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EU Cartel Enforcement and Litigation – New Challenges

Fair Trade Center, Tokyo

2 October 2007

A Recap on 2006 – A new environment

- Revised Access to File Notice (December 2005)
  - Substantially increased procedural burdens
- New Fining Guidelines (September 2006)
  - We have yet to see the first case (probably October 07)
- New Immunity & Leniency Notice (October 2006)
  - Some trends emerging (on “in-take side”, but still early)
- The arrival of civil plaintiffs firms in Europe
  - They are becoming active
- Direct settlements and plea bargaining?

What are the issues this year?

Same themes – but we now know more:

- Plea bargaining in Europe: “Direct Settlement”
- Early practice with "markers" -- New immunity procedures
- After *Emerson* and *Provimi*: Will the UK CAT become the forum of choice for European civil damages claims?
- Impact of the *Akzo* judgment - Legal privilege

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Direct Settlement

Last year I announced the Direct Settlement initiative in these terms

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, 7th 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 - avoid creating evidence?
- 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…

Since then the DG Competition has been working on reform of case resolution procedures, in part in the context of test cases

A proposal is expected to be published any day now

Why Direct Settlements?

- One criticism of the EU cartel enforcement system: It takes 3 to 5 years before any company can get "closure"
- Currently no means for expedited disposal of cartel cases
- While in the US individual plea bargains give companies an opportunity to "get on with business" by settling, the EU only provides for a single decision and therefore delay
- Also, the EU system suffers under the success of the immunity and leniency program – too many cases
- Last, the EU Commission is understaffed for handling cases with the factual complexity of recent global cartels and procedural requirements imposed by the Court

The Response: Direct Settlements

- What are we talking about?
  - A means to bring the cartel procedure to an end where companies and Commission can agree on facts and legal findings
    - Avoid having to wait for the Commission to have concluded the investigation and prosecute every company in cartel
    - Getting a cartel "off the books" of a company, and the Commission
  - Intended to take place before the Commission has expended considerable resources to prove its case (before SO)
    - Resource savings translate into fine reductions
  - "Settlement Phase" is separate from "Investigative Phase"
    - Investigation and Leniency Process – Establish the facts
    - Settlement – Stipulation as facts and law eliminates long procedure
  - Different from the US – Not investigative, but case resolution tool

How could it work?

1. Immunity application / dawn raids
2. Leniency applications are received
3. After some months, the leniency phase would be "closed"
   - **letter to all parties giving a last chance to submit under leniency**
4. Commission invites all parties to consider direct settlement.
   - **"reverse proffer on facts"**
   - **This could also be in oral form at the Commission**
5. Commission's provisional decision on the applicable leniency band
6. Companies invited to make "settlement submission" with conditional acceptance of the main factual and legal issues
   - **adjustments to the factual proffer discussed with Case Team?**
   - **stipulate imputed or direct liability of parent companies, succession issues**
   - **stipulate Single Complex Continuing Infringement (duration and pattern)**
   - **the acceptable fine (basic amount, recidivism, deterrence increase etc)**
7. Agreement in principle on a settlement ➔ short form SO issued
   - **waivers of full SO, Oral Hearing, full access to file, national language**
8. If approved, short form SO becomes (provisional) settlement Decision

The difficult issues (1)

- Settlement before or after the SO
  - Efficiency objective speaks in favor of early settlement
  - Defendant incentives greater early in case
  - But can Commission settle before it has defined its case?
- All parties or individual settlements?
  - Commission “efficiency objective” favors “all or nothing”
  - But not feasible in practice (hostage to “hold outs”)
  - EU will need to find a means to achieve individual settlements
- What is the reward for settlement?
  - Not 50% reduction as in France
  - Commission indicated 10-15% for administrative cost efficiencies
  - Avoid document production (SO & access to file fuels civil litigants)

The difficult issues (2)

