SLAUGHTER AND MAY

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Quick Links

Commission fines ethylene purchasers €260m in the Commission's first cartel settlement in 2020

On 14 July 2020 the European Commission **announced** that it had imposed fines totalling €260 million on ethylene purchasers who had colluded on purchase prices. Orbia (Mexico), Clariant (Switzerland) and Celanese (US) all received substantial fines for their participation in the cartel but the fourth cartel participant, Westlake (US), has received full immunity. This is the first horizontal purchasing price cartel in the chemical industry to be sanctioned under the **2006 Fining Guidelines** where, unusually, the four cartel participants colluded to lower the value of ethylene, to the detriment of ethylene sellers. The decision is also the 33rd settlement decision since the Commission's introduction of the settlement procedure for cartels in June 2008.

Background to the settlement decision

The Commission has settled with the cartel participants after a four-year investigation that began in June 2016 following a leniency application submitted by Westlake under the Commission's **2006 Leniency Notice**. Subsequent to Westlake's leniency application, the other cartel participants entered settlement discussions with the Commission and made their own applications for reduction of fines. On 16 May 2017 the Commission **announced** that it had carried out unannounced inspections at the premises of the four participants.

Purchase prices in the ethylene industry

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

The four cartel participants are ethylene purchasers. Ethylene supply agreements in Belgium, France, Germany and the Netherlands often attempt to reduce the financial risk caused by the volatility of the purchase price of ethylene by referring to a pricing formula that includes a 'Monthly Contract Price' (MCP). The MCP is determined month-by-month on the basis of individual negotiations between ethylene buyers and sellers and is then published by private and independent reporting agencies.

To establish the MCP for the upcoming month, two separate identical bilateral agreements between two different pairs of suppliers and buyers have to be reached. The process works as follows:

- After the first supplier and buyer pair reach an agreement on the price of ethylene for the upcoming month, they communicate this price to the private and independent reporting agencies.
- After another pair of a buyer and a supplier settles at the identical price, this price becomes the MCP for the following month via a publication by these agencies.

Collusion to set the ethylene MCP

Orbia, Clariant, Celanese and Westlake participated in MCP negotiations with ethylene suppliers. The Commission has now found that, from December 2011 to March 2017, during the process for establishing the MCP, the four cartelists: (i) coordinated their price negotiation strategies both before and during the bilateral MCP negotiation periods; and (ii) exchanged price-related information. Their objective was to push down the value of the MCP to increase their own profits.

The Commission has found that by colluding to push down purchase prices, the cartel participants lowered the value of ethylene in the market, which harmed ethylene sellers.

The settlement decision sends a clear message that the Commission takes an equally strong stance on purchase price cartels as it does on selling price cartels. Commissioner Vestager highlighted this in the Commission's announcement, stating that the Commission "*does not tolerate*" coordination of purchasing prices because it needs to protect competition for inputs.

The fines imposed

As the cartel influenced the purchase price of ethylene on the market, the Commission used the value of purchases (as opposed to the value of sales) to set the level of the fines. However, the Commission took into account the fact that the purchase prices can be taken to have been artificially reduced by virtue of the cartel behaviour. As such, in order to accurately reflect the true economic significance of the infringement, the Commission increased the amount of the fine for all companies by 10 per cent to account for this likelihood and to ensure the fine carried an appropriate deterrent effect.

The Commission also took account of the duration of the infringement, the individual weight of the companies in the infringement, their overall size and the fact that Clariant had previously been sanctioned for a similar infringement when setting the level of the fines.

Had Westlake not received full immunity from fines under the Leniency Notice, it would have been fined around €190 million. The other cartelists all benefited from reductions to their fines for their cooperation and for providing evidence to the Commission during its investigation as well as a 10 per cent reduction for settling with the Commission, resulting in fines of €22.4 million for Orbia, €155.8 million for Clariant and €82.3 million for Celanese.

Separately, due to the impact of Covid-19 on companies' liquidity, the Commission prolonged the due date for the payment of fines to six months from the date that the cartel decision was notified to the four cartelists.

