

LATHAM & WATKINS<sup>LLP</sup>

Presentation

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# The Coming of Age of European Cartel Enforcement?

**Marc Hansen**  
Brussels and London

# What is the Commission doing?

## Commissioner Kroes:

“So what is the European Commission doing to stop cartels? We have sought to develop a system that:

First, **deters** companies from entering into cartels, through a clear risk of discovery and heavy sanctions;

Second, **detects** existing cartels, through the actions of enforcement agencies, whistle-blowing and leniency; and

Third, **deprives** companies of their unlawful gains.”

Speech given at the 10<sup>th</sup> Annual Competition Conference at the European Institute, Fiesole, Italy, 13<sup>th</sup> October 2006.

# Overview

- Since last year, three legislative developments and two indicators of future change:
  - Revised Access to File Notice (December 2005)
  - New Fining Guidelines (September 2006)
  - New *draft* Immunity & Leniency Notice (October 2006)
  - The arrival of civil plaintiffs firms in Europe
  - Direct settlements and plea bargaining?

# Notice on Access to File / Rights of Defence

- **Purpose of the revised notice**
  - Address deficiencies found by EC courts
  - Due process and rights of defence
- **New Notice is a balancing act of different interests and objectives**
  - Access to addressees of SO vs access to third parties
    - Access to file only for addressees of the SO
    - Separate limited right of access for complainants
    - No right of access for third parties (e.g., plaintiffs in civil damages cases)
  - Notion of “Commission file” vs “internal documents” In particular:
    - “Commission file”: All documents collected by Commission, whether or not used as evidence by the Commission
    - All information accessible to defendants except:
      - “internal documents”, “business secrets” & “other confidential information”

# Access to File – Some innovations

- New process far more cumbersome
  - All documents must be made accessible, not only evidence used in SO
  - Extensive file review and summaries of all documents claimed as confidential
  - Note five year rule in para. 23
- Commission can order disclosure of inculpatory or exculpatory documents
  - See para. 24 – Subject to ruling by Hearing Officer & review by EC Courts
- Normal access vs special access
  - Access to file in electronic or paper form (CD ROM provided)
  - Special access for materials provided as part of leniency process
    - Protection against discovery orders issued in civil damages actions
    - Parties can review on site, but not copy or record
- Strict sanctions for “misuse” of Commission file
  - No more “selling the CD-ROM” for settlement of civil claims
  - Disbarment of lawyers and criminal prosecution of companies
  - Fine can be increased retroactively where breach of rules

# New Fining Guidelines

- Commissioner Kroes:

“These innovations are likely to increase average fines, particularly for long lasting infringements in large markets, where fines could well increase by a factor of three. I think all this will make potential cartelists think twice!”

- Highlights of new Fining Guidelines:

- ⚠ Heavier fines on large companies
- ⚠ Tough on multiple offenders (recidivists)
- ⚠ Exponential fine increase for long-lasting cartels (and duration as single infringement)
- ⚠ Leniency and cooperation discounts become key to surviving..

⇒ The 10% limit will be reached more frequently

# New Fining Guidelines

- Main features of new guidelines:
  - Market impact measured three times!
    - Fines are based on actual sales in market affected (up to 30% of value of sales in last full business year)
    - Multiplied by duration of cartel (number of years), and
    - “Entry Fee” 15-25% of sales (but perhaps mainly where short duration)
  - Up to 100% increase for recidivism
  - Deterrence – “top-up” for cases where effect would not be enough
    - Para. 30 – “big conglomerate company rule”: Ensures fines have “sufficiently deterrent effect” where company has large revenues beyond market affected
    - Para. 31 – “need to increase the fine in order to exceed the amount of gains improperly made” (recouping the overcharge; but consider the difficulties in calculating the overcharge, e.g., in markets with declining price curves)

# New Fining Guidelines

How some people see the guidelines:

But will there really be a doubling or tripling of the fines?