- Same fine reduction for all parties in a case?
  - Some “administrative savings” are common for all parties
    - no full SO, limited access to file, no hearing, language waivers
  - Savings also result from circumstances of individual parties
    - stipulation as to parent company liability saves appeal
    - different views on duration
    - Single Complex Continuing Infringement findings are not the same for all parties
  - Admitted, the Commission cannot give a discount in exchange for a party agreeing not to challenge a weak case
    - But different views on the strength of the case must be worked into the plea bargain process
  - The settlement value for each party must be reflected in the fine
    - either in fine reduction, OR in facts and legal findings accepted

The difficult issues (3)

- Single decision at the end or early settlement decision?
  - Very cumbersome for Commission to adopt a decision, so a single decision covering settling parties and “hold outs” is possible
  - Settling parties should then have a provisional decision
  - But then *AssiDomän* problem – Incentive for all to appeal?
- Finality of the settlement
  - Direct settlement cannot involve agreement not to appeal
  - What if the settlement collapses? Does the short form SO become the basis for a full decision?
  - Without formal “no prejudice” rules, what happens to admissions during the settlement process
- Are all cases eligible for direct settlement?
  - Commission will need clear criteria to avoid discrimination claims

Practical questions

- How to mesh direct settlement with US plea bargains?
  - US procedure merges investigative and settlement elements
  - EU process will remain sequential
  - EU will still be “behind” the US in timing of case resolution ?
- Does the EC have the resources to accelerate the investigative phase?
- Compressing the investigation and leniency phase will mean that defendants will need to decide very early whether to cooperate, and then whether to settle

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Early experiences with immunity and "markers"

Immunity under 2006 Notice

- Problems identified in 2006:
  - Immunity system has higher evidentiary threshold as compared with US and Japan
  - Granting of “marker” discretionary
  - Applicant can still be leapfrogged
  - Who can apply for the marker?
- Early experience with 2006 Immunity & Leniency Notice gives some insight into Commission practice

Emerging trends for grants of markers

- Practice so far:
  - Commission granted at least 3-5 markers under the 2006 Notice
  - Declined at least two requests as not specific enough information
- Marker applications can be done orally at the Commission
  - Lawyer can bring secretary to transcribe onto Commission system
  - Does not create evidence for civil litigation
- Start by counsel meeting to inquire whether marker is available
  - State general industry sector
  - Commission will ask more questions if doubt as to whether first in line
  - Commission will respond in a day or so
  - Company and counsel must commit to proceeding if marker is available
- If marker is available, proceed with application next day

Marker Application and Perfection

- Marker application requires a minimum of details
- Counsel must present elements of para. 15 of Notice
  - Name of applicant
  - Parties to alleged cartel (to the extent known)
  - Product affected (would be sector/product identified as available for marker)
  - Affected territories (as suspected by applicant)
  - Estimate duration of alleged cartel
  - Nature of alleged cartel conduct
- Not as detailed as for immunity, but detail is required
- Marker practice:
  - 1 or 2 weeks to perfect the marker (1 month would be unusual)
  - Extensions may be granted, but would need to be justified

Conclusions on markers and immunity

- Before going in for marker have a game plan for the internal investigation
  - Assume you can complete “in weeks” not months
- More cases are coming..
  - Commission granted several markers and received immunity applications shortly before the summer
  - Markers translate into dawn raids
- Immunity or not?
  - “Cascade cases”: One investigation leads to another because of immunity applications
  - Trend against giving credit for late leniency applications (GIS)

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After *Emerson* and *Provimi*: Will the UK CAT become the forum of choice for European civil damages claims?

Are civil actions becoming the norm in Europe?

- Key developments
  - *Empagran* and *Emerson*
    - no US treble damages claims for European purchases
  - Encouragement by the Commission
    - White Paper – post Ashurst Report is expected late 2007
  - Some changes in national law favor civil actions
    - *Provimi* action against European group companies in UK
  - But above all, the plaintiffs' firms arrived in London

Is the CAT the new forum of choice?

