CARTEL INTEL: INTERVIEW WITH BO VESTERDORF, FORMER PRESIDENT OF THE EU GENERAL COURT

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Legal Briefings

In advance of the next edition of *Cartel Intel*, our quarterly update on key EMEA cartel developments, **Daniel Vowden** (Partner, Brussels) had the great privilege of discussing important recent EU legal developments with **Bo Vesterdorf**, formerly a judge at and the President of the EU General Court (and more recently a senior consultant with Herbert Smith Freehills).

*The forthcoming edition of Cartel Intel is to be published in October and will be available, along with former editions, **here**.*

*To view a PDF of this interview, please click **here**.*

CARTEL ENFORCEMENT AND SUSTAINABILITY

***DANIEL VOWDEN**:* In the next edition of *Cartel Intel* we talk about the *Car Emissions* cartel.[1] Daimler, BMW and Volkswagen Group were together fined almost €875 million for infringing EU antitrust rules by colluding when developing exhaust gas cleaning technologies for diesel cars. This is the very first occasion on which collusion relating exclusively to technical development has been found to infringe Article 101 TFEU.

Do you consider that this case is *sui generis*, or could it usher in a new era of cartel enforcement activity aimed at promoting sustainability?

BO VESTERDORF: **I don't think this is a *sui generis* case and nor do I really think that it is going to usher a new era of cartel enforcement. I do, however, believe that whenever the Commission becomes aware, one way or another, of a possible infringement as regards more technical aspects of certain products, like technical details of trucks or more central, competition-sensitive equipment parts of automobiles or certain internal functionality features of high-tech products, it is not going to hesitate to investigate and pursue the case. The *Trucks* cartel decision[2] is a good example of that. I do, however, doubt whether going after this kind of cartel case will be given priority over other types of cartel infringements.**

Do you think, to date, the European Commission has been reluctant to use Article 101 TFEU in relation to collusion exclusively around technical developments? The "classic" cartel relates to price fixing or market sharing; restrictions of technical development are a bit more esoteric. More generally, do you believe that the Commission can target cartel enforcement activities to support a particular policy initiative – like the Green Deal - or is enforcement action opportunistic in nature?

Has the Commission been reluctant to use Article 101 in that regard? I am not sure they have been reluctant. It is probably more the result of not having its attention drawn (via complaints or other intelligence) specifically to this kind of cartel activity over the years. On the other hand, I don't see anything to prevent the Commission from targeting enforcement activity to support a particular policy initiative, i.e., a political wish to avoid giant companies from obtaining worldwide or EU-wide dominance in key areas of, for example, communication. Other than that, enforcement is largely opportunistic in nature (in other words, driven by leniency applications, complaints or other intelligence that is received).

Discriminating between legitimate cooperation and illegal collusion in relation to technical development is not necessarily a simple exercise. Indeed, the Commission acknowledged the novelty of the infringing conduct in the Car Emissions cartel when setting fines, applying a 20% blanket fine reduction. In your opinion, is there a risk that the very substantial fines imposed in the *Car Emissions* cartel could prove counter-productive and deter collaborative projects capable of delivering innovations and yielding important consumer welfare benefits?

It is correct, as the Commission acknowledged in the *Car Emissions* cartel, that it may in many cases become quite difficult to distinguish between generally valuable (for society) technical cooperation in finding the best possible solutions to technical problems and cooperation which is not indispensable in that regard and which is therefore perhaps driven by a desire to avoid competition which might benefit consumers by lowering prices. Aggressive enforcement imposing substantial fines may in some cases very well be the answer, but the Commission should be careful not to deter economically well-founded technical cooperation between competitors if that means the loss of important consumer welfare benefits. It can become a delicate balancing of pros and cons.

A striking feature of the *Car Emissions* cartel is the Commission's characterisation of competition law as a complement to its sustainability objectives in relevant press statements. However, curbing current behaviours and securing sustainability targets may in many industries require collective rather than unilateral action, and therefore collaboration among competitors. Competition law may prevent or, at a minimum, discourage this kind of concerted action. As a general matter, do you think that there is, or should be, scope for competition law to take into account sustainability considerations and related societal benefits?

As a general matter, I am not in favour of a competition policy which becomes primarily driven by considerations of, for example, sustainability and other related societal benefits. Competition policy is meant to enhance sound competition between competitors to the general advantage of consumers and thus society. It would thus, in my opinion, be a kind of abuse of its powers for the Commission to use Articles 101 and 102 TFEU to combat tax fraud or to force companies to use another kinds of energy in their production to help combat climate change. EU institutions have other legal means to pursue such objectives.

