



FREIGHT FORWARDERS CARTEL, APPLICATIONS FOR LENIENCY, APPEALS AND FINES FOR INFRINGING EU COMPETITION RULES

Commission imposes fines totalling €169 million on freight forwarders in relation to four price fixing cartels

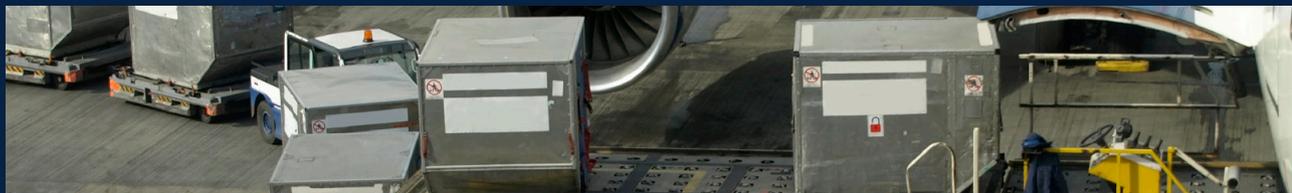
On 28 March 2012, the European Commission (the “Commission”) fined 14 international groups of freight forwarding companies (“the forwarders”) a total of €169 million for their participation in four distinct cartels. Each cartel sought to fix the price of a specific surcharge related to the provision of international air freight forwarding services between 2002 and 2007 (when dawn raids were carried out by antitrust authorities in the United States and EU).

The four cartels, according to the Commission’s findings, were as follows:

- The New Export System (NES) cartel - after the introduction of electronic declaration for UK exports in 2003, a group of forwarders agreed to establish a surcharge on this service and to fix its amount depending on the size of the customer.

- The Advance Manifest System (AMS) cartel - an advanced declaration is required when shipping goods to the US. A group of forwarders agreed to introduce a surcharge for the service and not to use the surcharge as a tool for competition.
- The Currency Adjustment Factor (CAF) cartel - when the Chinese currency (RMB) appreciated against the US dollar (USD) in 2005, a group of forwarders agreed to shift contracts from USD to RMB or, if this was not possible, on the introduction of a CAF surcharge and on its level.
- The Peak Season Surcharge (PSS) cartel - a group of forwarders agreed on a surcharge for peak season services offered in the build up to Christmas and also discussed its level.

The Commission noted that in most cases the forwarders involved in the cartels took specific measures to conceal their anti-competitive conduct. This included the use of private



yahoo email accounts and the use of code words (such as the “Gardening Club”).

Deutsche Post (including subsidiaries DHL and Exel) received full immunity from fines under the Commission’s 2006 Leniency Notice, as it was the first company to reveal the existence of the cartel to the Commission. Deutsche Bahn (including Schenker and BAX), Ceva, Agility and Yusen received reductions on fines ranging from 5% to 50%, in exchange for the timely provision of additional evidence and in accordance with the European Commission’s 2006 Guidelines on Fines (“Fines Guidelines”). Kuehne & Nagel, which was involved in all four of the cartels, faced the heaviest fines, totalling £53.7 million.

The Commission’s discretion regarding the scale of the fines

Under the Fines Guidelines, the Commission has considerable discretion over the level of the fines that it can impose. Fines may be increased for the purposes of deterrence, especially for continued or repeated infringements (in the 2008 car glass cartel decision, St. Gobain had its fine increased by 60%, as it was a repeat infringer). Fines can be decreased where companies provide the Commission with evidence that enables or furthers an investigation (leniency applications). Reductions may be permitted in various scenarios including, in limited circumstances, where the company concerned satisfies the Commission of its inability to pay. The Commission also has a general discretion to reduce the level of any particular fine that it calculates.

A pertinent question is whether the Commission has been relaxing the level of the fines that it imposes to reflect the current difficult economic environment. Outside of an increase in the number of companies successfully applying for reductions in fines on the basis of an inability to pay, there is no explicit evidence of this.

In the freight forwarding cartel, reductions in (or immunity from) fines were awarded to leniency applicants. There were no explicit reductions made in acknowledgement of the economic crisis. This is not surprising.

On the same day (28 March 2012), the Commission announced its decision in the window mountings cartel. The Commission fined nine European manufacturers a total of €85.9 million in relation to a cartel which operated from 1999 to 2007. Reductions in (or immunity from) fines were awarded to three leniency applicants.

Exceptionally, the Commission exercised its general discretion to reduce the fines in the window mounting cartel. However, this was not done in explicit acknowledgement of the current economic crisis. The products that were the subject of the cartel formed a large proportion of the overall turnover of many of the participants. Due to the manner in which the Commission calculates fines (based on the turnover of the participants in the products concerned), the Commission noted that the fines imposed would exceed the legislative cap of 10% of global turnover of some of the entities concerned. There is no indication

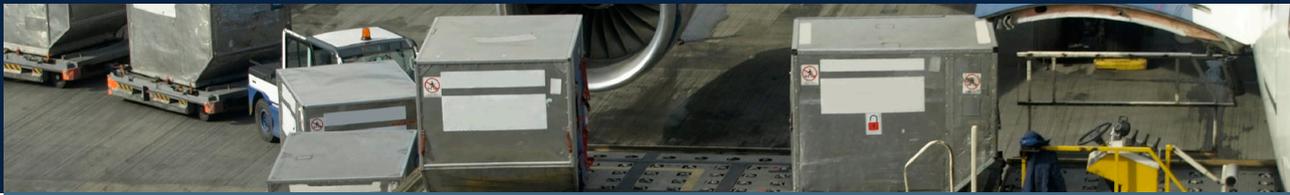
that the reductions were a response to the difficult economic climate. Separately, one company was granted a 45% reduction in its fine, after successfully convincing the Commission of its inability to pay the full amount.

