

LATHAM & WATKINS LLP

10 Practical Lessons from Pending Cases: The Moving Targets in Cartel Practice

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Recent Trends in Cartel Enforcement

- Maturing of cartel enforcement
 - Leniency applications may be leveling off after initial rush to file
 - Authorities focusing on stronger cases and more cooperation upfront by immunity/amnesty applicant
- More jurisdictions getting into cartel enforcement
 - Problems with inconsistent approaches
 - Threat of information leaking from one jurisdiction to the next
- Greater willingness to decline prosecution or limit penalties where other jurisdictions take the lead

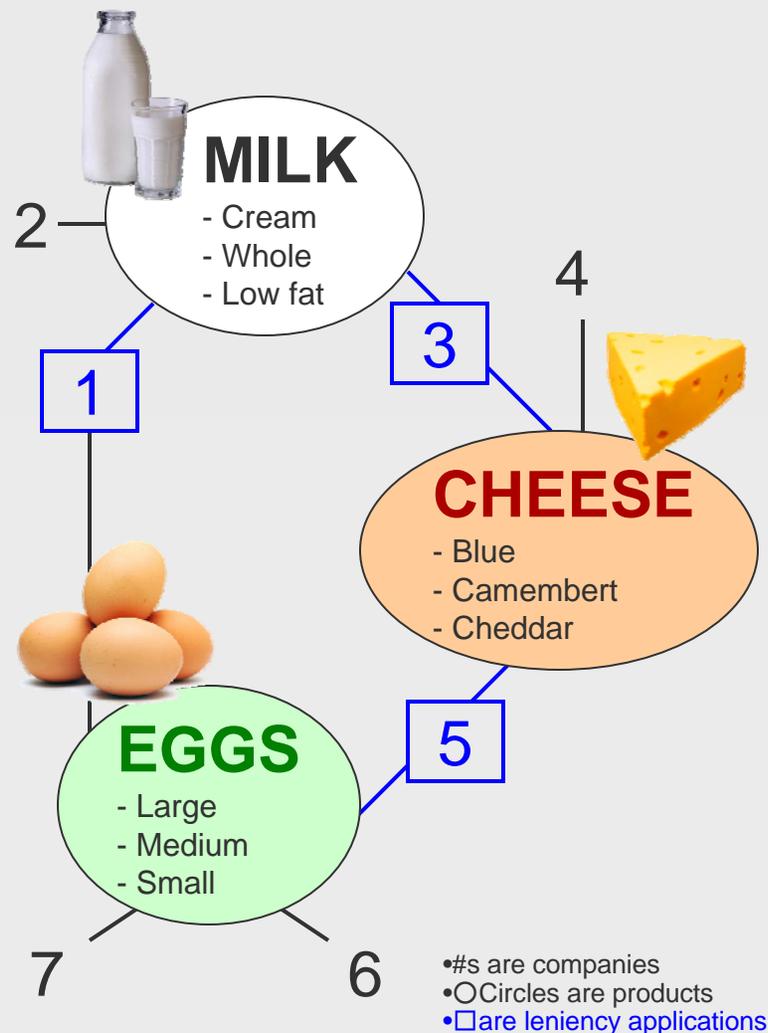
Whether to Seek Leniency and Self Report: A Cost/Benefit Analysis

- Costs
 - Need to report to more jurisdictions (all or none approach)
 - Reporting is not cost free
 - legal fees
 - business distraction
 - civil damage claims
 - structural changes in the industry
 - Retaliation by Other Members of the Industry
- Benefits
 - No Criminal Penalties
 - Companies that Report Second are Penalized Harshly (e.g. Hoffman La Roche \$500 million, LG \$400 million, Samsung \$300 million)
 - No Executives Go to Jail or Restricted From Travel
 - Ability to Resolve Problem Sooner and Get Back to Business
 - (E.g. AU Optronics)
 - If You Don't Report Someone Else Will (Do you trust your competitor)

