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The EU's Top Court Confirms No Agreement is Needed for a Cartel

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Antitrust & Competition

In an important ruling rendered March 19, 2015 in the *Bananas* case, the EU's top court definitively upheld the EU Commission's expansive view of cartel conduct and held that no "fix" (as in agreement) is needed for the EU to conclude that cartel activities have occurred.

It is no secret that the EU Commission is tough on cartels, imposing huge fines at ever increasing levels. The record €1.7 billion total fines imposed in the Euro and Yen interest rate derivative cartels at the end of 2013 is just one recent illustration of this stance. It may be less well-understood that in recent years the EU has adopted a very broad view of what types of competitor interactions can be treated as cartel conduct – a view that is far more expansive than the approach of any other major enforcement agency in the world, including the U.S. The *Bananas* ruling endorses this broad view, confirming that the mere exchange of forward-looking strategic information between competitors (*in casu* price-determining factors) *per se* violates EU antitrust law, and can be punished by cartel-like fines, regardless of whether the competitors reached agreements not to compete or the information exchanges affected any markets.

The ruling does not come without warning. In its 2011 Horizontal Guidelines, the EU Commission already stressed that it would normally treat such forward-looking information exchanges as a cartel. And in a 2009 preliminary ruling (*T-Mobile*, C-8/08), the EU top Court itself had taken the view that even a one-off exchange of sensitive information – albeit in a specific fact setting – could constitute a cartel. Nonetheless, the present *Bananas* ruling is a particularly important development in that it confirms these previous positions in a final ruling that is generally applicable across the EU. This also means that the 28 EU Member States are likely to take the same strict approach in their domestic antitrust enforcement activities.

For companies doing business in Europe, the ruling has a number of practical implications:

- EU-specific compliance training is key: *Bananas* shows that competitor interactions that are permissible (or at worst fall into a grey area) in most other jurisdictions can raise red flags in the EU. It is thus important to tailor the compliance for EU personnel, increase their awareness of the risks, and help them devise strategies that let them attain commercial objectives in a compliant way. Employees conducting Europe-related business will effectively have to pay an extra dose of attention to avoid violating EU cartel strictures:
  - Of course, caution is of utmost importance during direct interaction with competitors.
  - Caution is also warranted in discussions with suppliers and customers – depending on the facts, EU regulators might construe such discussions as hub-and-spoke exchanges that violate cartel laws.

  - Companies also should factor in EU-specific rules when assessing the functioning of and participation in trade associations, so that employees know how to act and react when confronted with potential red flag topics in that context.
- Alertness to widened private litigation risks: As a result of the EU's stricter approach to information exchanges, companies may face serious risk in an antitrust investigation in the EU, even if they have not violated the antitrust laws of other jurisdictions. As a direct consequence, companies may also face greater exposure to damage claims in the EU, especially if the EU investigation concludes that problematic exchanges took place. In addition, as experience has shown that damage claims could arise in multiple jurisdictions following governmental investigations (without there being necessarily a nexus between the two), it is important for companies to "ring fence" exposure following EU-specific findings on information exchanges – for example by minimizing risks that the files and facts pertaining to the EU investigation could be used against them in U.S. treble damage claims.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Antitrust & Competition practice group:

Brussels

Peter Camesasca	+32 2 549 52 38	pcamesasca@cov.com
Johan Ysewyn	+32 2 549 52 54	jysewyn@cov.com
Jiwon Choi	+32 2 549 52 51	jchoi@cov.com

Seoul

Laurie-Anne Grelier	+82 2 6281 0005	lgrelier@cov.com

San Francisco

Phillip Warren	+1 415 591 7012	pwarren@cov.com

Washington, DC

Michael Fanelli	+1 202 662 5383	mfanelli@cov.com
Derek Ludwin	+1 202 662 5429	dludwin@cov.com