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EC Cartel Leniency Programme

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Brussels, November 2004,[1]

A. Background

[1] The European Commission ("the Commission") has been pursuing cartels for many years. Its first decisions date back to 1969[2]. However, detection was not easy and the enforcement burden was great, since most cases were contested. Between 1969 and 1996, the Commission therefore adopted only 37 cartel decisions, with only limited fines[3].

[2] Then, the Commission decided to change its enforcement strategy with two new features:

- Fining guidelines[4], which resulted in a dramatic increase of the sanctions imposed on cartel members; and
- a leniency programme, following the US experience, designed to divide cartel infringers and conquer!

[3] The introduction of the first EC Leniency Notice in 1996 lead to significant results. Thus, in 2002, the Commission indicated that more than 80 companies had filed leniency applications under the 1996 Notice[5] However, the Notice was criticised, mainly because immunity appeared difficult to attain and the Notice appeared not to give enough certainty to applicants as to where they would fit in the system.

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1 With thanks to Stefano Fratta for his assistance.

2 Quinine [1969] EC Official Journal ("OJ") L 192/5 and Dyestuffs OJ [1969] L 195/11.

3 Guersant, "The Fight Against Secret Horizontal Agreements in EC Competition Policy", 2004 Annual Proceedings of the Fordham Corporate Law Institute, p.45. The fines imposed from 1969 to 1995 amounted to some €3.329 million.

4 Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No. 17/62 and Article 65(5) of the ECSC Treaty, OJ [1998] C 9/3. These are described below. The notice is included in the conference papers for Panel VI.

5 Commission Notice on the non-imposition or reduction of fines in court cases, OJ [1996] C 207/4; see generally, Arbault and Peiro, EC Competition Policy Newsletter, June 2002, pp. 15-22.

[4] Then, in 2002 the Commission adopted a second EC Leniency Notice[6], with two main changes:

- The introduction of clear full immunity granted to the first applicant which can provide substantial evidence on an infringement; and
- new procedures to indicate to applicants for what fine reduction they qualify within a few weeks from their application.

[5] It appears that these new features have lead to many new applications. For example, the Commission states that, in the first year of application of the 2002 Notice, the Commission received more than 20 applications in separate cases and carried out a huge number of company inspections, some 21 in 2003, 14 of which were based on information derived from leniency applications (as opposed to only four in 1996)[7].

[6] What is causing such a growth in cases is hard to gauge. It may be partly because leniency and compliance is becoming more well known in the EU. However, it certainly looks like the changes in the Notices have assisted considerably.

[7] What is clear is that modern cartel practice is now mainly about leniency procedures. There are still defence cases, above all where States intervene to pressure (but not order) private action or where there are other economic explanations for the conduct in question, but "stone wall defences" to cartel claims are now more the exception than the rule.

B. Current Practice

[8] As noted above, in February 2002, the European Commission ("the Commission") adopted a second version of its "Leniency Notice" in cartel cases[8], replacing the first 1996 Notice.

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6 Commission notice on immunity from fines and reduction of fines in cartel cases, OJ [2002] C 45/3. The text has been included in the conference papers for Panel VI.

7 Guersent, *ibid*, Appendix 5.

8 See also generally Van Barlingen, EC Competition Policy Newsletter, Summer 2003, pp.16-22. Mr Van Barlingen's paper is included in the conference papers for Panel VI.

[9] This is the currently applicable text for any new fine immunity or leniency application to the Commission for an infringement of the EC competition rules prohibiting cartels, Article 81(1) of the EC Treaty ("EC").

[10] Since May 2004, the EC competition rules are enforced by the Commission and the national competition authorities ("NCAs") of the EU Member States in what is now called the "European Competition Network" ("ECN").

[11] Normally, if a case has an effect on trade and competition in at least three EU Member States, an application should be made to the Commission.[9] Most international or transatlantic cartels will likely fall into this category. If less Member States than that are affected, application should be made to one or more NCAs, depending on which countries are affected.

