

# **WHAT'S THE FUTURE FOR CARTEL ENFORCEMENT**

address by

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***UNDERSTANDING GLOBAL CARTEL ENFORCEMENT***

CONRAD HOTEL - BRUSSELS  
11 FEBRUARY 2003

## **INTRODUCTION**

Thank you James (Rill), Trevor (Soames) and Elizabeth (Crossick) [OTHER NAMES] for your kind words of introduction. I am happy to be amongst such a distinguished audience and equally happy to be able to address an issue that goes to the heart of what we are doing at DG Competition: the fight against hard-core cartels. Also, I am personally happy to have been asked to talk about other matters than, to name one subject, merger control, which lately seems to have dominated the agenda for one reason or another (...) A second motivation for accepting the invitation for today's conference, and a more important one, was that the fact that, apart from the British Chamber of Commerce, two ex-cartelbusters of DG Competition have been involved in the organisation of the conference. Even though they have now regrettably jumped to the other side, both of them have contributed substantially to establishing a credible EU cartel policy.

As you will have seen from the program, I was asked to speak about *The future for cartels?* Well, ladies and gentlemen, doing so may lead you to think that there *is* a future for cartels, which is a message that, for obvious reasons, I do not want to be associated with. Therefore, even though the organisers have allotted 30 minutes for me to talk, I will end this speech very quickly by saying that, as far as I am concerned, there *is* no future for cartels! With that conclusion I want to thank you very much for your attention! [Gesture as if ending speech...]

I will come back to that Mr. Chairman, as I do not want to spoil this perfectly legitimate meeting between competitors in the legal trade, and I *do* understand that you expect something more from me. Nevertheless, I hope to have made clear the conclusion to which I will want to guide you today, namely that the future for cartels is gloomy, to say the least. Indeed, it is becoming increasingly clear that to embark on the business of setting up cartels is to engage in a lost battle, now that the likelihood of uncovering corporate conspiracies by competition agencies around the globe is becoming greater every day.

Ladies and gentlemen, in order to be able to be somewhat more informative, I have slightly renamed my speech of today to: *What is the future of cartel enforcement?* I should mention though that my talk will, logically, focus on the anti-cartel policy of the European Commission, although our goals fully coincide with those of the Member States and other cartel enforcement agencies around the globe.

### *Some facts and figures:*

When looking into the future of cartel enforcement, it is important to know where we are coming from and how the Commission has progressed in its fight against cartels. Also, the results of the past two years have been encouraging, to say the least, although I am not sure that all of you would agree with my choice of words there.

Let me provide you with a short historic overview and some figures:

From 1969, when the first decision in a cartel case was adopted, until today, that is over a period of some 34 years, the Commission has issued 66 cartel decisions and imposed a total of 4.3 billion Euro in fines.

However, until the beginning of the 1980's there were only very few cartel decisions and although the average rose to about three decisions per year for the period 1980 until the

mid 90's, the number of hard-core cartel investigations remained limited. That changed dramatically towards the end of the last decade. In 1996 the first Leniency notice was adopted, in order to entice companies to report cartel behaviour. Also, as you may be aware, the fight against cartels received increased priority in 1998 through the establishment of a specific unit solely dedicated only to investigating hard-core cartels. A further gradual increase in resources took place during 2001 and 2002, and now there are two fully fledged cartel units in place, with some 40 personnel in total. The ability to specialise in cartel enforcement, including the organisation of inspections as well as the considerable time spent on training and refining investigation techniques, have ensured that we now have a truly operational task force dedicated to cartels.

A further important event was the adoption, in February 2002, of a revised Leniency notice, and the instrument has proven to be a very important case generator. I will elaborate on the issue of Leniency a bit later.

I am proud to say that our efforts of the past years have paid off: out of the 66 decisions adopted in the period 1969-2002, nearly half (29 to be precise) were adopted after 1998. Over 200 companies were involved in those cases. The years 2001 and 2002 have been truly remarkable, not only because we issued 19 cartel decisions, but also for the fines that were imposed: nearly 3 billion Euro in total. Furthermore, there was also a considerable surge in the number of unannounced inspections. Equally notable is the fact that our efforts have not been concentrated on just a few sectors of the economy: if we look at last year's decisions, they range from basic commodity industries, for instance in *Reinforcing bars for concrete*, to high profile consumer services, as in the auction services in the case of *Christie's and Sotheby's*. Also, they may concern intermediary chemical products, such as in *Methionine*, or products destined for final consumers, such as in *Plasterboard*.

Having provided you with some historic data by way of introduction, I would like, in the time remaining, to touch upon three topics that will be important for the future of EU cartel enforcement. These are 1) the Leniency program, 2) modernisation, and 3) international co-operation.