- Competition Appeals Tribunal ("CAT") a more efficient forum?
- Damages actions based on EC Commission or OFT decision
  - Legal basis -- Section 47A of the Competition Act 1998
  - Rule 31 of the CAT Rules: claims brought within two years, but only when final ruling on fining decision (in relation to each defendant?)
  - CAT disclosure (discovery) rules apply
  - Can the CAT take jurisdiction for claims against group companies related to purchases in other EU countries? (*Provimi* jurisdiction)
  - Which substantive and quasi-procedural rules would apply?
- Untested, but see *Emerson Electric v. Morgan Crucible*
  - Only second damages case before the CAT (*Vitamins* was settled)

Still many open issues

- Single “port of call” for European-wide actions
  - Provimi doctrine so far only in UK courts
  - What about the CAT? What about in other countries?
- Punitive and exemplary damages awards
  - Would provide more incentive to claimants; exists in UK
  - Incentives may distort market leading to inefficiencies; punitive damages alien to some national jurisdictions
- Class action suits or improved “joinder” rules
  - Would assist indirect purchaser actions
  - No European Jurisdiction currently allows such actions
- No contribution among antitrust tort-feasors
  - Increases leverage on cartel members to settle
  - Many jurisdictions currently have a contribution rule
- *Res judicata* of Commission decisions
  - Largely the law already for EU and “local” NCA decisions
  - Cannot be done for other NCA decisions (Art 81 (3) autonomy)

Still many open issues (2)

- *Hanover Shoe* – Disallowing the "passing on" defence
  - Would provide more incentive to claimants
  - Would mean some degree of double recovery – politically difficult
- *Illinois Brick* – Eliminating indirect purchaser suits
  - Prevents double recovery where Hanover Shoe rule adopted
  - Probably not possible under *Francovich* doctrine
- Increased information on antitrust cases brought?
  - Increases possibility of suits by foreign claimants
  - May increase delay in national court proceedings
- Statutes of limitation – Ensure that plaintiffs bring cases at same point
  - Increased legal certainty
  - Risk of harmonization to lowest common denominator

- The Commission could deal with this in its initiative, OR the CAT can write the rules?

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Legal Privilege after *Akzo*

Legal Privilege: Judgment of the CFI in *AKZO*

Akzo v. European Commission

Judgment of CFI on 17 September 2007

Joined cases T-125/03 and T-253/03

AKZO v. European Commission

- Confirms and clarifies earlier EU case law on legal privilege in antitrust investigations:
  - In-house lawyers still not entitled to legal privilege
  - Internal documents preparatory to seeking legal advice from outside counsel may enjoy legal privilege
  - Commission cannot cast a "*cursory glance*" on disputed documents to establish *if* they are legally privileged

No legal privilege for in-house counsel

- **No legal privilege for in-house counsel communications with internal clients**
  - CFI confirms in full previous case law: Legal privilege limited to "independent" (non-employed) lawyers registered with a EU Bar
  - Arguments submitted by professional associations rejected: No indication that CFI would be favorable to ECJ ruling for extension of legal privilege to in-house counsel admitted to bar
  - The problems:
    - modernization of EU competition law requires in-house counsel to be more involved in antitrust compliance and self-assessment activities
    - Legal privilege becomes a necessity