**Table 7 Fines under 1998 vs 2006 penalty guidelines**

Cartel/Date	Cartelists	1998 Fine €m	2006 Fine €m	% Sales	ratio 98/06
Amino Acids (Lysine)	ADM	52.6	52.3	128%	1.0
	Ajinomoto	56.6	118.1	158%	2.1
	Kyowa	18.9	16.8	105%	0.8
	Cheil Jedang Corp Sewon	17.4 17.8	14.5 15.8	85% 105%	0.8 0.9
Vitamin A	BASF	92.3	179.2	398%	1.9
	Roche	171.0	265.5	443%	1.6
	Aventis	68.4	110.6	295%	1.6
Vitamin E	BASF	179.7	249.9	398%	1.4
	Roche	199.5	276.6	443%	1.4
	Aventis	39.9	147.5	295%	3.7
Vitamin B2	Elisa	18.9	99.4	295%	5.3
	BASF	37.8	27.4	196%	0.7
Vitamin B5	Roche	84.0	43.5	218%	0.5
	Takeda	15.5	7.8	130%	0.6
	BASF	68.0	37.6	358%	0.6
Vitamin C	Roche	106.0	62.6	398%	0.6
	Daichi	36.0	27.8	295%	0.8
	BASF	29.4	38.9	216%	1.3
Vitamin D3	Roche	131.0	189.6	240%	1.4
	Takeda	43.5	20.8	160%	0.5
	Merck	10.9	20.8	160%	1.9
Beta Carotene	BASF	15.1	7.8	196%	0.5
	Roche	42.0	13.1	218%	0.3
	Aventis	5.6	1.5	73%	0.3
	Solvay	14.0	13.1	145%	0.9
Carotinoids	BASF	86.4	31.5	277%	0.4
	Roche	96.0	198.6	308%	2.1
Carbonless Paper	BASF	83.7	19.2	297%	0.2
	Roche	93.0	21.4	285%	0.2
Paper	AWA	283.5	721.3	195%	2.5
	Bollore	28.4	53.6	95%	1.9
	Carris	1.8	8.7	75%	5.0
	Divipa	1.8	15.4	75%	8.8
	MHTP	33.1	210.2	130%	6.4
	Zicunaga	1.5	7.6	45%	4.9
	Mougeot	7.3	25.7	85%	3.5
	Koehler	33.1	144.8	130%	4.4
	Sappi	15.1	37.2	95%	2.5
	Torraspapel	14.2	58.3	95%	4.1
	Zanders	33.1	175.9	130%	5.3
Citric Acid	ADM	79.4	89.4	194%	1.1
	Cerestar Bioproducts	4.6	24.3	115%	5.3
	Haasman & Reimer	122.5	45.5	145%	0.4
	Hoffmann-La Roche	79.4	110.9	298%	1.4
Plasterboard	Jungbunzlauer	29.4	101.5	145%	3.5
	BPE	196.0	1,666.5	330%	8.4
	Knauf Westf	85.8	737.0	220%	8.6
	Lafarge	249.6	876.4	308%	3.5
	Gyproc	7.2	40.2	49%	5.6
Food Flavour Enhancers	Ajinomoto	22.2	9.9	295%	0.4
	Cheil	4.6	3.5	308%	0.8
	Daesang	4.6	2.3	205%	0.5
Choline Chloride	Takeda	9.4	3.6	302%	0.4
	UCB	14.8	97.2	100%	6.6
	Alkzo Nobel	30.0	40.8	270%	1.4
<b>Totals</b>	<b>BASF</b>	<b>437.7</b>	<b>20.0</b>	<b>226%</b>	<b>2.3</b>

Source: Case Associates – New EU Penalty Guidelines - <http://www.casecon.com/data/pdfs/casenote43.pdf>



# New Fining Guidelines

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	UCB	14.8	97.2	100%	6.6
	Akzo Nobel	30.0	40.8	270%	1.4
	BASF	43.7	20.0	203%	0.5
	Totals	3,368.6	7,655.6	226%	2.3

Source: Case Associates – New EU Penalty Guidelines - <http://www.casecon.com/data/pdfs/casernote43.pdf>

# New Fining Guidelines

Company turnover € 5 billion; Business in Relevant Market is one among many business areas  
 Duration of the infringement is 4 years; Two prior "cartel convictions"; Ringleader

<b>TABLE 1 - Old Guidelines</b>		
<i>Basic Amount</i>	<i>Range</i>	
	<i>Low</i>	<i>High</i>
Basic Amount	30,00	40,00
Deterrence (+50%)	15,00	20,00
Duration [+40% (+10% per year)]	18,00	24,00
	63,00	84,00
<i>Aggravating/Mitigating Factors (1)</i>		
Ringleadership +25%	15,75	21,00
Recidivism +50%	31,5	42,00
	110,25	147,00
Limit 10% Art. 23(2)	500,00	500,00
Leniency (3rd Applicant: -15%)	-16,54	-22,05
<i>Estimate</i>		
	93,71	124,95

<b>TABLE 2 - New Guidelines</b>		
<i>Basic Amount</i>	<i>Estimate</i>	
	Turnover on Relevant Market	100
20% of relevant turnover	20,00	20,00
Duration (Relevant Turnover * 4 years)	80,00	80,00
Entry Fee (25% of relevant turnover)	25,00	-
	105,00	80,00
<i>Aggravating/Mitigating Factors (1)</i>		
Ringleadership +25%	26,25	20,00
Recidivism +100%	105,00	80,00
	236,25	180,00
Specific Deterrence Increase +50%	354,38	270,00
Limit 10% Art. 23(2)	500,00	500,00
Leniency (3rd Applicant: -15%)	-75,00	-75,00
<i>Estimate</i>		
	279,38	195,00