Other developments

Merger control

Lower UK merger thresholds for certain national security related sectors entered into force

On 21 July 2020 the **Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020** and the **Enterprise Act 2002 (Share of Supply) Amendment Order 2020** (the 2020 Orders) entered into force. The 2020 Orders amend Section 23 and 23A of the Enterprise Act 2002, which set out the criteria for a merger to be a 'relevant merger situation', and the definition of 'relevant enterprises' respectively.

The 2020 Orders implement changes first announced by the Department for Business, Energy and Industrial Strategy in June 2020 (see also our previous **client briefing**) to extend the definition of 'relevant enterprises' to include three additional enterprise categories impacting national security, namely artificial intelligence, cryptographic authentication technology and advanced materials. For these sectors the turnover test for intervention will be lowered to £1 million (the standard threshold is £70 million), and an alternative 'share of supply' test can be applied, under which the target enterprise must supply at least one quarter of all goods or services of a particular description (therefore dispensing with the requirement for the merger to increase the share of supply as required under the standard test). These changes will allow the Secretary of State to intervene on public interest (national security) grounds in mergers in these sectors where the standard turnover or share of supply tests would not be met.

The 2020 Orders follow similar Orders introduced in 2018 which provided lower jurisdictional thresholds for relevant enterprises active in military or dual-use goods, computer processing units, and quantum technology.

The Department of Business, Energy and Industrial Strategy has published **guidance** on the amendments, explaining why the government amended the Enterprise Act, describing the effects of the amendments, as well as providing advice to businesses and others about how they may be affected by the changes.

Antitrust

European Commission adopts Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law

On 20 July 2020 the European Commission, following a public consultation in 2019, adopted a **Communication** on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law. Depending on the applicable national rules, private enforcement actions can take various forms, including damages actions, declaratory actions or actions for injunctions.

In the course of these actions, national courts may receive requests for disclosure of evidence. This will require national courts to balance competing interests of granting access to the relevant information and protecting the interests of parties whose confidential information is subject to disclosure. In particular, in

the context of damages actions, the **Damages Directive** requires Member States to ensure that national courts have the power to order disclosure of evidence containing confidential information, but at the same time, having at their disposal effective measures to protect such confidential information. However, national laws may differ in terms of access to and protection of confidential information. The Commission has therefore adopted this Communication to support national courts in their task of striking the right balance by providing some practical guidance.

Section II of the Communication provides guidance on the definition of confidential information and relevant factors for national courts to consider when presented with disclosure requests. Section III highlights a number of measures (redactions, confidentiality rings, use of experts and closed hearings) and describes how and when such measures could be effective.

The Communication aims to be a source of "*inspiration and guidance*" for national courts, and is not binding on them. In particular, the Communication notes that the measures set out in Section III should only be used "*if they are available under and compatible with national rules*".

Chinese tech giants promise fair competition and stronger corporate governance

In a recent meeting with China's State Administration for Market Regulation (SAMR), 20 major Chinese internet platforms signed a public document promising to compete fairly and promote the healthy development of the online economy. This was published by SAMR in a **press release** (in Chinese only) on 17 July 2020.

Chinese tech giants Alibaba, Tencent and Baidu, along with food delivery platform Meituan and online travel agency Ctrip, were among the signatories to the industry-wide self-discipline pact. The companies pledged not to force businesses using their platforms into exclusive cooperation or licence agreements, or to impose unreasonable constraints on the businesses' choice of platforms. There were also promises not to hinder or damage the normal operation of online products or services provided by their competitors, as well as commitments to provide compliance training to their staff.

This is an interesting development as it comes amidst a number of alleged complaints of platforms imposing exclusivity on suppliers, and yet SAMR was willing to rely on the industry's self-discipline to resolve such issues. This is in stark contrast to the increasing scrutiny of the tech sector globally, particularly with the ongoing 'Big tech' antitrust hearings before the US House of Representatives and various market studies and investigations in other jurisdictions. In its press release, SAMR added a general reminder that it is still prepared to act if there are issues in the sector. Given the importance of the digital industry to the Chinese economy, it may only be a matter of time before SAMR turns its enforcement focus to the online sector.

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