

The Commission reported in the case of E.ON that:

- When the inspection team returned in the morning of the second day of the inspection, it found that such "VOID" signs were clearly visible on the entire surface of one of the seals which had been affixed the evening before.
- Also pieces of glue were found around the seal indicating that somebody had removed the seal and tried to fix it again.
- The broken seal was intended to secure the room in which all documents previously collected by the Commission, i.e. highly sensitive documents, were stored.
- E.ON denied breaking the seal and first argued that the Commission had the only key to the room. However later it turned out that 20 keys were in circulation among E.ON employees.
- E.ON also tried to argue that there might be other explanations for the appearance of the "VOID" signs on the seal. E.ON's suggested explanations were inter alia: vibrations caused by the preparation of a conference next door; the use of an aggressive cleaning product; the age of the seal; and a high level of humidity.
- In order to assess these arguments, the Commission carried out a very thorough investigation, including the use of outside experts to test the seals, but came to the conclusion that [E.ON's] arguments are not valid.

The Commission is expressly given the power under Regulation 1/2003 to fine businesses up to 1% of annual turnover where intentionally or negligently:

"seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken" [Council Regulation 1/2003, Article 23(1)(e)]

Fining E.ON EUR38 million, the Commission commented that breaches of seals are a "serious infringement of competition law". Competition Commissioner Neelie Kroes added:

"The Commission cannot and will not tolerate attempts by companies to undermine the Commission's fight against cartels and other anti-competitive practices by threatening the integrity and effectiveness of our investigations. Companies know very well that high fines are at stake in competition cases, and some may consider illegal measures to obstruct an inquiry and so avoid a fine. This decision sends a clear message to all companies that it does not pay off to obstruct the Commission's investigations"

Toby Tyler
Solicitor



rewards for information about cartels

On 11th March, the Office of Fair Trading (OFT) announced that it is prepared to offer rewards, of up to £100,000, for information about cartels.

what is a 'cartel'?

Put very simply, a cartel is an agreement between competitors which has the effect of fixing prices, sharing markets or limiting supply or production. And 'agreement' here is very broadly defined. For example, a simple exchange of information about proposed prices, with no commitment to adopt those prices, will be regarded as a cartel. (See for example the case involving independent schools' fees, where bursars simply completed a questionnaire with details of their proposed fees for the following year. That agreement was 'a cartel', and the schools involved were fined.)

Other examples of cartels are:

- 'tender management', where competitors agree who amongst them should win which tenders, the other parties not bidding; and
- 'covering', where by agreement all but one competitors invited to bid for a contract bid higher than the nominated party.

significance of the OFT offer

For obvious reasons, it is not easy for OFT to obtain reliable information about the operation of successful cartels. Secrecy is essential to their success.

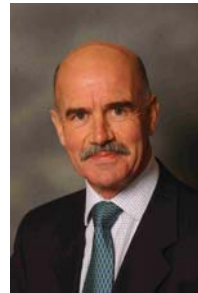
It was for this reason that a provision for 'leniency' was included in the rules relating to anti-competitive agreements. Under these, a party to an unlawful cartel could request and be granted immunity from fines if they provided information to the OFT allowing it to uncover and condemn the cartel concerned. This provision has proved successful in unearthing such agreements when, without the provision, it is unlikely that the cartel would have been uncovered, and prices would have been higher as a result.

The policymakers in the OFT clearly feel they need to put another arrow in their enforcement quiver. This offer of substantial monetary rewards is innovative.



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can the identity of the informant be withheld?

The OFT will not accept anonymous tip-offs. But it has offered to put in place procedures to protect the identity of the informant. Specially trained officers will be tasked to deal with the informants. Systems will be operated to ensure the information supplied is safeguarded and handled with a view to protecting the informant's identity.

what determines the size of the reward?

The OFT announcement speaks of rewards of "up to £100,000". The actual size of the reward in a particular case will depend on a range of factors:

- what the information allows the OFT to do in terms of successful prosecution of the cartel;
- what harm to the economy is prevented by the supply of the information;
- the effort that has to be made by the informant to supply OFT with the information;
- the risk taken by the informant.

can a party to a cartel claim a reward?

The OFT points out in its announcement that the leniency provisions are intended to cater for parties to cartels who want to get out of the arrangement without any penalties. For that reason, in most cases, no rewards will be offered to parties to cartels who supply information about the cartel.

However, in exceptional circumstances, a reward may be paid to such a party. These cases might, for example, be where the informant took only a peripheral part in the cartel, and was not a leading player or ringleader.

conclusion

When taken together with the leniency provisions, which have already proved effective, and the provisions allowing for compensation for victims of cartels, which are beginning to come into play, the making of reward payments for information about cartels strengthens the OFT's powers to unearth cartels. It will be interesting to see how quickly these rewards are paid, and how the OFT discloses their role in any particular cases.

David Whibley
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Akzo Nobel article update

We last wrote about the Akzo Nobel case in January's edition of this newsletter (Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Limited and Ackros Chemicals Limited v. Commission of the European Communities*). Good news particularly for in-house lawyers - Akzo has now lodged an appeal of the Court of First Instance's (CFI) decision. The form of Order sought includes the appellant's claim that the CFI's decision that legal professional privilege does not extend to communications between in house lawyers and their companies should be set aside.

In support of that application, the Law Society is also seeking leave to intervene before the European Court of Justice, on the basis that in-house (employed) lawyers should be afforded the same protection as private (independent) practitioners. The Law Society has argued in its application to intervene, that the requirement for lawyers to be independent is enshrined in the Code of Conduct that binds all solicitors in England and Wales including those that work in-house.

So all in-house lawyers watch this space!

Toby Tyler
Solicitor

something technical: breaching the seal

On 30 January 2008, the European Commission announced that it had fined E.ON Energie AG EUR38 million for "breach of a seal".

The Commission is responsible for enforcing competition law at EU level. It regularly carries out inspections (popularly known as 'dawn raids') at the premises of businesses that it suspects of having infringed the law. The aim of each such inspection is to locate and preserve documentary evidence of infringement, which may be used subsequently as a basis for an infringement decision.

The inspection process can sometimes be completed within the course of one working day. However, a longer period of time is often required, and in such cases the Commission has the power:

"to seal any business premises and books or records for the period and the extent necessary for the inspection"[Council Regulation 1/2003, Article 20(2)(d)]

In practice, the Commission uses a sticker made of plastic film to seal rooms to make sure that no documents can be removed when the inspection team is absent (e.g. at night). The Commission reports that if a seal is removed, it does not tear, but shows irreversible "VOID" signs on its surface.