# New Fining Guidelines – The questions

- It looks a lot worse, but let's see how it will be applied...
- Some issues already becoming clearer:
  - You cannot fine three times for market impact
    - Perhaps 30% of turnover will be the exception ?
    - The “entry fee” where duration is short? (cartel of less than 3 years?)
  - Deterrence – “top-up” for cases where effect would not be enough
    - “Big conglomerate company rule” may be applied only where the revenues in the market is insufficient to “attract attention at board level” of parent?
    - Recouping the overcharge is fine in principle, but imagine calculating it and then defending it before the Court. There are easier ways to get to a big fine...
  - Also, the methodology has certain effects
    - The “below the line” adjustments for deterrence operates to significantly increase fines, but leniency is also deducted at that point, so may cancel each other out!

# New Draft Leniency Notice

- Building on the experience from the 2002 Notice
- Stated policy goals:
  - Bringing EU into line with other major jurisdictions
  - Increased legal certainty
  - Increased safeguards
  - Moving towards a one-stop-shop in Europe (ECN model program)
- Additional objectives:
  - Preserving the integrity of the Leniency Programme by confining it to rewarding the provision of factual evidence, not cooperation as such

# Main Features: Draft Leniency Notice

- Marker system for immunity applicants
- Compulsory corporate statement for “targeted inspection”
- Clarification of SAV evidence and now “compelling evidence”
- Requirement of full and continuous cooperation
- Making current and former staff available for testimony
- No destruction of evidence prior to filing for immunity/leniency
- Requirement of non-disclosure of cooperation until SO
- Termination of infringement, but subject to Commission exception
- Evidence of broader scope of cartel (time and scope) will not be used against company making such admission
- But nothing on parent company vs. subsidiary leniency applications

# Draft Leniency Notice – Problems..

- Marker system for immunity applicants
  - Queue system – similar to the France, Japan, USA, UK (more burdensome)
  - Granting of marker discretionary
  - Applicant can still be leapfrogged
  - Who can apply for the marker?
- Compulsory corporate statement for “targeted inspection”
  - The new list of what is required in para. 9(a) (“must provide”)
  - Does the new list raise the evidentiary hurdle?
  - “Enabling a targeted inspection” is more than dawn raid?
  - Delay because “all contemporaneous evidence” must be submitted?
  - Mismatch of evidentiary hurdles compared to US and Japan?

## Draft Leniency Notice – More problems..

- Not much clarification of “SAV” evidence, but includes:
  - Evidence that extends duration
  - Evidence of broader product scope
  - Evidence that implicates other participants
  - Roadmap to identify and locate other information (e.g., by dawn raid)
  - But question: Do admissions/contextual explanations qualify as SAV?
  - “Compelling evidence” (no corroboration needed) given more weight
- **?** Are we seeing a tightening of the requirements for SAV and the provision of some types of information being treated as just “cooperation” under para. 29 of Fining Guidelines?

## Draft Leniency Notice – And more problems..

**The applicant must “*cooperate genuinely, fully, on a continuous basis and expeditiously from time of application [...] including:*”**

- **Promptly providing all relevant information and evidence**
  - as it comes by it
  - in its possession
- **Remains at Commission disposal to**
  - respond to questions
  - ensure current and former employees are available for interviews
- **Does not disclose the leniency cooperation (unless agreed w. Commission)**
  - Raises significant issues under Section 409 Sarbanes-Oxley
- **Terminates infringement unless otherwise instructed**
  - Reduce conflicts with “no tip-off” jurisdictions (e.g., US)



# Interplay of US/EU/Japan Leniency Programs - Selected Issues

- **Access to file and use of leniency information and admissions in civil litigation**
  - Compulsory corporate statements (a step backwards)?
  - Use of corporate statements (“roadmap” *or* evidence in themselves)?
  - Applicant no worse off than non-applicants in all countries?
- **Marker systems**
  - Discretionary aspect aspect of European system
  - Losing place in queue if under-estimated value of evidence?
  - Initial evidence threshold versus full disclosure (compelling evidence)
  - Inspection versus “targeted” inspection
- **Delayed termination of infringement in order to:**
  - collect evidence and incriminate others *or*
  - not to tip-off others?
- **Non-disclosure requirements?**
  - Securities Law and Stock Exchange requirements? (“is cooperating with...”)

