EC Cartel Enforcement
Developments and Trends

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Fair Trade Center – Latham & Watkins, Tokyo
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Outline of the presentation

Four major developments in cartel enforcement:

• First examples of application of 2006 Fining Guidelines
• The EC Settlement Package
• New case law: Complex long lasting cartels
• White Paper on damages actions in antitrust cases
Three main innovations:

- **Market impact measured three times!**
  - Fines based on **actual sales** in market affected
  - Up to 30% of value of sales in last full business year
  - Value is multiplied by **duration** of cartel (in years)
  - "**Entry Fee**" 15-25% of sales (but perhaps mainly if short duration)

- **Recidivism: +100% for each past infringement**

- **Deterrence – “top-up” where fine not sufficient**
  - Ensures fines on big conglomerates have “sufficiently deterrent effect” where company has large revenues beyond market affected
  - Fine may be increased to exceed amount of gains improperly made
2006 Fining Guidelines
First cases decided under the Guidelines

- First four cases where Commission applied Guidelines
  - Professional Videotapes – 20 November 2007 (published)
  - Flat Glass Producers – 28 November 2007 (not published)
  - Chloroprene Rubber – 5 December 2007 (not published)
  - Synthetic Rubber – 23 January 2008 (not published)

- Very limited but useful indications

- Compare what seems to be current approach with:
  - 1998 Guidelines
  - Literal enforcement of 2006 Guidelines
EXAMPLE 1:

Hardcore cartel. Duration of five years. One previous recidivism (20 years ago). Small turnover, but significant turnover outside the relevant market; Base: 18% of turnover.

<table>
<thead>
<tr>
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<tbody>
<tr>
<td><strong>Basic Amount</strong></td>
<td></td>
<td>Base Amount</td>
<td>20.00</td>
<td>30.00</td>
</tr>
<tr>
<td>Deterrence (+50%)</td>
<td>10.00</td>
<td>15.00</td>
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<tr>
<td>Duration [+50% (+10% per year)]</td>
<td>15.00</td>
<td>22.50</td>
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<tr>
<td>Aggravating/Mitigating Factors</td>
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<tr>
<td>Recidivism +50%</td>
<td>22.50</td>
<td>33.75</td>
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<td>Limit 10% Art. 23(2)</td>
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<tr>
<td>Leniency</td>
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<tr>
<td>Leniency (3rd Applicant: -15%)</td>
<td>-10.13</td>
<td>-15.19</td>
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<td>Estimate</td>
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<td>57.38</td>
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<table>
<thead>
<tr>
<th>Turnover on Relevant Market 2007</th>
<th>30.00</th>
<th>30.00</th>
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<tbody>
<tr>
<td>Basic Amount</td>
<td></td>
<td></td>
</tr>
<tr>
<td>% of relevant turnover</td>
<td>9.00</td>
<td>5.40</td>
</tr>
<tr>
<td>Duration (Relevant Turnover * 5 years)</td>
<td>45.00</td>
<td>27.00</td>
</tr>
<tr>
<td>Entry Fee based of relevant turnover</td>
<td>7.50</td>
<td>5.40</td>
</tr>
<tr>
<td>Aggravating/Mitigating Factors</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Recidivism (one past infringement)</td>
<td>105.00</td>
<td>32.40</td>
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<tr>
<td>Specific Deterrence Increase (SDI)</td>
<td>if +50%</td>
<td>if 10%</td>
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<tr>
<td>Limit 10% Art. 23(2)</td>
<td>Not met</td>
<td>Not met</td>
</tr>
<tr>
<td>Leniency</td>
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<td></td>
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<tr>
<td>15% discount</td>
<td>23.63</td>
<td>4.91</td>
</tr>
<tr>
<td>Estimate</td>
<td>157.50</td>
<td>32.72</td>
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</table>

**Limit 10% Art. 23(2)**

**Leniency**

**Estimate**

133.88 27.82
2006 Fining Guidelines  
First indications on actual enforcement

EXAMPLE 2:

Hardcore cartel. Duration of ten years. One prior infringement (five years earlier). Small turnover, but significant turnover outside the relevant market; Base: 18% of turnover; 20% deterrence.

