

LATHAM & WATKINS LLP

Presentation

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EU Commission Cartel Enforcement Policy and Priorities

Impact on Defense and Civil Litigation Strategies

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Overview

- **What's New in EU Cartel Enforcement**
 - The Effect of EU Competition Law Modernisation on Cartel Enforcement
 - Recap on the post-2002 EU Cartel Enforcement regime
 - Highlights of the leniency program
 - What are the new enforcement issues in 2004?
 - Multi-jurisdictional hazards
 - Withdrawal of immunity
 - How to manage civil litigation risks arising from leniency applications
 - Changing the EU civil litigation landscape
 - Legislative proposals – What could the Commission propose?

Effect of “Modernisation”

- **New investigative tools as of 1 May 2005**
 - Requests for Information - Voluntary and Mandatory
 - Dawn-raids or searches
 - Company premises
 - “Other premises” e.g., private homes or cars of directors, officers or employees
 - Taking Statements
 - Requests that documents or facts be explained
 - Interview of employees (and of competitors)
 - Fines for incomplete or misleading information
- **Refocusing enforcement – Cartels as a priority**
 - EU Commission – Increased resources and enforcement manpower
 - Decentralisation – competing “NCAs” and variable geometry
 - Encouraging civil litigation as an alternative to public enforcement

Post-2002 EU Cartel Enforcement

- **A “refresher course”:**
 - Immunity and reduction of fines: The 2002 Leniency Notice
 - How to get immunity
 - How to obtain a fine reduction
 - Interplay with the new fining policy and guidelines
 - New procedural issues identified in 2003

Immunity

- **The 2002 Notice introduced immunity**
 - (i) the **first company to submit evidence** that leads either to the adoption of a decision to carry out investigation (“dawn raid sufficient”) or to the finding of infringement is granted immunity if the Commission did not already have sufficient evidence;
 - (ii) **evidentiary requirement**: the company can either submit an anonymous corporate statement which points to the evidence in its possession, or send the evidence directly
- **Apply and make sure that you have priority (and keep it)**
- **Formalities for applying: Dedicated Fax**

Leniency and Fine Reduction

- **Fine Reduction**
 - If not the first to apply for immunity,
 - Still possible to get fine reduction if new disclosure adds significant added value to evidence already received
- **Scale of Fine Reductions**
 - First company to meet the standard: reduction 30-50%
 - Second company to meet the standard: reduction 20-30%
 - Subsequent companies: reduction < 20%
- **But still impossible to tell how much the fine will be**
 - The uncertainty is in the base fine amount
 - Fining guidelines give Commission discretion

Leniency Notice – Procedural Issues

- **Additional procedural guarantees:**
 - Exclusion of new facts: Facts previously unknown to the Commission which have a direct bearing on the case will not be taken into account when setting the fine
 - No disclosure of Corporate Statement of Conduct to other parties or authorities (see below, on discovery rules in US civil litigation)
- **Other procedural issues**
 - Room for cooperation and fine reduction outside leniency notice?
 - Role of parent company in defence of subsidiary



EU Cartel Enforcement – What is new?

New enforcement issues in 2004

- **Several new risks and issues:**
 - Multi-jurisdictional hazards
 - Revocation of immunity
 - Fueling civil litigation in US or EU
 - Relationship to European criminal prosecutions

Risk 1: Multi-jurisdictional hazards

- EU-US-Japan-Canada – Coordinated raids
 - Reacting quickly when it happens
- Management of Intra-EU risks
 - Modernisation also means decentralisation of cartel enforcement
 - When does one file multiple leniency applications? (EU/NCAs?)
 - Beware: National confidentiality and legal privilege rules
- 10 New Member States – How well are they prepared?
- Dealing with other risks
 - Financial disclosure obligations and Sarbanes Oxley

Risk 2: Revocation of Immunity

- Revocation anytime from conditional immunity grant to Decision
 - Because non-compliance with full and continuous cooperation
 - Misleading the Commission (often comes out in others' defence)
- So far only one (unpublished) case in the EU – But examples:
 - Agreement among leniency applicants to conceal duration of cartel
 - Found to be ringleader, after claiming not to be
- Recent examples of immunity revocation
 - Stolt (US Decision in March 2004)
 - Morgan Crucibles (2002)
- Comes out through amendment of financial disclosure!