Over the previous two years, in other cases, nine other companies (including entities in the animal feed phosphates cartel, heat stabilisers cartel, fasteners cartel, pre-stressing steel cartel, and bathroom fittings and fixtures cartel) have successfully applied for reductions in fines due to their inability to pay. It is unsurprising that a number of successful applications for reductions have been made on this basis during the economic crisis. It is apparent from the Commission’s reasoning for the fines it has imposed that the inability to pay mechanism is the method by which the Commission may acknowledge the current economic climate. However, there is no evidence to suggest that the Commission has been relaxing its approach in the manner in which it initially sets out to calculate the level of the fines that companies should face.

Notwithstanding the reasons given for the reduction in fines in the window mountings cartel, the reductions could lead to future cartelists using this example to argue for reduced fines.

Appealing the Commission decision in the freight forwarding cartel

Companies may bring an appeal against the Commission decision finding them guilty of involvement in a cartel before the General Court of



the European Union, which is based in Luxembourg.

A number of the entities fined in the freight forwarding cartel have indicated that they may appeal against the Commission decision to the General Court. Panalpina asserts that the infringements likely did not affect prices paid by Panalpina's customers. Kuehne & Nagel has indicated that it believes the facts were not correctly investigated and that the Commission drew significantly incorrect factual and legal conclusions. A number of those entities may ask for an annulment and/or the further reduction of the fines imposed.

Who can bring an appeal?

Any company which is the subject of a Commission decision can bring an appeal. This includes the original leniency applicant, which will likely have received 100% immunity from fines.

Companies that have not been fined may bring appeals to limit their exposure to follow on damages actions (against which they do not enjoy any immunity). They may also wish to limit their exposure to higher fines in future, if they are investigated in other cartels (previously established involvement in cartel conduct will amount to an aggravating factor in the calculation of fines in future).

What are the prospects of bringing a successful appeal?

Appeals are usually brought on both the issue of liability for the infringement and the amount of the fine that the Commission imposes.

While it affords the Commission a wide margin of discretion, the General Court is prepared to review the Commission's substantive analysis. It will consider whether the evidence relied on by the Commission is reliable, accurate and consistent, and whether the appropriate conclusions have been drawn from it. The General Court is entitled to substitute its own appraisal of the facts for the Commission's, which may lead to an annulment of the Commission's infringement decision, or a reduction in the amount of the fine.

Since 2000, 50% of appeals to the General Court have been successful in some part, leading to decisions being annulled (17%), or a reduction in the level of the fine imposed (33%). The most common aspects of a Commission fining decision that are subject to review are: the duration of the infringement; the severity of the infringement; the issue of whether parent companies can be held liable for the acts of their subsidiaries; and procedural errors of the Commission.

The interaction of EU and national cartel investigations where companies apply for leniency

Many of the entities involved in the freight forwarders cartel were also involved in the parallel proceedings of national competition authorities, including the Italian antitrust authority. The Italian authority investigated the road freight forwarding aspect of the cartel, which was not investigated by the Commission.

DHL had made a leniency application under the EU

proceedings and received 100% immunity from fines. DHL also made an ancillary leniency application to the Italian authority, before applications were made by Schenker and Agility. However, DHL did not receive immunity from fines in the Italian proceedings. DHL appealed against the Italian authority's decision. The Italian court considered that DHL's leniency application was restricted to the air transport sector and did not extend to the road transport sector. The court considered that DHL's original application was therefore ineffective and that DHL was not entitled to immunity. The decision showed that an application for leniency at EU level does not necessarily imply the same protection at a national level, if the infringements being investigated in the national proceedings are not covered by the application for leniency.

For more information, please contact [Anthony Woolich](#), Partner, on +44 (0)20 7264 8033 or anthony.woolich@hfw.com, or [Eliza Petritsi](#), Partner, on +44 (0)20 7264 8772/+32 2 643 3402 or eliza.petritsi@hfw.com, or [Konstantinos Adamantopoulos](#), Partner, on +32 2 643 3401 or konstantinos.adamantopoulos@hfw.com, or your usual HFW contact.

Lawyers for international commerce

HOLMAN FENWICK WILLAN LLP
Friary Court, 65 Crutched Friars
London EC3N 2AE
T: +44 (0)20 7264 8000
F: +44 (0)20 7264 8888

© 2012 Holman Fenwick Willan LLP. All rights reserved

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please contact Craig Martin on +44 (0)20 7264 8109 or email craig.martin@hfw.com

hfw.com