Lesson 1: Creeping Product Scope of Investigations – Recent DOJ & EU Approaches

- U.S.
 - Immunity applications are interpreted broadly to increase incentives to self-report
 - Pleading defendants: Two approaches
 - Amnesty Plus – Full immunity on second product
 - U.S.S.G. § 1B1.8 – Charged For Related Conduct But No Increase in Fines or Other Penalties for Reporting New Information
- EU
 - EU remains demanding in terms of immunity applications
 - In recent cases, scope of immunity has been broad
 - But beware of the scope negotiation; EU is key, as before raids
 - Partial immunity for those who come after, but *GIS/Transformers*
 - Fine reductions, 50% and more even within same product

Lesson 1: Creeping Product Scope of Investigations (continued)



- 1** - is the 1st leniency applicant for Milk conspiracy
 - would cover all milk products if part of a single conspiracy
 - 3** - comes in + pleads guilty on Milk, but to get its fine lower will report its involvement in a **Cheese** conspiracy (which may involve several types of cheese)
 - 5** - comes in + pleads guilty on Cheese, but to get the lower fine will report its involvement in an **Eggs** conspiracy (which may involve several egg sizes)
- Also gives evidence of # **1** involvement in the eggs conspiracy
- Danger not fully reporting all BAD conduct – could end up chased on another product

Lesson 2: Expanding Country Scope: Where to Go for Leniency and Where Not to Go

- Increasingly complex analysis
- Aggressive enforcement across many jurisdictions
 - US (criminal/
extradition)
 - EU (large fines)
 - Japan
 - UK (criminal and civil)
 - Australia (criminal/civil)
 - Canada (criminal/civil)
 - Brazil (billions in fines?)
 - New Zealand
 - Korea
 - South Africa
 - Switzerland??
 - 8 countries in
South America??
- The decisions are difficult, and irreversible
 - But failing to file has consequences
 - *DRAMS* in Brazil; *Power Cables* in Brazil, Australia...

Lesson 3: When is a Cartel a Cartel?

- Lessons learned from recent cases
 - Lessons on “stay at home” arrangements (*GIS, Transformers, Cables*)
 - Tender markets
 - Information exchanges (the European perspective)
- What is “hard core” cartel conduct
 - Explicit price-fixing, output restriction, territory and customer allocation, and bid rigging
- What is *not* hard core cartel conduct
 - Episodic information exchanges vs. regular exchanges (but *T-Mobile*)
 - Co-supply agreements (customer-supplier relationships even among competitors)
 - Oligopoly: independent decisions to raise prices or stay out of markets based on observed conduct of a competitor
- Border-line cases – when does a JV “cloak” a cartel

Lesson 4: Small Matters Leave Large Footprints

- The rush to self-report can lead to over reporting
- Global nature of economy means that most businesses affect numerous jurisdictions, and many products
 - Finding a small conspiracy in the U.S. or Europe can result in immunity applications in several jurisdictions
 - The cost and complexity increases exponentially with cases in multiple jurisdictions
 - E.g. Brazil can open an investigation even if you did not do business in the country during the conspiracy period (they look to the years prior to opening of investigation as relevant).
 - “Rings in the water” spread from product to product
 - Sometimes, applicants are being over-cautious and file where conduct does not rise to cartel standard

Lesson 5: Increased interest in cartel conduct abroad “affecting” domestic markets

- DOJ
 - Expanding view of extraterritorial reach of U.S. antitrust laws
 - With manufacturing moving overseas, DOJ is pushing to capture indirect effects of cartels
 - e.g., *LCD* (products bought and sold overseas but placed in computers and TVs shipped to U.S.); *Chunghwa*; and *Hannstar*
 - FTAIA – Courts are interpreting scope of antitrust law narrowly
 - What will be the effect for criminal cases
- UK and EU
 - EU following the same line as the US (*LCD*)
 - EU focused on “stay at home” arrangements reducing competition in the European markets (non-entry)
 - How will the UK OFT (European criminal enforcement) look at conduct outside the UK?