[12] Many EU Member States have leniency programmes, but not all. The national systems also have different sanctions and procedural rules which will not be dealt with here, save to note that in the United Kingdom the sanctions are criminal.

[13] There are also now specific provisions agreed between the Commission and the NCAs on the transfer of information on leniency applications within the ECN. [10]

C. Main Rules of the Commission's leniency programme

[14] These are as follows:

[15] First, in practice a company involved in a cartel which wishes to approach the authorities has two ways to obtain no fine, or "immunity" as it is called:

- Either, it will be the first company to provide the Commission with sufficient evidence to enable the Commission to take a decision to carry out an inspection on the company's premises or, since May 2004 at executives homes (so-called "dawn raids") and the Commission does not already have such evidence (Paras 8(a) and 9 of the 2002 Notice).

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9 See the recent Notice on Cooperation between the Commission and National Competition Authorities, available on Commission's website, competition page and at OJ [2003] C 101/43.

10 See the Commission's website, competition page for further information.

- Or, it will be the first company to submit evidence enabling the Commission to find an infringement of Article 81 EC, which the Commission has not already and another company has not already earned immunity under the "evidence for a dawn raid" route (Paras 8(b) and 10).

[16] In both cases immunity is also conditional on:

- Continuous, expeditious and full cooperation by the company during the procedure.
- Provision by the company of all evidence in its possession or which is available to it related to the suspected infringement.
- The company being available to answer any request from the Commission which may contribute to establishment of the facts.
- The company ending its involvement in the infringement at the latest when it applies for immunity.
- The company not having taken steps to coerce others to participate in the infringement. (Para. 11).

[17] Secondly, if immunity is not available, a company can obtain a reduction in fines if it provides the Commission with evidence of the infringement which represents "significant added value" to the evidence which the Commission already has and again ends its involvement in the suspected infringement at the latest when it approaches the Commission. (Para 21). This is usually called applying for "leniency".

[18] The focus here is on directly relevant written evidence, at best originating from the time of the alleged infringement, but later evidence, including oral statements by executives, is often considered highly useful.

[19] Thirdly, the level of fine reduction depends on which company gives the Commission the relevant evidence first (Para. 23):

- The first company may benefits from a reduction of 30-50%.
- The second may benefit from a reduction of 20-30%.
- Subsequent companies may receive a reduction of up to 20%.

[20] Fourthly, the Commission will also not take into account against a company evidence which the company has given relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the infringement (Para. 23, final sentence).

[21] Recently, the European Commission has been giving credit for such contributions also in 1996 Notice Leniency Applications. [11] It may be complex to qualify for such treatment because it may be hard work to show who provided what when and we are talking about more than just ordinary leniency material. However, this is a really useful incentive for companies and should help lead to better (and in some cases broader) decisions. (We should note that there is no US style "amnesty-plus" system in the EU for revealing other infringements.)

[22] Fifthly, companies are given a confirmation of their "immunity" or "leniency" position in the light of the evidence which the Commission had already obtained and/or had received from other applicants during the Commission's procedure (Paras 12-19 and 24-27).

[23] Once the Commission has assessed the validity and usefulness of the information provided by the applicant and its ranking, the Commission confirms in writing that it intends to grant immunity or a reduction of the fine. The Commission has stated that this may be more or less two working weeks from the date of the application.[12]

[24] However, it should be stressed that leniency applicants will only be told their ranking in the leniency line and the percentage band of reduction from which they will benefit. The actual amount of their fines will be only known later when the final decision is adopted. (We should also note that there is no US style "marker system" in the EU. This is discussed further below.)

[25] Sixthly, this document is a "Notice", whose legal value is that it creates legitimate expectations on which undertakings may rely (Para. 29). Its application by the Commission is, however, subject to review by the European Court in Luxembourg.

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11 E.g. In the Industrial Tubes case (IP/03/1746, 16 December 2003) in addition to 50% for leniency cooperation, one firm's fine was reduced some further 20% for evidence disclosing the full duration of the infringement.

