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Examining cars and cartels

by **Suzanne Rab**

On 21 February 2018, the European Commission (Commission) announced three separate cartel settlements. These are the first cartel decisions announced by the Commission so far this year. What is particularly striking about these cases is their connection with a key European industry sector: cars and trucks (Cases AT.40009 (*Maritime Car Carriers*), AT.40113 (*Spark Plugs*) and AT.39920 (*Braking Systems*). The Commission relied on leniency information and the cartel settlement procedure introduced in 2008, echoing themes which are becoming familiar in its cartel enforcement in recent years and in 2017 in particular. This recent enforcement activity prompts examination of whether the experience in the automotive sector is anything more than episodic, or whether it might yield useful insights on the priorities and efficacy of the Commission's cartel policy.

The Commission's decisions

The first case concerns the market for deep sea transport of cars, trucks and large vehicles on routes between Europe and other regions (*Maritime Car Carriers*). The Commission imposed fines totalling €395 million on CSAV, "K" Line, NYK, and WWL-EUKOR. MOL received immunity from fines. The settlement follows a number of proceedings in other jurisdictions including criminal prosecutions in Australia and the US and civil investigations and penalties in Chile, China, Japan, Korea, Mexico, Peru and South Africa.

The second case involves suppliers of spark plugs in the European Economic Area (EEA) (*Spark Plugs*) The Commission imposed fines totalling €76 million on Bosch and NGK. Denso received full immunity from fines. Denso has stated publicly that since a US Department of Justice investigation in 2010 in respect of cartel activity, it has taken measures to ensure compliance with applicable antitrust laws.

A third case concerns braking systems in two separate cartels (*Braking Systems*). The Commission imposed a total fine of €75 million. TRW received immunity in relation to the hydraulic braking systems cartel and Continental received immunity in relation to the electronic braking systems cartel. The Commission maintains that in both cases the suppliers exchanged competitively sensitive information including through bilateral meetings, phone calls and emails.

In all three cases the Commission applied the *2008 Settlement Notice* (2008/C 167/01) and granted a reduction of 10% to the fines imposed on the companies in view of their acknowledgement of their participation in the cartel and their liability.

Focus on the automotive sector

These 2018 decisions reflect what appears to be a focus of regulatory scrutiny by the Commission on the automotive sector (and, indeed, that of other enforcement agencies, some of whose investigations are mentioned above).

These decisions follow a succession of Commission investigations into cartels in the automotive parts sector. Previous probes have included car air-conditioning and engine cooling (2017); occupant safety systems (2017), car lighting (2017), alternators and starters (2016); parking heaters (2015); automotive bearings (2014), polyurethane foam used in car seats (2014) and wire harnesses (2013).

The Commission has also closed investigations into EEA-wide cartel activity in the trucks sector in its decisions of 19 June 2016 (*Trucks Settlement Decision*) and 27 September 2017 (*Trucks Infringement Decision*) in Case 39824 (*Trucks*). The Settlement Decision (addressed to undertakings in the MAN, Volvo/Renault, Daimler, Iveco and DAF groups) and the Infringement Decision (addressed to the Scania undertaking) concern the same anti-competitive conduct. This consisted of coordination amongst the participating undertakings in respect of the EEA gross list prices for medium trucks and heavy trucks (weighing 16+ tonnes) and coordination amongst the participating undertakings in respect of the timing of introduction of new emissions standards on affected trucks and the extent to which the costs associated with the introduction of these standards would be passed on.

The focus of the Commission on the automotive sector is perhaps not surprising given its consumer dimensions and the very obvious wins from targeting practices that may be endemic across an industry over a number of years. Further, the economic significance of the sector should not be overlooked as Commissioner Vestager makes clear in her statement accompanying the 2018 decisions that *"car manufacturing is also a major European industry, one that*

supports a large number of jobs across Europe." She notes that "*in 2016 alone, the EU exported more than 190 billion euros worth of cars*." It is therefore hard to dispute the claim that "*a cartel like the one between the maritime car carriers, which raised the cost of exporting European cars, is a threat to European industry and jobs*."