RIGHTS OF PARTIES IN CARTEL SETTLEMENT CASES

In the last edition of *Cartel Intel* we reported on the judgment by the EU Court of Justice ("**CJEU**") in *Pometon.*[3] This is a landmark decision in which the CJEU for the first time provided guidance on 'hybrid settlement' procedures (i.e., cases in which the settlement procedure and settlement decision do not cover all the parties prosecuted for a cartel). In this specific case, four companies agreed to settle with the Commission while a fifth, Pometon, withdrew from the settlement procedure. Reference was made to Pometon in the 2014 infringement decision adopted against the settling parties.Pometon was fined separately in 2016. Among various grounds of appeal, Pometon claimed that reference to its conduct in the 2014 decision breached the principles of equal treatment, impartiality and presumption of innocence. In its judgment this year the CJEU rejected these grounds of appeal. It found that reference could be made in a settlement decision to the conduct of a non-settling party to the extent necessary to establish the liability of the settling parties.

Do you think that the CJEU has adequately balanced the different rights and interests at issue in a hybrid settlement procedure? When considering the rights of non-settling parties I am strongly reminded of the EU General Court judgment in *ICAP*,[4] where it was held that "*the requirements relating to compliance with the principle of presumption of innocence cannot be distorted by considerations linked to the safeguarding of the objectives of rapidity and efficiency of the settlement procedure, no matter how laudable those objectives may be*" (paragraph 266). Do you believe that the judgments in *Pometon* and *ICAP* are consistent?

The *Pometon* and *ICAP* judgments might at first glance seem slightly at variance with each other. On the one hand, the CJEU found that it is not incompatible with the rights of a non- settling party if reference to it is made in a Commission settlement decision concerning settling parties. And on the other hand, the General Court found that otherwise legitimate objectives of rapidity and efficiency in a settlement procedure must not undermine the principle of innocence of a non-settling party.

I admit that it needs some reflection to avoid the impression on lack of consistency. However, what the CJEU is simply saying is that it is a non-disputable fact that the Commission had launched an investigation which implicated the non-settling party as well as the settling parties and that it was entitled to mention this in the decision. By referring to that fact but at the same time expressly mentioning in the settlement decision that this was not addressed to Pometon and that Pometon's case was being examined and to be decided in a separate procedure, the Commission had not violated the presumption of innocence.

When one reads the *Pometon* judgment it becomes clear that both the General Court and the CJEU in its appeal judgment had very carefully examined whether anything in the settlement decision could be found to violate the principle of innocence. The General Court statement in *ICAP* on the contrary appears more to be a general statement of principle, underlining the importance of the principle of innocence which should not be violated because of a wish to obtain a rapid and efficient settlement decision.

Those clarifications are helpful. Nonetheless, in practice do you think it really remains viable for a party to refuse to settle with the European Commission when other companies do enter into settlement agreements? Also, and as reported in the next edition of *Cartel Intel*, the UK has proposed eliminating the ability of companies to appeal cases where they have reached a settlement decision. Do you think that the Commission might try to introduce similar limitations for settling parties?

A party to a cartel where the other participants choose to settle may very well still have considerable interest in refusing to settle. That party might well consider that the Commission's finding of what constitutes illegal collusion is wrong, even if other parties choose to settle just to receive a reduction of the fine and avoid long and costly legal proceedings before the courts. The non-settling party may also choose to go to court to reduce the fine envisaged by the Commission if it considers that it stands a good chance of obtaining a far larger reduction than the usual 10% offered by the Commission to settling parties.

In this connection it should not be forgotten that the settling parties are not prohibited from attacking the fine imposed by the settlement decision before the courts, even if I think that it is not going to happen often. Could this be forbidden by law in order to avoid that risk? I don't see how this could be done under existing EU law without changing the Treaty.

One final question. The settlement procedure has proven a striking success for the European Commission, with many parties choosing to settle. From the Commission's perspective, this conserves valuable resources and delivers administrative efficiencies. However, do you have any concern that the success of the settlement procedure also means that fewer cases are being scrutinised by the EU Courts? Do you think that there is a risk that the settlement procedure has weakened judicial oversight of the European Commission's decision-making?

The settlement procedure has indeed proven to be a striking success for the Commission, as evidenced by the large and increasing number of settlements concluded since its introduction in 2008. It is a positive thing seen from a strictly practical point of view, in that it is efficient and saves administrative resources just as it reduces the number of complicated and resource-demanding cases being brought before the CJEU and the General Court.

On the other hand, this in turn means that a potentially important number of legal questions and uncertainties are not being brought precisely before the two courts, thus leaving such questions to be resolved only by the Commission and not finally before a court. This is worrying and risks creating judicial uncertainty to the detriment of companies and consumers. Judicial oversight of the Commission's decision-making over the last decades has contributed largely to legal certainty and to important developments in competition law. It would be an undesirable consequence of the settlement regime if this, to some extent, were to be impeded.

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1. Case AT.40178 – Car Emissions.
2. Case AT.39824 - Trucks (2017).
3. Case C-440/19, judgment of 18 March 2021.
4. Case T-180/15 , judgment of 10 November 2017.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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