## A rush to file?

- December 2006, entry into force of new leniency notice
- A rush to file immunity applications?
- Look at previous experiences:
  - 2002 EU Leniency programme – within the first year 30 applications filed
  - 2006 Japan Leniency programme – 26 applicants in the first three months of 2006
- Put down a marker, but anticipate the next steps:
  - Differing evidentiary standards to file and perfect the marker in each jurisdiction
  - Rules on withdrawal from cartel may differ
  - Non-disclosure requirements and securities law obligations
  - Effect on anticipated civil litigation may dictate your approach
  - Criminal liability and extradition is increasingly a concern

LATHAM & WATKINS LLP

# Next Steps, Next Threats

# Civil Antitrust Litigation in Europe – Is it finally coming?

- We are starting to see cases in Europe:
  - Several European cases resulting from the “Vitamins” decision
    - **France May 2006 (passing-on defence recognised; but liability based on EC decision)**
    - **Germany: many claims; failed on passing on defence (now changes in the law abolish the defence)**
  - “Cement” cases claims aggregated (following change in law)
    - **29 “victims” sold their claims to Cartel Damage Claims SA which is claiming damages totalling €210 million against 6 cement cartel members**
  - National moves towards adopting legislation allowing class actions
    - **E.g., Italy draft in Parliament**
    - **Vigorous public debate on merits of private enforcement**

# Civil Litigation in Europe – Is it finally coming?

- Most significantly; the plaintiffs firms have arrived!

## **Cohen, Milstein, Hausfeld & Toll**

*Michael Hausfeld is on "a crusade to export America's legal system around the world". "Hausfeld is at the forefront of developing his brand of the law not only in the US, but internationally; and some would say that's really bad news,"*

## **CDC S.A. – claims aggregator**

**Murray, Frank & Sailer**, joined forces with Germany's Tilp Rechtsanwalt

## US Firm - New London Office Antitrust/Competition

### Partners and Associates

Our client is one of the leading US claimant practices. It has an international reputation and has spearheaded some of the groundbreaking complex group claimant cases in the US. Its partners include some of the pioneers in this field and the firm has particular strengths in antitrust/competition, securities/investor protection, pharmaceuticals/healthcare, consumer protection matters and human rights.

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# Plea bargaining and direct settlements

- Commissioner Kroes:

*“But if, despite these efforts, the Commission is not able to deliver swift enforcement with timely punishment, we may need to look at how some form of plea bargaining procedure could bring advantages in the context of European competition law.”*

(The First Hundred Days – Brussels, 7<sup>th</sup> April 2005)

- “Direct settlement” -- How would it work in practice?
  - A procedure between Article 7 Decision and Article 9 Commitments
  - Waiver of SO, access to file, Oral Hearing to avoid creating evidence for civil suits?
  - No intrinsic link to leniency policy?
  - All the cartel participants must be part of the process?
  - Discount, but not at the level of the French procedure (i.e., not 50%)
  - Effect of settlement on NCA proceeding or potential proceedings unclear..
  - But, it seems possible even under the current rules...

# The Settlement Process

## Possible Sequence of Settlement Process:

1. Dawn raids, possible immunity or leniency application
2. When case is ripe, preliminary discussion on Settlement Parameters
3. Preliminary Assessment (PA) or draft SO of Commission served on the Company
4. Settlement Discussion
  - i. Discussion on no contest of facts and factual findings in PA
  - ii. Presentation of Company's views on fine calculation and allocation
  - iii. Commission letter on cooperation and application of Leniency Reduction
  - iv. Company offer on fine and negotiation
  - v. Offering the same structure of deal to other companies (all must participate?)
  - vi. Provisional Settlement Agreement with Commission Staff (no prejudice and conditional on both sides on ratification by the Commission)
5. Waiver of full Statement of Objections, Access to File and Right to Oral Hearing
6. Decision by Commission adopting Decision imposing fine on the Company

# Final Comments

Everyone is taking cartel enforcement more seriously...

BA Execs Embroiled In Cartel Probe Resign  
October 9, 2006 Monday 2:52 PM GMT  
By Rod Stone  
Of DOW JONES NEWSWIRES

LONDON (Dow Jones)--British Airways PLC (BA) said Monday that two executives embroiled in an investigation over alleged cartel activity have resigned with immediate effect. Commercial Director Martin George and head of communications Iain Burns had been on leave of absences since June 2006 when the U.K. Office of Fair Trading and U.S. Department of Justice began an investigation focused on long-haul passenger fuel surcharges. [...]

BA shares moved lower and by 1435 GMT were down 2.0%, or 8.75 pence, at 429.5 pence in London. This "restructuring and damage control" is an obvious step, said trader Martin Slaney at GFT Global Markets. He noted there's still potential downside on the issue from any fine the company may have to pay going forward. [...] In its last financial year, BA posted revenues of GBP8.52 billion.



# The future enforcement scenario

- **Not a lot more real “legal certainty”, but**
- **Higher fines for sure, and probably increases to be expected**
- **Better immunity options for multi-territory cartels**
- **More incentives to cooperate, as better protection against evidence and admissions of guilt being used in subsequent civil actions**
- **Plea bargaining and incentives to settle**
- **But still some way from an active plaintiff’s bar, so some will want to move quickly before civil litigation becomes a disincentive to cleaning up the past**