<table>
<thead>
<tr>
<th>1998 Guidelines</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Basic Amount</strong></td>
<td>Low</td>
</tr>
<tr>
<td>Basic Amount</td>
<td>30.00</td>
</tr>
<tr>
<td>Deterrence (+50%)</td>
<td>15.00</td>
</tr>
<tr>
<td>Duration [+100% (+10% per year)]</td>
<td>45.00</td>
</tr>
<tr>
<td></td>
<td>90.00</td>
</tr>
<tr>
<td><strong>Aggravating/Mitigating Factors</strong></td>
<td></td>
</tr>
<tr>
<td>Recidivism +50%</td>
<td>45.00</td>
</tr>
<tr>
<td></td>
<td>135.00</td>
</tr>
<tr>
<td>Limit 10% Art. 23(2)</td>
<td>Not met</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2006 Guidelines</th>
<th>Potential</th>
<th>Trend</th>
</tr>
</thead>
<tbody>
<tr>
<td>Turnover on Relevant Market 2007</td>
<td>100.00</td>
<td>100.00</td>
</tr>
<tr>
<td><strong>Basic Amount</strong></td>
<td>Estimate</td>
<td>Estimate</td>
</tr>
<tr>
<td>% of relevant turnover</td>
<td>30.00</td>
<td>18.00</td>
</tr>
<tr>
<td>Duration (Relevant Turnover * 10 years)</td>
<td>300.00</td>
<td>180.00</td>
</tr>
<tr>
<td>Entry Fee based of relevant turnover</td>
<td>25.00</td>
<td>18.00</td>
</tr>
<tr>
<td></td>
<td>325.00</td>
<td>198.00</td>
</tr>
<tr>
<td><strong>Aggravating/Mitigating Factors</strong></td>
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<td></td>
</tr>
<tr>
<td>Recidivism (one past infringement)</td>
<td>325.00</td>
<td>198.00</td>
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<tr>
<td></td>
<td>650.00</td>
<td>396.00</td>
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<tr>
<td>Specific Deterrence Increase (SDI)</td>
<td>if +50%</td>
<td>if +20%</td>
</tr>
<tr>
<td></td>
<td>975.00</td>
<td>403.92</td>
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<td><strong>Leniency</strong></td>
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<tr>
<td>Leniency (3rd Applicant: -15%)</td>
<td>-20.25</td>
<td>-27.00</td>
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<tr>
<td>Estimate</td>
<td>114.75</td>
<td>153.00</td>
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</table>

|                 | 828.75   | 343.33 |

Note: The table and calculations are illustrative and may not reflect actual enforcement outcomes.
### 2006 Fining Guidelines
**First indications on actual enforcement**

#### EXAMPLE 3:

Hardcore cartel. Duration of five years. One past infringement. **Significant** turnover on relevant market and on other products; Base 18% of turnover; 20% deterrence.

<table>
<thead>
<tr>
<th>1998 Guidelines</th>
<th>2006 Guidelines</th>
</tr>
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<tbody>
<tr>
<td><strong>Turnover on Relevant Market 2007</strong></td>
<td>Potential: 250.00</td>
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<td><strong>Basic Amount</strong></td>
<td>Estimate</td>
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<td>% of relevant turnover</td>
<td>75.00</td>
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<tr>
<td>Duration (Relevant Turnover * 5 years)</td>
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<td>Entry Fee based of relevant turnover</td>
<td>62.50</td>
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<td><strong>Aggravating/Mitigating Factors</strong></td>
<td>Estimate</td>
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<td>Recidivism (one past infringement)</td>
<td>437.50</td>
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<td><strong>Specific Deterrence Increase (SDI)</strong></td>
<td>if +50%</td>
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<tr>
<td>Limit 10% Art. 23(2)</td>
<td>Not Met</td>
</tr>
<tr>
<td><strong>Limit 10% Art. 23(2)</strong></td>
<td>Not Met</td>
</tr>
</tbody>
</table>

#### Basic Amount

<table>
<thead>
<tr>
<th>Low</th>
<th>High</th>
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<tbody>
<tr>
<td>18%</td>
<td>20%</td>
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#### Duration