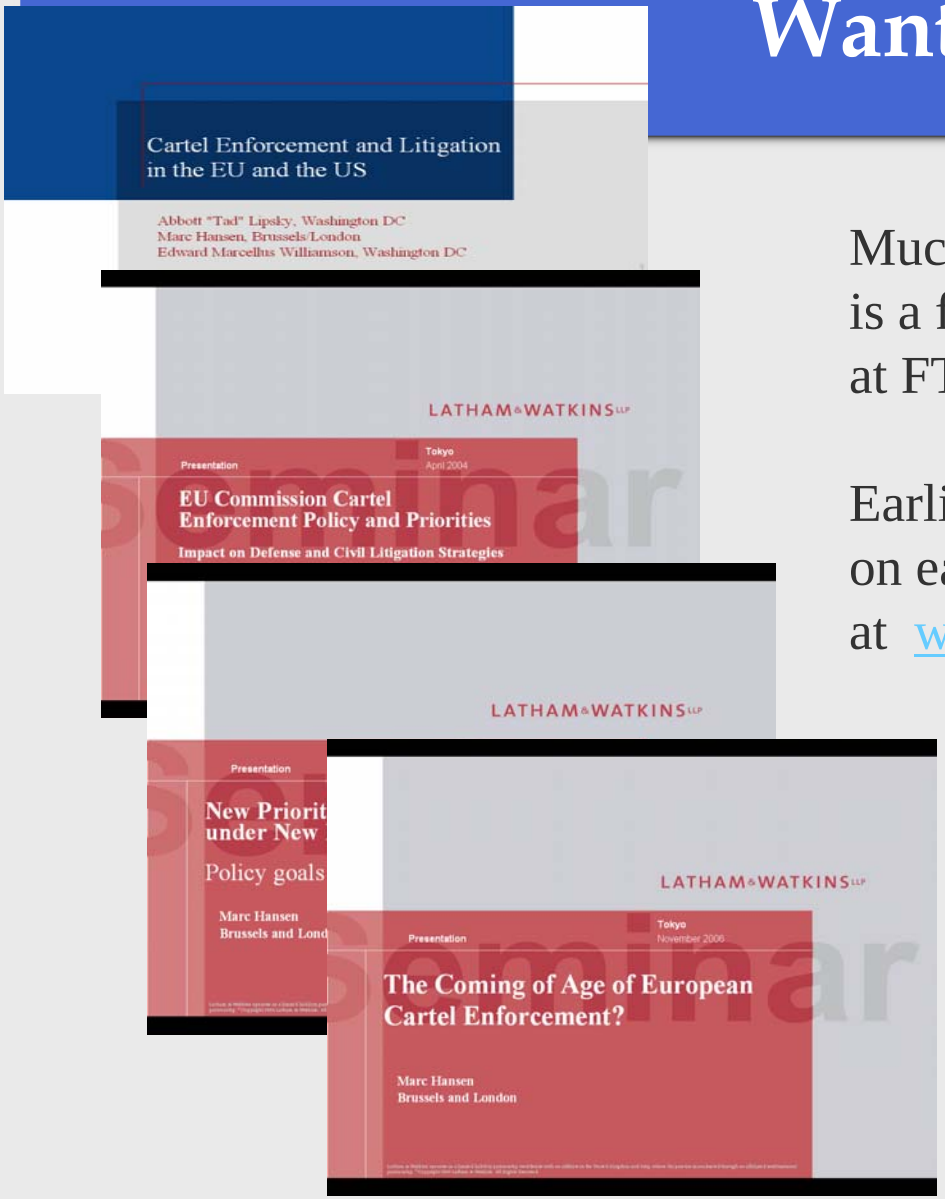
Legal privilege covers internal preparatory documents

- Scope of legal privilege before AKZO was uncertain
  - Communications with outside lawyer registered with an EU Bar for the purpose of exercise rights of defence; *and*
  - Internal documents summarizing legal advice by outside lawyer
- *AKZO* – Legal privilege also extends to:
  - Internal working documents or summaries and possibly handwritten notes…
  - …even if not sent to a lawyer or not created for purpose of being sent to a lawyer…
  - …if drawn up **exclusively** for the purpose of seeking legal advice from outside lawyer in exercise of rights of defence
- Open issue: compilations of pre-existing documents, e.g., compiled as part of seeking or receiving privileged advice?
- Most significantly – Identify and segregate privileged documents!

In summary…

- Direct settlements could have as profound an impact on EU cartel enforcement as the 2002 Leniency Notice
- Practice under the 2006 Immunity/Leniency Notice emerges from the dark
- Beware of the civil actions in Europe – the CAT is reality
- After *Akzo*, legal privilege requires more safeguards

Want to know more?



Much of what was covered today is a follow-up to earlier speeches at FTC seminars

Earlier presentations and articles on each of the topics available at www.lw.com

Marc Hansen
London: +44 20 7710 1094
Brussels: + 32 2 788 6301
Mobile: +44 7876 506 990
Email: marc.hansen@lw.com