases C-231/11 P to C-233/11 P, EC v Simemens AG Österreich, VA Tech Transmission & Distribution et al, Nuova Magrini Galileo SpA, 10 April 2014), heat stabilisers (Case T-30/10, Regens SpA v EC, 14 May 2014; Case T-181/10, Reagens SpA v EC, 20 March 2014), plastic industrial bags (Case C-238/12 P, FLSmith & Co A/S v EC, 30 April 2014), zip fasteners (Opinion of AG Wathelet, Case C-408/12 P, YKK Corp., YKK Holding Europe BV, YKK Stocko Fasteners GmbH v EC, 12 February 2014), carbonless paper (Case C-414/12 P, Bolloré v EC, 8 May 2014) to liquid crystal display panels for TVs, notebooks and PC monitors (Case T-91/11, InnoLux Corp v EC, 27 February 2014). For previous cases before the General Court see chapter 8 of Faull & Nikpay: *The EU Law of Competition* (3rd ed).

In addition, the recent €138 million fine being imposed on producers of smart card chips (EC, IP/14/960, 3 September 2014) that are used in mobile telephone, such as SIM cards, bank and identity cards, and the interest rate derivatives cartel (Comp 39 961 – Yen Interest Rate Derivatives (YIRD) and Case 39914 – Euro Interest Rate Derivatives, decision not yet available, thus reported in the EC's Report on Competition Policy 2013, COM (2014) 249 FINAL, 6 May 2014) involving the forward rate agreements and credit default swaps etc. stand out as most welcome developments in the banking sector in the aftermath of the financial crisis. The €1.7 billion fine being imposed on eight banks for their involvement in the derivatives cartel is one of the best in years for the EU budget.

In sharp contrast, the European Commission's achievements in detecting cartels that harm the welfare of the final consumer remain relatively modest with the Bananas cartel (Case T-588/08, Dole Food Company, Inc., Dole Germany OHG v EC, 14 March 2014), the North Sea shrimps cartel (COMP AT 39633 – Shrimps) and the canned mushrooms cartel (EC, IP/14/727, 25 June 2014).

In conclusion, one can say that only an insignificant percentage of the above EU cartels harm directly final

consumers; the vast majority affect directly industrial sectors and only indirectly final consumers.

In recent practice, ‘Crystal Meetings’ held in Taiwanese hotels were found to be anti-competitive by object (Case T-91/11, *InnoLux Corp v EC*, 27 February 2014, para 15). This means that even undated or unsigned documents have probative force where their origin, probable date, and content can be determined with sufficient certainty (ibid, para 94). Thus participation in meetings is insufficient to prove the existence of the cartel without any further proof of the anti-competitive nature of such meetings (ibid, para 184). However, the simple attendance in certain meetings was sufficient to prove the Industrial Bags cartel (Case C-35/12 P, *Plásticos Españoles SA (ASPLA) v EC*, 22 May 2014, para 16). In the Heat Stabilisers cartels, in an internal memorandum an employee had drawn to the attention of his supervisors to indicate that the undertaking wished no longer to participate in meetings where ‘red papers’ detailed group decisions to raise prices (ibid, para 160). Previously, in the Zip fasteners cartel (Case T-448/07, *YKK and Others v EC*, 27 June 2012, para 116; COMP/39168 – PO/Hard Haberdashery: Fasteners), the GC had warned that the notion of ‘publicly distancing oneself’ from the cartel as a means of excluding liability must be interpreted narrowly. Therefore, silence in a meeting cannot be regarded as an expression of ‘firm and unambiguous’ disapproval. One can only commend the hard line taken by the European courts when it comes to pernicious cartels.

Dr Anca Chirita, Lecturer in Competition Law, Durham Law School, UK

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