Risk 3: Managing Civil Litigation Risks

- **What is the concern?**
 - Statements made to EU/NCA in cooperation procedure are used against the cooperating company in civil damages litigation
- **How does it happen?**
 - Discovery of documents from cartel member who is cooperating
 - EU non-confidential file is introduced in civil case
 - Company executives are deposed by plaintiff
 - Enforcement official are deposed/subject to document production

The first experiences - *Empagran*

- **The first experiences:**

- Discovery of “corporate statement” from applicant in US civil litigation
- In *Empagran* the Special Master allowed discovery of leniency applications: ¹

“... the Court is concerned, given the allegations in the complaints of defendants’ fraudulent concealment and destruction of key conspiratorial documents, that these foreign defendants may have transferred key documents to their unnamed foreign affiliates to prevent plaintiffs’ from discovering this information.”²

1. In Re: *Vitamins Antitrust Litigation*, Order Re: Merits Discovery of 20 June 2001, and order re: Bioproducts’ Rule 53 objection of 18 December 2002

2. In Re: *Vitamins Antitrust Litigation*, Order Re: Merits Discovery of 20 June 2001, Judge Hogan, Page 13

The first experiences - *Methionine*

- In ***Methionine***:
 - EU Commission intervened and prevented disclosure,
 - but not for pre-existing documents
 - nor for documents supplied under compulsion
 - Disclosure denied on basis of “self-evaluative privilege”; principles of comity and investigatory privilege

The first experiences – *Methionine* (“

- “Plaintiffs are now asking the Court to overrule the Special Master and to compel defendants to produce those same documents despite the fact that they were prepared by counsel exclusively in connection with foreign governmental investigations (“foreign government submissions”) and thus protected by a myriad of legal privileges and protections recognized in this jurisdiction as well as by the foreign governmental entities to which the submissions were made.”³
- “No documents are to be accorded the privilege unless they were prepared with the expectation that they would be kept confidential. That is certainly the situation in this case. Notwithstanding the fact that plaintiffs somehow obtained redacted copies, it was the intention of both the defendants and the European Commission that the documents would be confidential.”⁴
- “Furthermore, the EC maintains that production of the foreign government submissions would have a chilling effect on the willingness of companies to make these types of submissions.”⁵

3. In Re: *Vitamins Antitrust Litigation*, Defendants’ Opposition to plaintiffs’ rule 53 Objection of 23 August 2003, page 1 lines 4-9.

4. See *supra*, page 7 lines 27-28.

5. See *supra*, Page 10 lines 17-19.

Other early experiences

- **The “second weak point”: The Non-Confidential File**
 - The defendants (in EU case) each get a CD- ROM with all documents held against them
 - CD-ROM is “traded” as evidence by defendant in settlement of civil case (recent example in UK civil suit)
 - What can the Commission do?
 - No remedy under Article 15(4) of Procedural Regulation (no fines)
 - No remedy under Reg 1/2003; Art 23 and 24 (fines)
 - But, inadmissibility of evidence in civil case as “improperly obtained”?

Why does the Commission care?

- **Why is the Commission protecting “bad” cartel members?**
 - 2002 EU leniency policy has been highly effective
 - But over-exposure to civil litigation reduces incentive to cooperate
 - If criminal prosecution of executives; less likely leniency application
 - Much like the US de-trebling proposal – overkill drives cartels underground
- **Not only a US litigation problem**
 - In large part a US litigation issue - worsened by “*Empagran*” jurisdiction
 - But also:
 - Discovery in UK courts
 - Discovery by criminal courts (request in *Lombard*)
 - Using criminal procedures as vehicle to obtain evidence (“*partie civile*”)

What is the Commission doing?

- **Commission actions to safeguard effectiveness of leniency policy:**
 - Seeking to limit discovery:
 - *Amicus Curiae* briefs attempting to persuade US courts not to grant discovery of corporate statement as it impedes enforcement interest – mixed success as principle of privilege not yet settled
 - Objecting to orders from national courts in EU to disclose corporate statements, records of statements, or EU working papers
 - “Pre-existing” documents discoverable – privilege does not apply
 - Changing investigation and prosecution procedures
 - But limited legal basis (paras. 32 and 33 of Leniency Notice)

Paragraphs 32 & 33- Leniency Notice

Paragraph 32

“The Commission considers that normally disclosure, at any time, of documents received in the context of this notice would undermine the protection of the purpose of the inspections and investigations within the meaning of Article 4(2) of Regulation (EC) No 1049/2001..”

