Dangerous to know: cartel liability just got wider

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Summary

The *Villeroy & Boch AG* judgment(1) confirms that businesses can be liable for cartelising products that they do not even have in their portfolio and in jurisdictions in which they are not active, provided that:

- there is an anti-competitive agreement with an overall plan covering multiple products and geographies;
- the undertaking participated directly in the execution of some parts of the anti-competitive agreement (eg, with regard to certain products); and
- the undertaking was aware of the other parts of the anti-competitive agreement or could have reasonably foreseen those other parts and was prepared to take the risk.

Facts

In 2010 the European Commission fined a number of manufacturers of bathroom fittings and fixtures, including the Villeroy & Boch Group, for agreeing on sales prices to wholesalers and exchanging information relating to their business in Austria, Belgium, France, Germany, Italy and the Netherlands. According to the commission, the products covered by the infringement were shower enclosures and accessories, as well as ceramics and taps and fittings. Villeroy & Boch manufactures two of the three products: shower enclosures and accessories as well as ceramics, but not taps and fittings. In the relevant period, Villeroy & Boch was active in all member states concerned except Italy. The commission found that under the concept of a 'single and continuous infringement', Villeroy & Boch could be held liable for the infringement concerning all products (ie, including taps and fittings) and all member states (including Italy). Villeroy & Boch appealed before the General Court and, after achieving a partial annulment concerning the duration of its participation, lodged a further appeal before the European Court of Justice (ECJ).

General Court and ECJ

Before the General Court, Villeroy & Boch argued that it could engage in anti-competitive agreements only with regard to products that it actually manufactures. It should therefore not have been held liable for agreements of manufacturers of taps and fittings that:

- were not its competitors;
- concluded those agreements in meetings where Villeroy & Boch was not present; and
- did so in relation to a country in which Villeroy & Boch did not conduct business.

The General Court rebutted these arguments and held that the commission was correct in attributing comprehensive liability to Villeroy & Boch since it took part in a 'single and continuous infringement'. Under this concept (accepted by the courts in a long line of judgments), different infringements can be grouped together as one, provided that they form part of an overall plan.(2)

According to the commission, the overall plan was to present a united front regarding the wholesalers that play a central role in the distribution chain and sell all the product sub-groups in question. Given the importance of the wholesalers, the manufacturers had an interest in coordinating how they would raise wholesale prices for the different bathroom fittings and fixtures. Due to its membership in a number of national trade associations covering all cartelised product groups, the courts found that Villeroy & Boch must have been aware of the illicit agreements – not only for its own products, but also concerning taps and fittings and Italy. Since Villeroy & Boch contributed to the overall plan by directly engaging in anti-competitive conduct in relation to ceramics and shower enclosures, its mere knowledge of the infringement in Italy was sufficient for it to also be held liable for that portion of the cartel. It did not matter that Villeroy & Boch itself does not manufacture taps and fittings and has no business in Italy in general.

On these grounds, the General Court and the ECJ upheld the commission's decision.

Comment

The concept of 'single and continuous infringement' allows the commission to penalise undertakings for the wrongdoing of third parties, even with regard to products and geographies served only by those third parties. The consequences are far reaching:

- Increasing the fine – although the product scope of the penalty will not increase (a company is fined based only on its own sales of the cartelised products), lumping together infringements pertaining to different products and geographies can increase the proportion of the value of the sales taken into account for the calculation of the basic amount of the fine, since the geographic scope of the infringement is one of the factors considered in that context.
- Increased civil exposure – aggrieved customers of a single and continuous infringement could claim damages from any participant for all products and geographies affected (which arguably prompted the first leniency applicant in the bathroom fittings case to appeal the commission decision, despite having received immunity from fines).(3)
- Extension of the limitation period – the limitation period will start only once the single and continuous infringement comes to an end. An undertaking might have ceased its direct involvement, but still sit in trade association meetings witnessing other manufacturers continuing illicit agreements for separate products and geographies. Chances are that the commission would assume continued participation in that illicit agreement, pushing out the limitation period for the undertaking that ceased its direct involvement. This would simultaneously increase fines, since the basic amount is calculated using a multiplier reflecting the number of years of infringement.

It is therefore prudent to keep in mind that undertakings do not have to be directly involved in all parts of a cartel to be liable – knowledge or the ability to foresee other participants' anti-competitive behaviour is sufficient to establish liability.

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Endnotes

(1) Case C-625/13 P, *Villeroy & Boch AG v Commission*.

(2) For example, Case C-441/11 P, *Commission v Verhuizingen Coppens*, Paragraph 41 *et seq*.

(3) Case C-614/13 P, *Masco Corp v Commission*.