The theory of harm

According to Vestager "*these cases are about collusion at the expense of car makers. But in the end, any extra costs these car makers may have incurred could potentially be passed on to final consumers when they buy a car*". In that respect the cases are consistent with the Commission's and indeed most competition authorities' focus on combating so-called 'hardcore' cartels being agreements between competitors, usually with clandestine or secret elements, for fixing prices, selling or production quotas or sharing customers or markets.

There is nothing particularly striking about these enforcement priorities. However, on a closer inspection there are some features of these cases which are worth more than a passing reference as regards development of the Commission's cartel jurisprudence.

First, *Maritime Car Carriers* appears to cover EEA inbound services. It is by no means established that the prohibition in Article 101 TFEU applies to such arrangements. The case law on this point is far from settled. On 24 July 2017 details were published in the Official Journal of 11 appeals brought by air cargo carriers against the Commission's decision to re-adopt its 2010 decision to fine the air cargo carriers for their involvement in a price-fixing cartel. Some of the applicants are also challenging the Commission's jurisdiction to find infringements of EU competition law in relation to air cargo transport from airports outside the EEA to airports in the EEA and in relation to conduct taking place outside the EEA (see, for example, Case T-323/17 – *Martinair Holland v Commission* (OJ 2017 C239/51)). Since the 2018 cases are settlement decisions, and may be unlikely to be appealed, this is not likely to be a point on which the EU Court will have an opportunity to opine.

Duration of the investigation

The Commission launched its investigation in *Maritime Car Carriers* with unannounced inspection visits in September 2012 and concluded the investigation over five years later. The cartel itself ran for some six years from October 2006 to September 2012, a duration equivalent to that of the Commission's cartel investigation.

In *Spark Plugs* the Commission began its investigation following receipt of a leniency application and found that the cartel lasted 11 years (2000–2011).

In *Braking Systems*, the Commission found that the first cartel lasted for four years (February 2007 to March 2011). The Commission found that the second cartel lasted from September 2010 to July 2011 (it related to one specific tender for electronic braking systems for Volkswagen).

A comparison with the average duration of the cartels in recent years provides a reference point. In 2017, the average duration of the cartels that were the subject of decisions by the Commission was five years and similar to 2016. (*Case Associates, Case Note*, March 2018). However, these figures should be viewed in light of Scania's involvement in the *Trucks* cartel which spanned some 14 years. If this decision and the readopted *Airfreight* and *Envelopes* decisions were excluded the average duration was 3.2 years.

One should perhaps be wary of drawing too many conclusions from these figures, but an interesting question that invites consideration is whether the settlement procedure has in any way contributed to a speedier resolution. It is fair to say that the 2018 decisions are rather a mixed bag. Excluding the second *Braking Systems* cartel, which related to a single tender the others are of somewhat longer duration than the 2017/2016 average. In *Maritime Car Carriers* it took the Commission as long to conclude its investigation by settlement as the cartel was in operation. It might be surmised that the use of the settlement procedure expedited that conclusion. However, this is an area that would invite further detailed research as recent cases suggest that conclusion cannot be safely drawn. Case Associates, for example, observes that in 2017 it took the Commission on average six years to reach a settlement (as in *Maritime Car Carriers*) but that this was similar to the time it took the Commission to conclude two contested decisions (*Trucks Infringement Decision* and *Car Batteries*).

Leniency and settlement

The 2018 decisions are the 26th, 27th and 28th settlement decisions since the first settlement decision was taken in May 2010.

All the 2018 decisions involved the grant of complete immunity. In *Maritime Car Carriers*, MOL received full immunity for revealing the existence of the cartel and thereby avoided a fine of €203 million.

In *Spark Plugs*, Denso received full immunity and avoided a more modest fine of about €1 million. In *Braking Systems*, TRW received full immunity for revealing the first cartel and avoided a fine of about €54 million. Continental received full immunity for revealing the second cartel and avoided a fine of about €22 million.

All the other firms received leniency discounts ranging from 20%–50%. These discounts were in addition to the 10% discounts under the *2008 Settlement Notice*.

All of these investigations were started as a result of a leniency application. The decisions reflect that the Commission continues to rely on leniency applications to uncover the existence of a cartel and to bring its case to closure.

The use of leniency discounts in combination with settlement discounts suggests that these mechanisms should be viewed as much as detection tools as they are aids to investigation, by providing incentives to the parties to cooperate with the Commission's investigation.