Paragraph 33

“Any written statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission’s file. It may not be disclosed or used for any other purpose than the enforcement of Article 81.”

Creating less discoverable materials

- **Objective:** Reduce amount of discoverable documents in the possession of immunity/leniency applicant
- **Solution:** Oral statements
 - Oral statement recorded by Commission
 - Transcribed and signed by immunity/leniency applicant
 - No transcript given to party
 - When is this special procedure available?
 - Only immunity applicants? Or also leniency (fine reduction)?
 - Only if risk of US litigation? Also European litigation?
 - When will you be told? When do you have a deal? (Compare 7 days to record)
 - Risk: Being “overbid” by another cartel member who does not seek protection

“Leaks” from Commission evidence

- **Balancing rights of defence:**
 - Avoiding Corporate Statement is on CD-Rom (no “leak” in settlement)
 - But ensuring rights of defense of other cartel defendants
- **Solution: Modified access to file**
 - Transcript of testimony not included on CD-Rom
 - Defendants have limited on-site access to Commission file
 - Their testimony and notes of Corporate Statement are “hearsay”?

Other procedural innovations

- **Other applications of “modified access” procedure when dealing with immunity and leniency applicants:**
 - Preference for written non-compulsory statements (discoverable?)
 - Informal requests for information instead of Article 11 requests
 - Status of reports of internal investigations prepared by defendant or its shareholder representatives
- **Other future issues..**
 - Ability to influence text in Decision (e.g., re specific bid rigging)

Unresolved risk factors

- **Are Oral Statements an effective shield?**
 - Depositions as an alternative route?
 - Executives of leniency applicant
 - Commission officials
 - NCA officials under information exchange
 - Other defendants based on what they saw?
 - Discovery requests when defendant has not retained a copy?
 - What if defendant has right to request a copy? (US or European courts..)
 - Discovery requests when only lawyers have retained copy?
 - What about discovery orders issued to the Commission?
 - Austrian judge in the *Lombard* criminal investigation

The Lesson – Pre-application assessment

- **The Lesson: Anticipate the risks before the leniency application**
 1. Assess where to apply for Immunity/Leniency – One or more jurisdictions
 2. Balance and assess national confidentiality and legal privilege rules
 3. Balance and assess financial disclosure requirements
 4. Balance and assess risk of civil litigation resulting from disclosing cartel
 5. Assess conflicting interests between executives and company
 6. Assess whether – and seek – criminal immunity at the same time as applying for immunity from EU or national competition authorities
 7. Assess parent company v. subsidiary issues: does parent leadership increase risk of a finding of imputed liability?
 8. Any decision on cartel leniency should be a corporate level decision as the effects cannot necessarily be confined to any one jurisdiction

The Lesson – Post-Application

- **Request:**
 1. Seek to provide oral statement only
 2. Avoid Article 11 Letters
 3. Request paragraphs 32 & 33 treatment for voluntary submissions such as corporate statements and internal investigation reports
 4. Avoid all such documents being included on CD-ROM

EU Law to facilitate civil antitrust claims?

- **Why does the Commission care?**
 - 2004: Improved and decentralized antitrust enforcement
 - Antitrust enforcement through the courts is a priority
 - Increased exposure should condition behaviour
 - Some tension with protecting leniency policy...
- **What can the Commission do?**
 - Propose legislation to make civil damages claims more likely to succeed?
 - Intervene in national courts to ensure that national procedural law is interpreted in a manner that makes civil antitrust litigation viable
 - Intervene before ECJ where national courts refer questions (pass on defence?)
 - In reality, probably a combination, but nothing will move quickly

Legislative Proposals

- Legislative proposals – What could the Commission propose?
 - **Punitive Damages**
 - Would provide more incentive to claimants
 - 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)

Legislative Proposals (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
- But is this all likely to go anywhere? Probably not...

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