Lesson 6: Avoiding Double Punishment

- DOJ, UK and other enforcement agencies making small efforts to coordinate to avoid double punishment for same conduct
 - *Marine Hose* (U.S. chose not to see imprisonment of UK executives where UK sought imprisonment)
 - Recent comments by high level DOJ enforcers endorse position
 - JFTC – Willing to let other jurisdictions take the lead on International Cartel Enforcement with no strong Japan contacts?
 - Agencies seem willing to listen to double counting arguments
- However, plenty of examples where enforcers seem to double count the commerce.
 - Air Cargo (DOJ counts some inbound and all outbound commerce and EC counts all outbound commerce)

Lesson 7: Inability To Pay

- Recent EU approach to inability to pay claims
 - When is a company “unable” to pay
 - *“not only be likely to lead to the bankruptcy of an undertaking as such, but also that it would cause its productive assets to lose “significantly” their value.”*
 - What does the 10% cap on fines apply to – parent or subsidiary ?
 - Recently acquired subsidiaries – Does the new parent have to pay for the sins of the subsidiary over 20 years?
 - Buying assets out of bankruptcy (*Conex Banninger*)
- DOJ
 - Consistent Acceptance of Inability to Pay Arguments
 - Well grounded in U.S.S.G. § 8C3.3
 - Reduce fine when it “will impair its ability to make restitution to victims” and “to avoid substantially jeopardizing the continued viability of the organization.”
 - However, the bar is high to meet “inability to pay” standard
 - DOJ will hire expert accountants and dig deep into a company’s finances before reducing the fine.

Lesson 8: Discovery of Foreign Located Documents by US DOJ and EC

- Foreign documents getting into hands of enforcers
 - Leaks between jurisdictions (by co-conspirators w. access to file)
- US
 - Civil damage claims can result in foreign documents coming into the U.S. and then subpoenaed by the DOJ
 - See *In re: Grand Jury Subpoenas Served on White & Case, et. al.*, No. 10-15758 (9th Cir. Dec. 7, 2010)
 - MLATs and Letters Rogatory (difficult and time consuming but easier to do in context of witness interviews)
- EC
 - Can a European subsidiary of a non-EU company be required to deliver documents controlled by the parent outside the EU? (*LCD*)
 - Access to databases that are accessible from the EU

Lesson 9: Covert Surveillance

- U.S.
 - Covert surveillance in antitrust cases (*ADM, Marine Hose*)
 - Tape and video recording, wiretapping phones and offices, FBI surveillance, *etc.*
 - If only *one* caller is in the U.S. they can record phone calls
 - Tape recordings are frequently required for leniency applicants
 - Limited or no foreign surveillance in antitrust cases
- UK
 - Covert Intelligence Sources (CIS) are registered and must report their unlawful conduct
 - Can a CIS operate outside the UK ? Relationship to local law ?
- EC
 - Cannot condone ongoing illegality / at most passive observation
 - Uneasy fit with UK and US criminal enforcement

Lesson 10: Freedom to Travel - Is Senior Management at Risk of Arrest or Detention

- Commonly used tool in antitrust cases
 - U.S. Border Watch
 - Even if you briefly land in U.S. territory (e.g. Guam) on your way to another country you can be stopped and arrested (under seal indictment or material witness warrant) or served with a grand jury subpoena (must return to U.S.)
 - You can be stopped every time you enter the U.S.
 - Just because you make it safely through once, does not mean you will not be stopped the next time.
 - Red Letter Notice
 - If you are indicted (even under seal) you can be detained in most countries until a determination is made on extradition, which can take weeks or even months.
 - US uses the Red Letter Notice process frequently
 - Brazil cannot use because of alternate penalties in current law (5 yrs or..)
 - UK and Australia – untested so far in antitrust cases