12 See Van Barlingen, cited above at p.21.

[26] Finally, in the 2002 Notice, the Commission has made certain points relating to disclosure of the company's cooperation with the Commission. Notably:

- The fact of a company's cooperation will be indicated in its decision. (It has to be because the Commission will have to explain any differences in fines imposed.)
- "Normally disclosure, at any time, of documents received in the context of this notice would undermine the protection of the purpose of inspections and investigations" (Para. 32).
- "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 EC" (Para. 33).

[27] The last two statements are designed to address the problem for leniency applicants that plaintiffs in US treble damage actions have sought copies of such statements from the companies concerned. Since it is not clear that this can be prevented however, although the Commission has sought to do so in order to protect the written nature of the EC leniency programme, companies involved in a case with a US dimension usually want to make only oral statements to the Commission.[13]

[28] In purely EC matters, this practice is not generally followed, since companies prefer the written statements which they can better prepare and check and similar discovery issues have not yet developed in the EU.

D. Guidelines on Fines

[29] It is beyond the scope of this paper to give a detailed account of current Commission fining practice. However, it may be useful to do three things: First, emphasise that sanctions by the Commission are on the company, not individuals (although there may be internal company sanctions which follow). Secondly, outline EC fining policy in cartel cases, since this is also a key factor in leniency applications. Thirdly, I include an indication of the general scale that fines may attain, which is now huge.

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[13] See Van Barlingen, cited above at pp.19-20.

[30] The current rules are Guidelines on the setting of fines[14], which were published in early 1998 (the "1998 Fining Guidelines").

[31] The general system is that a base amount is defined by reference to the gravity and the duration of the infringement. The basic amount defined in this way is then increased or reduced by aggravating or attenuating circumstances.

[32] In assessing gravity the Commission looks at the nature of an infringement and its actual market impact.

- Minor infringements are likely to be fined between €1,000 and €1 million. These may be trade restrictions, often vertical, with limited effects on the market and in the EU.
- Serious infringements are likely to be fined between €1 million and €20 million. These may be horizontal or vertical restrictions with greater effects and EU impact. Some cartel cases may well be covered here. Abuses of dominant position (such as refusals to supply, loyalty rebates) are examples given.
- Very serious infringements are likely to be fined more than €20 million. Generally, these will be horizontal restrictions (price cartels, market sharing quotas, other measures to compartmentalise national markets in the EU and clear cut abuses of dominant position by firms with a virtual monopoly).
- Fines may also be increased for deterrent effect.

[33] In practice, most international and some national cartel cases are treated as "very serious", although smaller cartels in a single EU Member State may be only "serious".

[34] As regards duration, the Commission states that there will be no increase in the amount of the fine for infringements of up to one year; an increase of up to 50% for infringements of one to five years; and up to 100% for infringements of five to ten years.

[35] Aggravating circumstances include: recidivism, refusal to cooperate, where a company is the leader or initiator of an infringement, and "the need to increase the penalty in

[14] Cited above and included with the conference papers for Panel VI.

order to exceed the amount of gains improperly made as a result of the infringement, where it is objectively possible to estimate the amount".

[36] Attenuating circumstances include: a passive or a "follow-my-leader" role in an infringement; not fully applying the relevant restrictions; terminating an infringement when the Commission intervenes; reasonable doubt as to whether an infringement exists; non-intentional infringement; and effective cooperation.

[37] The total amount can still not exceed 10% of aggregate worldwide sales/turnover of the group concerned.[15]

[38] The Commission will also take account of the circumstances, including the specific economic context and the ability of the offender to pay.