Coming down the road

On 23 October 2017 the Commission carried out further unannounced inspection visits at the premises of German car manufacturers. Daimler and Volkswagen have confirmed that they have been raided. The raids follow inspections in

the German vehicle sector and where BMW has confirmed that it has been the target of an inspection visit by the Commission.

The Commission has stated that it believes that the manufacturers may have breached Article 101 TFEU. Reports in the German media in the summer have speculated that the manufacturers coordinated over the size and shape of car parts. There has also been speculation that Daimler and Volkswagen applied for leniency some time ago, although the recent raids suggest that the Commission has not rushed to investigate the conduct at issue. This might be due, in part, to the type of conduct under investigation which may bear the hallmarks of legitimate cooperation over standardisation rather than hardcore cartelisation. (Commission Statement 17/4103).

Against this ongoing scrutiny an observer of the Commission's investigations in the automotive sector might be forgiven in wondering whether there is anything else left to uncover.

Another feature is the fact that a supplier that is investigated in one case might find itself the victim of cartelisation in another (contrast, for example, *Braking Systems* and the more recent Commission investigation in Germany where Volkswagen was a victim in the former and target in the latter). This probably suggests one clear conclusion that we have not seen the end of the Commission's interest in this sector.

A thought on private enforcement

Although the focus of this article has been on public enforcement, the spotlight on the automotive sector invites comment on the growing number of private damages cases underway in the national courts, in particular in relation to the *Trucks* cartels.

Optimising the relationship between the public and private enforcement regimes therefore remains a priority which should not be overlooked in any review of the Commission's enforcement cases. The Commission confirmed on 8 March 2018 that it has closed infringement procedures against 18 member states for their failure to implement Directive 2014/104 on actions for damages under national law for infringements of competition law (*Damages Directive*) (OJ 2014 L349/1).

The Damages Directive states that it is designed to ensure that "*anyone who has suffered harm caused by an infringement of competition law…can effectively exercise the right to claim full compensation*". As will be familiar, the broad aim is to address the impediments to the effective enforcement of competition law in the majority of member states and to establish minimum standards and approaches in the procedural rules. Member states were required to implement the Directive by 27 December 2016. A number of states failed to fully implement the Directive but these teething troubles appear to have been resolved.

However, it is now nearly two years since the Commission issued its *Trucks Settlement Decision*. It may be speculated why the damages claims have not followed in greater numbers more speedily.

One factor to take into account is that since the *Trucks Settlement Decision* was taken under the settlement procedure it is necessarily an abbreviated decision. There will be scope to obtain access to the supporting evidence that lies behind this short decision subject to the limits in the Damages Directive. The Directive requires that leniency statements and settlement submissions are protected from disclosure in damages claims at any time before or after the Commission's file is closed (Article 6(6)). National courts may order disclosure of other information prepared for the purposes of the proceedings of a competition authority only after the competition authority has closed its proceedings (Article 6(5)). This will include settlement submissions that have been voluntarily withdrawn by a party. As regards the defendants, this has the practical effect of protecting from disclosure the actual settlement submissions and leniency statements.

Against this background it may be asked (revisited) whether the Damages Directive strikes an appropriate balance to assist claimants in obtaining access to evidence, while seeking to ensure that leniency applicants and settlement parties are not prejudiced as a result of their cooperation with the administrative procedure. It might be argued that the compromise struck was never actually needed. The Damages Directive affords certain safeguards to ensure that the leniency regime is not undermined and that companies are not encouraged to bring unmeritorious litigation. A company that has been granted leniency in the form of a 100% reduction in the fine will only be liable for the loss that is caused by them. This exception to the position on joint and several liability is motivated to avoid disincentivising potential leniency applicants and also contributes to the incentives of parties to seek leniency.

It will be clear from the commentary above that the challenges of cartel enforcement in the automotive sector and beyond are an uncompleted task. Given the combination of public and private enforcement, we might revisit the chestnut that was raised in the debates around the Damages Directive. We might ask whether we really need to limit cartel victims' ability to recover their losses by restricting access to leniency material (at least) to preserve the effectiveness of the leniency programme and whether it is sufficient to achieve that by limiting the leniency applicant's liability for damages.

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