



CARTELISATION IN WATER MANAGEMENT CONTRACTS, EUROPEAN UNION*

Forum:

European Commission

Legislative Provisions referred:

Treaty on the Functioning of the European Union¹,

1. Article 101²- '*Agreements restricting competition*';
2. Article 102³- '*Prohibition on Abuse of dominant position by firms holding a dominant position*'.

Parties to the Case:

1. European Commission⁴
2. Flamco GmbH
3. Flamco B.V
4. Voestalpine Polynorm B.V
5. Voestalpine AG
6. Reflex winklemann GmbH & Co. KG
7. Winklemann Group GmbH and Co. KG
8. TA Hydronics Switzerland AG

Facts of the Case:

The above named companies engaged in a cartel by coordinating prices in the Water Management Products⁵ sector in Germany and many other EU member states, which was discovered by the Commission in an unannounced inspection in

*Case COMP/39.611- Water Management Products, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39611/39611_2354_3.pdf, last accessed on 5th October 2013.

¹ Hereinafter referred to as 'the Treaty'.

² With effect from 2009, Article 81 and 82 of the EC treaty have become Articles 101 and 102 respectively of 'the Treaty'.

³ Ibid

⁴ Hereinafter referred to as 'the Commission'.

⁵ Hereinafter referred to as WMP.

December 2008 and April 2009, after receiving an immunity application from Pneumatex for immunity from fines and for reduction of fines⁶. The Commission initiated proceedings in January 2011 and the cartel members agreed to be part of the settlement between February 2011- March 2012. On 25 April 2012, the Commission adopted a Statement of Objections addressed to Flamco, Reflex and Pneumatex. All the parties replied to the Statement of Objections by confirming that it corresponded to the contents of their settlement submissions and that they therefore remained committed to following the settlement procedure. The Commission adopted the decision on 27th June 2012.

Findings of the Commission:

1. Flamco, Pneumatex and Reflex engaged in a cartel to coordinate prices in the WMP sector in Germany.
2. Pneumatex and Reflex coordinated prices in other EU member states as well.
3. Flamco indulged in contracts to coordinate prices in the WMP sector only in Germany.
4. The companies exchanged information on the current prices including the gross price list and other commercially sensitive information and planned price increases by establishing bilateral contacts.
5. The conduct of each of the companies and their intentions were communicated to each other, and therefore pre-determined.
6. It is apparent from the above that the parties engaged in a horizontal anti-competitive arrangements which formed part of an overall scheme pursuing a single anti-competitive object and single anti-competitive aim of restricting price competition.
7. The existence of a single and continuous infringement is supported by the fact that the cartel followed the same pattern throughout

⁶ OJ C 298, 8.12.2006, p. 17.

the entire period of infringement, the individuals involved were essentially the same and the communications between competitors concerned the same products.

8. The cartel was mostly existent in Germany and other EU member states such as Belgium, France, Spain, Portugal, Italy, Finland, Sweden, Greece, Netherlands, Denmark, Hungary, United Kingdom and Luxembourg and there are evidences to suggest varying periods of activity of the cartel in the member states. Between 2006 to 2008 the cartel remained dormant and in total lasted from June 2006 to May 2008.
9. Thus, the cartel had a negative effect on trade between member states, as the market for WMP was characterised by a substantial volume of trade between the Member States, and thereby restricted competition, in violation of Article 101(1) of 'the Treaty'. For this provision it is not necessary to show that individual behaviour of entities as against the cartel as a whole, affected the member states not the physical transfer of goods has to be proved. It is enough if there is strong evidence of price coordination and infringement between the undertakings, to have an appreciable effect on the trade in EU member states.

Remedies:

1. Fines have been imposed on all companies except Pneumatex.
2. Fine imposed 15% of the undertakings 'sales of WMP in the above mentioned member states.
3. The duration, during which the cartel was dormant and had limited activity, was not taken into account for calculating fines.
4. As a result of the Settlement Notice, the fine imposed on Flamco and Reflex is reduced by 10%.
5. In this particular case, the adjusted basic amounts do not exceed 10% of the total turnover of any of the undertakings achieved in 2011.
6. No other entity than Pneumatex applied for immunity or reduction of fines, therefore, no Leniency for any other entity.

Fines Imposed:

The fines are imposed in accordance with the 2006 Guidelines on Fines. These guidelines set out the methodology for setting out fines so that there is some degree of transparency and legal certainty for the undertakings. The fines are decided in two steps; first, the assessment of fines is made and second, all the necessary factors specific to the particular entity are taken into consideration.

The fines were imposed for single and continuous infringement. Following fines were imposed:

1. EUR 9791000 on Reflex Winklemann GmbH and Co. KG and Winklemann Group and Co. KG jointly and severally.
2. EUR on TA Hydronics Switzerland.
3. EUR 3870000 on Flamco GmbH, Flamco Holding B.V., Voestalpine Polynorm B.V. and Voestalpine AG, jointly and severally.

In this case, no aggravating and mitigating circumstances were found and fines were not increased to create a special deterrence effect. The fines are increased for those entities/undertakings which have particularly larger sales, going beyond the sales of goods and services to which the infringement relates.

Analysis:

There have been 5 settlement decisions after the Settlement Notice was issued by the Commission in 2008, imposing fines over EUR 1.2 billion. The first stage of imposing fines is, calculating the Basic amount, which is a cumulative of the value of sales and the duration of infringement. The second step has not been changed and is still similar to the 1998 guidelines for fines. It takes note of the aggravating and the mitigating factors involving each entity indulging in cartelisation. The new guidelines set rules for deterrence, though, the classification of fines to be 'minor', 'serious' and 'very serious', needs some further 'serious' understanding.

Prepared By: Rishika Mishra, CIRC