[39] Fines can be huge, such as €855 million in total on nine companies in the Vitamins decision[16], with Hoffman-La Roche being fined €462 million. The following table gives an indication of recent fines:

EC Cartel Fines

2003-2004	**Total Fines**	**Highest company fines(s)**
Carbon and graphite products:	€101	Carbone Lorraine was fined €43.05
Organic peroxides:	€70	Atofina was fined €43.47
Industrial tubes:	€79	KME Group companies fined a total of €39.81
Belgian architects:	€0.1	
Copper plumbing tubes:	€222.3	KME Group companies fined a total of €67.08
French beer:	€2.5	Danone €1.5
Spanish raw tobacco:	€20	Deltafina €11.88
Needles and haberdashery:	€60	Coats and Prym €30 each

All figures are € million

[15] This used to be Article 15 of Regulation 17/62, but is now Article 23 of the new Regulation 1 /2003, which entered into force in May 2004; again the text is available on the Commission's website and at OJ [2003] L 1/1.

[16] OJ [2003] L6/1.

E. Current Issues

[40] I would mention a few points here, which are topical in the EU and affect leniency applications.

Uncertainty as to fines

[41] First, owing to the number of factors taken into account in fines, companies are expressing concern that it is uncertain as to what extent the benefits of leniency will be counterbalanced by fine increases based on issues such as:

- The different sizes of companies concerned in an infringement (deterrence).
- Infringements in the past, which may have been in very different parts of a conglomerate business (recidivism).
- Uncertainty as to the starting point for fines, particularly in smaller markets.

[42] Companies are still applying for leniency, because clearly overall there is a gain, but the benefit for the Commission is being tempered by numerous appeals, reflecting discontent with overall fining decisions.

[43] The Commission appears to be working on the "starting point" issue, in part through decisions and we believe also through contemplated changes to the 1998 Fining Guidelines. This is welcome, although we also understand that the Commission still does not want this to be pure maths!

[44] However, the Commission appears committed to deterrence and recidivism increases. In my view, this also merits review. I am not convinced that conglomerate companies should systematically receive larger fines than their smaller competitors, notably where smaller companies were really the leaders of the infringement on the market concerned and the main beneficiaries. Nor do I think that, just because such companies are big, they can better police their very large groups and therefore should be fined more.

[45] Equally, it would be useful to clarify further the precise object and scope of deterrence and recidivism and the somewhat overlapping relationship between the two in the

Commission's Fining Guidelines, given in particular that in practice both serve to deter a company from further infringement.

Concern about eventual disclosure of submissions made

[46] Secondly, as noted above, there are concerns about submission disclosure. European companies generally prefer to make written company statements where they can better control what is being said, not in order to stop things being revealed, but rather to ensure that what is said is in fact accurate.

[47] However, there are two issues with this.

[48] First, the huge concern about the whole question of US discovery: The idea that statements have to be given only orally (both in the US and the EU) causes great anxiety, that the case will not be correctly presented; and that someone will make a mistake and a text will end up in the hands of the company, when US counsel have made it clear that such contact is essentially akin to radioactivity in terms of harm for US treble damage law suits!

[49] Greater clarity as to procedures is only part of the issue (although it would be welcome) because the impression given is that in the end, the US Plaintiff Bar will obtain the statements and then, inevitably, some level of triple damages settlement will have to be paid which will be based thereon.

[50] The problem is also compounded by the fact that, in the EU, although cooperation credit can be given for oral statements reduced to internal Commission minutes and relied on by the Commission, for reasons of procedural fairness and rights of the defence, other defendants may need access to such statements, which therefore the Commission may need to have vetted by the company and put in the case-file.

[51] Second, there is also new tension with the relatively new EU Regulation 1049/2001[17]. This Regulation gives certain general rights of access to information. There is some concern that this could be used to obtain access to company statements (and other file documents), revealing their content to third parties, with the consequence that individuals could be named publicly and companies sued for damages based on those statements.

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[17] OJ [2001] L 145/43.

[52] It should be said that, as matters stand, the names of individuals may come out amongst the cartel participants in the Commission's procedure (e.g. through access to the file documents and in the Commission's Statement of Objections), but normally they are not in the Commission's public decision. Any individual name disclosure would likely be a major concern to potential leniency applicants.

