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European Commission Announces Wave of Dawn Raids

November 9, 2021

On 22 October 2021, European Commission Executive Vice President and Competition Commissioner Margrethe Vestager invoked a new era for cartel enforcement in the EU, announcing:

- A wave of dawn raids in the coming months.
- Focus on non-classic cartels, in particular purchase cartels, 'no-poach' agreements, and collusion that diminishes product quality or sustainability.
- Possible revision of the leniency policy in light of increased private litigation.
- The use of public data analysis and whistleblower information to improve cartel discovery.

Dawn raids starting again

As the pandemic subsides, the European Commission has started carrying out dawn raids again, including in the garment industry, followed by unannounced inspections in the wood pulp sector. As announced by Vestager, 'that's just the start of a series of raids that we're planning for the months to come'.

Vestager considers that the Covid-19 outbreak slowed down operations: '[While] the fight against cartels has been right at the top of the Commission's priorities […] in the last couple of years the pandemic has made it hard to carry on some of our work at full speed'. In particular, inspections have been halted as, 'for nearly two years, it's been practically impossible to do coordinated raids in many countries at once'.

In 2020, the European Commission adopted decisions in only three cases.[1] In 2021, cartel decisions have increased to seven.[2]

Which cartels will be targeted?

While the European Commission tackles all types of collusive activities, Vestager specifically mentioned three areas:

1. Purchase cartels
2. 'No-poach' agreements
3. Cartels with a negative impact on the quality or sustainability of products

In purchase cartels, competitors coordinate their purchasing strategies. In 2020, the European Commission fined four ethylene buyers more than EUR 260 million for conspiring to reduce the reference price in long-term contracts. In 2017, scrap battery purchasers were fined EUR 68 million.[3] Vestager underlines that these cartels make the economy less efficient, even if they do not raise consumer prices.

'No-poach' agreements are cartels in which companies agree not to compete for each other's employees, thereby restricting talent from moving companies and taking away the incentive to provide competitive compensation. Vestager's focus on these types of arrangements mirrors a similar stance in the US, where antitrust agencies have placed extreme scrutiny on restraints in the labour market. Indeed, earlier this year, after years of foreshadowing, the US Department of Justice made true on its promise to criminally prosecute 'no-poach' agreements, indicting Surgical Care Affiliates, a unit of UnitedHealth Group, for allegedly entering into agreements with two other unnamed healthcare companies to not poach each other's senior-level employees. This came directly on the heels of the Department of Justice indicting a former owner of a therapist staffing company for conspiring with competitors to agree to lower wages for physical therapists.[4]

The European Commission intends also to combat collusion that harms product quality or sustainability, and it may issue new guidance to encourage the development of greener products in compliance with competition law. Recently, five car manufacturers were fined EUR 875 million for restricting competition regarding emission cleaning of their diesel passenger cars. It also fined truck manufacturers for delaying the introduction of new technologies, among other infringements such as price coordination.

Other initiatives

Once the main driver of cartel enforcement, leniency applications have dropped in numbers. Companies are increasingly concerned about the repercussions of follow-on damages litigation. The European Commission is reviewing the attractiveness of its leniency program through discussions with businesses and other competition enforcers. Germany has already revised its rules and is considering even further benefits for immunity applicants, such as allowing ring leaders of a cartel to apply for leniency.

The European Commission is increasingly relying on whistleblowers. It receives approximately 100 relevant messages per year through its dedicated electronic tool. In parallel, the open-source intelligence unit analyses public and complex data, which has helped track down cartels in more than 30 cases in the past five years.

What's next?

A campaign of dawn raids is set to start. On 25 October 2021, only a few days after Vestager's announcement, the European Commission carried out inspections in the animal health sector in Belgium as part of an abuse of dominance investigation.

Companies should review their dawn raid preparation, including guidelines and trainings. Given the clear focus of the European Commission, companies could revisit their general compliance efforts to ensure they capture less traditional cartels such as purchasing, 'no-poach' agreements, or collusion that harms product quality or sustainability.

Notes

1. European Commission Cartel Statistics, period 2017-2021; AT.40410 – Ethylene; AT.40299 – Closure Systems; AT. 39563 – Retail Food Packaging (re-adoption).
2. AT.40413, 40414, 40420, 40422, 40424 – Video Games; AT.40330 – Rail Cargo; AT.40346 – SSA Bonds; AT.40324 – European Government Bonds; AT.39861 – Yen Interest Rate Derivatives (re-adoption); AT.39914 – Euro Interest Rate Derivatives (re-adoption); AT.40178 – Car Emissions.
3. AT.40018 – Car Battery Recycling.
4. Refer to our January 2021 Cooley alert for more details on the US approach to 'no-poach' agreements
5. AT.39824 – Trucks.

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