<table>
<thead>
<tr>
<th>[50% (+10% per year)]</th>
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<tbody>
<tr>
<td>60.00</td>
<td>75.00</td>
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#### Recidivism +50%

<table>
<thead>
<tr>
<th>90.00</th>
<th>112.50</th>
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#### Aggravating/Mitigating Factors

<table>
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<tr>
<th>Limit 10% Art. 23(2)</th>
<th>Not Met</th>
</tr>
</thead>
</table>

#### Leniency

<table>
<thead>
<tr>
<th>Leniency (3rd Applicant: -15%)</th>
<th>-40.50</th>
<th>-50.63</th>
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</table>

#### Estimate

<table>
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<tr>
<th>229.50</th>
<th>286.88</th>
<th>1312.50</th>
<th>550.80</th>
<th>1312.50</th>
<th>550.80</th>
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</thead>
</table>

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**LATHAM & WATKINS LLP**
2006 Fining Guidelines
Comments

- 2006 Guidelines may potentially result in huge fines:
  - Predictions: heading towards a 1 billion fine?
  - So far no mechanical application of Guidelines

- Key developments to follow:
  - Determination of % of relevant turnover: 17-25% as a trend?
  - Aggravating circumstances
    - Increase for recidivism: up to 100% for each infringement?
    - Obstruction (see Videotapes for an indication of new practice)
  - How will deterrence increase be applied / very large companies?
  - Duration – developments in case law on SCCI

- Less legal certainty? More deterrence?
  - Or will the settlement policy require more transparent fining?
EC Settlement Package
Introduction

• Public consultation on proposed EC Settlement Package
  • Includes a settlement notice and amendments to procedure
  • Following comments, Commission to adopt package by summer 2008

• The problem with EC cartel enforcement
  • Great success of leniency procedures: more cartels uncovered
  • Commission issues relatively few decisions every year (6-8)
  • Procedural obstacles: SO in many languages, access to file, oral hearing
  • Result: each case lasts 3-5 yrs, higher costs, waste of resources

• A possible solution: streamlining cases … settlement procedure
  • Acknowledgment of liability by the cartel members…
  • …and partial waiver of defense rights should allow procedural savings…
  • … in exchange for a reward (a lower fine and shorter procedure)
EC Settlement Package
Main features

• Settlement procedure:
  • Does not replace traditional investigative tools
  • An additional possibility: no duty or right to settle
  • Not alternative to leniency: Starts when leniency window closes

• Reward remains undisclosed:
  • Rumors: should be around 15-20%
  • Each party would get the same reward
  • Possible to cumulate leniency and settlement discounts
EC Settlement Package (1)
How it will work

A. Initial Stage
   • Commission concludes initial investigation (9-12 months):
     • Commission has a draft SO ready
     • Commission considers whether case suitable for settlement
     • Criteria: number of parties willing to settle, languages, time savings
     • Commission indicates that case is open for settlement

B. Settlement Discussions
   • Commission discloses essential elements of infringement
     • Facts, legal qualification, evidence, range of likely fine…
     • Parties submit their views on the allegations
     • Discussions on application of fining guidelines
       • Turnover affected; Base % of turnover, Where in leniency band
       • Note deterrence increase capped at 200%
   • Not “negotiations” but mutual exchange
   • The Commission is “hearing” the parties
   • Objective is to reach “common understanding” of the facts / fine
EC Settlement Package (2)
How it will work

C. Finalization of the Settlement Submission (SS)
   • Parties submit (orally) based on discussions including:
     • acknowledgment of liability
     • indication of maximum fine expected
     • waiver of rights (hearing, access to file and SO in original language)

D. Commission issues a short SO (15-20 pages)
   • SO reflects the SS - “common understanding”
   • Parties to reply yes/no. No further discussions

E. Commission adopts decision under Article 7 Reg. 1/2003
   • Short streamlined decision – not much longer than SO
   • Published in OJ
   • Appeal still possible – but of course grounds very limited
EC Settlement Package
Getting the incentives right

• EC Settlement not an investigative tool
  • Different incentives from US system where part of the “race”
  • Efficiencies yes.. But avoid disincentives such as “all or none settling”

• Disclosure has to be sufficient to understand facts
  • Full disclosure of documents – not just inculpatory evidence

• Discussion must be premised understanding the alternatives
  • Understanding what the fine would have been absent settlement
  • Only then is a fixed % discount meaningful
  • And because separate from leniency – need a substantial discount!