[53] Any legislative steps which can be taken in the EU and/or the US to remove these concerns would be most welcome. The Plaintiff Bar can still sue for damages, but access to the company's statements appears likely to threaten the viability of the new successes in worldwide leniency. The elaborate systems to prevent such disclosure also appear highly artificial.

Total cost and the US dimension of a case.

[54] Thirdly, there is in Europe much concern about the scale of US sanctions.

[55] Not so much the principle that a cartel infringement may be a criminal offence. That is clearly not liked, but it is known and accepted. Indeed, it appears to be the main reason why, if a US infringement is found, a quick amnesty application is likely to follow, albeit with considerable concern that the company may be only the second one in and prison may still be part of the settlement with the US authorities!

[56] However, there is also the concern about triple damages litigation, which is perceived in Europe as basically going too far, because of the scale of recovery and the tactical pressure to settle which can be brought to bear, irrespective of precise proof of the extent of actual involvement in the United States.

[57] Rightly, or wrongly, most European executives do not consider triple (as opposed to single) damages as fair punishment for some cartel activities, especially in an environment where, in the not too distant past, some cartels were accepted and where they can come under great corporate or indirect governmental pressure to infringe.

[58] I am not pleading to go lightly on infringers. However, I think that it is important to realise that the total financial cost of governmental and triple damages settlements, plus prison can become counterproductive in terms of promoting leniency applications.

[59] At least in Europe, there are, as a result, still executives who consider carefully individual or collective termination of the infringement, without approaching the authorities, in the hope that prescription may work and end the matter, without such unpleasant heavy consequences.

[60] In this context the new American development of reducing triple damages exposure to single damages under certain conditions if a company is a leniency applicant is very welcome.[18]

"Markers" and the race to cooperate.

[61] Fourthly, there are various jokes in Brussels about the need in leniency applications to "get your skates on (literally)!" (e.g. "Pick law firm 'x', they are nearer to DG COMP!!).

[62] More seriously, there is concern that a company does not know if, when they approach the Commission with the evidence they have, that is enough to earn them a certain band of reduction, without someone else coming in after them with more evidence and beating them to that band.

[63] This appears to be deliberate by the Commission in order to make companies hurry to give something substantial to the Commission, generally to keep the pressure on to produce information and to stop abuse by companies just putting in a little information and claiming that they are first in at a certain band level.[19]

[64] It should be said that, while this is an anxiety for companies, it is understood that the risk exposure is until a company has given enough evidence to qualify for a reduction, but not after it has obtained that level. How much is enough is, however, not entirely clear.

[65] One possible solution might be to allow that any company which comes in with a serious and reliable statement and documents based on its internal review within a month of a dawn raid will qualify for the same cooperation credit. Such an idea may need refining, but at first sight this appears consistent with the case-law and might increase the procedural fairness at this stage in the proceedings.

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18 Antitrust Criminal Penalty Enhancement and Reform Act 2004; see Wilmer Cutler Pickering Hale and Dorr Antitrust and Competition Law Update, June 30, 2004.

19 See, Van Barlingen at p.18

Fine increases at the European Court

[66] Finally, there is some debate about the fact that companies only see what the Commission has made of all the information supplied in the Statement of Objections and then are induced at least under the 1996 Notice not to challenge the facts therein by a 10% fine reduction.[20]

[67] Often companies may want to correct the record, but do not. Then, when they see that it can affect fines hugely, they appeal (and we are now seeing the results in various cases, with the Commission asking the European Court to remove any fine reduction given).[21]

[68] A possible solution appears to be to give the parties cooperating a "preliminary findings of fact statement", inviting them to clarify and correct it, if appropriate and rewarding them for doing so. Then, by the time the (formal) Statement of Objections comes, the companies should be in a more reasonable factual and legal position.

[69] I hope that is a useful introduction and otherwise refer participants to the EC materials enclosed for Panel VI.

[20] See, Section D of the 1996 Notice.

[21] E.g. Graphite Electrodes, Cases T-236/01, Tokai Carbon and Others v. Commission, Judgement of 29 April 2004.