

The European Commission imposed record fine of EUR 2.9 billion for a truck cartel

Elisabeth Eklund / Partner
Nafsika Karavida / Senior Associate

On 19 July, the European Commission (the "Commission") decided to order four truck manufacturers to pay a fine of EUR 2.9 billion, which is the highest fine the Commission has ever issued for a cartel. The companies subject to the fine – which constitutes a part of a settlement with the manufacturers – are MAN, Volvo/Renault, Daimler, Iveco and DAF. The truck manufacturers were fined for their participation in a cartel in which they agreed, over a period of 14 years, on the pricing of trucks, the timing of the introduction of new emission technologies on the market, and to transfer the cost of the new emission technologies to customers. MAN, which would otherwise have had to pay the highest individual fine of EUR 1.2 billion, escaped a fine completely through a leniency application and could thereby take advantage of the leniency policy meaning that a cartel member that reports a cartel is relieved from paying fines.

The cartel in brief

The cartel, which lasted between 1997 and 2011 in the entire EEA, was conducted through meetings between senior representatives from the companies. Sometimes the meetings were held in conjunction with different industry conferences. The parties also made agreements via telephone and email. At these meetings, the companies made agreements on the prices of trucks, the timing of the introduction of new emission technologies on the market and to transfer the cost of the new emission technologies to customers.

What was the Commission's reasoning behind the record fine?

The decision is remarkable due to the significantly high amount of the fines, especially considering that the decision is a part of a settlement with the Commission under which

the companies in question (after MAN had been the first to reveal the cartel) admitted their participation and received a 10% rebate on the fines.

The Commission applies guidelines in order to determine the size of the fines imposed for a cartel violation. The maximum amount is 10% of the company group's global turnover. The size of the fines depends on e.g. how long the prohibited collaboration has been going on; on how many markets and thereby the number of consumers that have been affected by the cartel; and other circumstances such as the type and gravity of the violation. In addition, there are mitigating and aggravating factors. Mitigating factors are, for example, that a company's participation in the cartel was very limited e.g. that the company in practice has not applied the competition restrictions upon which the members of the cartel had agreed or if the company's participation was limited to a short period. Aggravating factors are, for example, if a company continues or repeats an identical or similar violation after the Commission has held that the company has violated the anti-trust rules. Other aggravating factors are if a company refuses to cooperate or hinders the Commission's investigation; that a company has had a leading role or has taken the initiative to the violation in question. The purpose is, of course, that the draconian fines will act as a deterrent for companies that are thinking of forming cartels. Margrethe Vestager, who is the EU Commissioner for Competition, stated in a press release (that may be interpreted as a reason for the record fine) that the EU has over 30 million trucks that account for three quarters of all inland transport of goods in Europe and that the truck manufacturers in question account for around nine out of every ten medium and heavy trucks produced in Europe. She also pointed out the long duration – 14 years – of the cartel. The Commission is

(in) famous for its high cartel fines, to take some examples: in 2012 seven technology companies (*inter alia* Samsung, Philips and Panasonic) were fined a total of EUR 1.47 billion and in 2008 four producers of car glass were ordered to pay a total of EUR 1.35 billion. Many national competition authorities have also imposed very high fines.

The Commission's decision may be appealed to the Court of Justice of the European Union (the "CJEU"). However, appealing decisions which have been taken within the framework of a settlement procedure, as was done in this case, is unusual, which can be explained by the fact that the parties admit their participation in certain activity that the Commission regards as unlawful and the circumstances on which the decision is made. The fines for the cartel as a whole might also become even larger; there is an ongoing parallel investigation concerning Scania, which is suspected of participating in the same cartel but has opted to not participate in a settlement procedure.

Possibility of avoiding fines – leniency applications

The Commission (and also the Swedish Competition Authority and other national competition authorities) provides a possibility for companies which have participated in a cartel to obtain immunity and thereby avoiding fines entirely. The purpose of the rules is to be able to identify cartels, which by nature are often secret and thus difficult to discover. In order to obtain immunity the company is required to make a leniency application (the corresponding procedure of the Swedish Competition Authority is called *eftergiftsförfarande*). In a leniency application, the company in question must submit information and evidence which enables the Commission to determine a violation of the cartel rules. Such information includes, *inter alia*, a detailed description of the suspected cartel, its aim, activities and methods. Information must also be provided regarding the product or service which the cartel involves, the cartel's geographical scope, the duration and an estimate of the market volumes affected by the cartel. The company must furthermore provide specific dates, places, content and participants as regards suspected cartel contacts. An advantage for a company that takes part in a leniency application or a settlement procedure is that the Commission, in such cases, only publishes a short decision (instead of a long, detailed decision) which cannot, to the same extent, be used as basis for companies, which after the cartel has been held to exist, wish to seek damages from the former cartel member. The Commission's leniency policy, which has been inspired by the system in the US, has been very successful and practically all large cartels revealed in recent years have been disclosed due to leniency applications. The Swedish equivalent has thus far not had any greater effect, but several Swedish companies have been affected by leniency applications made in European

cartels. As regards abuse of a dominant position where only one company is liable for restricting competition, a leniency application is not, however, possible and in such cases the competition authorities are dependent on complaints from the parties subjected to the abuse in question or other concerned parties.

What can we expect in the future from the Commission and the national competition authorities?

The decision clearly shows that the Commission will continue to take cartels' negative effect on competition, and thereby prices, innovation and development, extremely seriously. The fact that some of the information in the current case has been exchanged in conjunction with industry conferences and meetings also shows how important it is for companies to have guidelines in place regarding participation in such meetings (i.e. guidelines concerning what the companies' representatives may not discuss, the importance of the participants' being provided an agenda before industry meetings and how the representatives must act if another participant breaches the anti-trust rules), and that the companies comply with the guidelines. The decision clearly shows that the Commission is prepared to be tough against cartel violations. It is possible that the record fine means that we can expect even a significantly higher level of the already very high fines for which the Commission has been known in cartel matters. The future will also tell whether the decision will have any effect on the fine levels which the various EU Member States' national competition authorities impose on companies participating in cartels. The decision further shows how much money is at stake for companies which is considering submitting a leniency application and that cartels are no longer as difficult to discover as they once were, which clearly increases the risks for the companies involved.

The truck manufacturers involved in the cartel can now probably expect many actions for damages from the customers that have suffered financially from the cartel, and that is also something which the Commission encourages in its press release. The number of actions for damages based on competition law is expected to increase in the coming years. In 2014, the Commission took the initiative to harmonize the availability of anti-trust damages in the entire EU and no later than 27 December 2016 the Member States must have enacted new rules. In Sweden, a completely new anti-trust damage act has been proposed. The possibilities for companies which have suffered from competition restrictions to be financially compensated are thus expected to increase in the future, which at the same time means increased risks for companies violating the rules, in addition to the very high fines.