• Procedure must not create too much collateral damage
  • If admission of guilt – keep it narrow to avoid use in civil/criminal cases
  • Avoid written submissions if oral submission would do

• If not a “negotiation”, then a meaningful discussion and “hearing”
Doctrine of SCCI in EU Antitrust law

**Single Complex Continuous Infringement:**

- **Complex:**
  - includes elements of agreement *and* concerted practice
  - Separate infringements (different times, forms, countries)…
  - …brought under one encompassing arrangement

- **Continuous:**
  - Different conducts consecutive in time but linked into a single infringement
Impact of SCCI in EU antitrust enforcement

- SCCI is used by the Commission in most complex cartel cases

- Consequences of involving all parties in SCCI are:
  - Parties are liable for the entire infringement even if...
  - ...participated to a portion of it
  - Statute of Limitation is extended for the entire period by linking the old infringement to the most recent one

- A finding of a SCCI in a cartel case can have a significant impact on fines:
  - More products/countries are caught
  - Increased duration
Recent development on SCCI: *BASF* Judgment - December 2007

- So far, Commission applied SCCI in many complex and long lasting cartels:
  - asserting a broad common aim...
  - ...to bring under same infringement different conducts in the same industry

- CFI judgment in *BASF* of December 2007:
  - EU/US market sharing agreement not sufficiently related to a subsequent customer allocation among EU producers alone
  - CFI annulled the Commission decision: two practices not linked in a SCCI

- The CFI rejects in *BASF* overbroad definition of single aim:
  - SCCI not to be used to bring unrelated activities in an industry under common aim
  - To establish SCCI, individual elements should be **complementary** - they must “interact” to reach an economic objective

- Commission will need to be more careful in future big cartel cases
White Paper: Damages Actions in Antitrust Cases - Background

- Published 3 April 2008, continues debate on 2005 Green Paper
- Compensation for consumers and businesses victims of:
  - Cartels/concerted practices
  - Abuses of dominant position
- Make victims’ rights to damages effective
- Legislative measures to achieve the goals of the White Paper (regulation/directive) yet to be determined
- National courts and legislatures to play important role
- Interested parties invited to submit comments until 15 July 2008
White Paper: Damages Actions in Antitrust Cases – Proposals 1/3

• Single, full compensation for actual loss and loss of profit

• Collective redress
  • Representative actions brought by “qualified entities” on behalf of identified or identifiable victims
  • Opt-in collective actions

• Disclosure *inter partes*
  • Improved access to evidence for victims
  • National courts empowered to order parties to the proceedings or third parties to disclose precise categories of relevant evidence
  • Strict conditions for disclosure to be demonstrated by the claimant
White Paper: Damages Actions in Antitrust Cases – Proposals 2/3

- Binding effect of decisions of National Competition Authorities
- Acceptance of pass-on defence
- Rebuttable presumption that the unlawful price increase was passed on to indirect customers
- Fault requirement: infringer liable for damages unless it demonstrates that the infringement followed a “genuinely excusable error”
- Removal of cost-related disincentive to bring a damages claim: early settlement, proportionate court fees and derogation from the “loser pays” principle
White Paper: Damages Actions in Antitrust Cases – Proposals 3/3

- Revision of national limitation periods
  - Start of limitation period (end of infringement or when victim has reasonable knowledge of infringement)
  - Final infringement decision + 2 years

- Protection of leniency applicants
  - Limitation of civil liability to direct and indirect customers
  - Corporate statements excluded from disclosure mechanism
White Paper: Damages Actions in Antitrust Cases – Comments

- Main effect on SMEs and consumers
- "Genuinely European approach": single damages, restricted disclosure
- Some of the policy choices would bring private enforcement in Europe closer to the US system:
  - Representative actions on behalf of “identifiable” victims
  - Cost allocation rules
- Challenge: harmonization of a central area of private law across the 27 EU Member States
- Antitrust damages claims vs other civil claims
- Balance between private and public enforcement
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