### **1) Leniency policy as one of the drivers of cartel investigations**

The leniency instrument has proven to be a formidable tool for encouraging firms to co-operate with the competition authorities. Not only does it allow specific cartels to be uncovered, more generally the mere apprehension that a member of a cartel might go to the authorities and secure immunity tends to destabilise the activity of the cartel itself.

The revised Leniency notice of the Commission was published nearly a year ago, on 14 February 2002, and it has a tremendous success. The main driver for that success appears to have been twofold: it offers full immunity to the first company providing the requisite evidence and it offers more legal security, in the sense that companies will know more rapidly what treatment will be accorded to them. Until today, the Commission has received some 30 applications under the new Notice. I would like to note that the requests under the new Notice not only concern applications for immunity, but also a substantial amount of leniency applications (10 in total).

The experience with the new Notice and the way we are currently applying the program lead me to make two remarks:

The Commission has shown a willingness to address the concerns of companies that their applications for immunity or leniency become the subject of so-called discovery in civil trials, notably in the US, where companies are exposed to high civil damage payments. In the past, the risk of discovery has apparently withheld potential applicants from coming in under the EC program. Therefore, in order to maximise the effectiveness of our program, we have allowed companies that have demonstrated that this risk exists, the possibility to submit an application orally. The background to this approach is that while the Commission certainly does not want to hinder civil litigation, neither does it believe that plaintiffs in civil litigation should gratuitously benefit from the entirely unrelated and autonomous procedure of the Commission's leniency program, thereby undermining the latter program in the process. By adopting this approach, the Commission is following a similar line on this issue as that set out by the US Department of Justice.

The second point relates to the Member States and the scope of protection that would follow from any Commission decision on immunity or leniency, in particular following the entry into force of the new Regulation 1/2003 adopted within the framework of the Modernisation exercise. (I will come back to that subject in just a moment.). Some commentators have stated that in view of the trend in some Member States to render cartel behavior a criminal offense, the Commission's leniency program risks being undermined if the immunity granted by the Commission does not protect the employees of the company concerned from criminal prosecution in the Member States.

I would just like to mention to you that we are well aware that this is real issue and that we are addressing it, together with the Member States, in the framework of the preparatory discussions within the new ECN, the network of European competition agencies, that I will touch upon in a minute.

Now then, some more on the subject of Modernisation, and more specifically the new investigative powers of the Commission.

## **2) Modernisation**

I have already alluded to the new implementing regulation, Council Regulation 1/2003, that is the outcome of the comprehensive reform package that was submitted by the Commission in 2002. The new regulation replaces Regulation 17/62 and will enter into force on 1 May 2004, coinciding with the enlargement of the European Union with the addition of 10 Member States. In relation to cartels, I would like to touch upon two relevant issues: the functioning of the network of competition authorities and the new investigation tools that the Commission will dispose of.

The new system will allow the Commission and the NCA's, the national competition authorities, to focus their resources on those restrictions that are most harmful to competition and consumers. I do not have the time to go into great detail about this - and certain issues still need to be clarified with the Member States - but it is evident that the new rules will also allow a more vigorous antitrust enforcement by means of a better and more effective sharing of enforcement tasks between the Commission and the NCA's. The way we intend to operate the network with the Member States is laid down in a joint statement that is annexed to the new Regulation. Further work on the details continues as

we speak under the aegis of the newly formed European Competition Network, comprising the Commission and all NCAs.

The extended powers of investigation that we will have under the new Regulation are principally: the power to interview particular individuals during inspections, the possibility to affix seals and the possibility to enter private homes.

The last of these new powers has been much reported about. The public misconception is apparently that the Commission will abuse that power to systematically invade the privacy of company executives and their families. Clearly, this is not the aim. But we do know from experience that business records relating to a cartel are sometimes stored at a private residence or that communications between the cartel participants take place from and to private homes. If we have such suspicions, we feel it must be possible to retrieve such information as well. However, there are additional procedural safeguards foreseen in the sense that we could only obtain entry into a private residence after authorisation from a national judge.

The possibility of putting questions to individuals is in our view a logical extension of the existing powers. Often companies have tried to hide themselves behind the highest level of management by giving evasive answers to questions put during inspections. The Commission must be certain that the person who in the Commission's view is best placed to reply to a question, will actually be the one that the question is put to.

Another logical extension of our powers is the possibility to affix seals. It follows from the limitation imposed on the Commission not to extend its presence in a company beyond normal business hours. The Commission has to have certainty that during an inspection no evidence disappears overnight. Until now, we have relied on the powers of the national authorities to seal cupboards or offices. In the future we will have that possibility ourselves.

Other relevant changes to mention from the new regulation - but on which I do not have time to comment - are the possibility of conducting interviews and the increased sanctions for procedural breaches, which can be as high as 1% of turnover.

### **3) International co-operation**

The last subject that I would like to touch upon is that of international co-operation. Clearly, this is an issue that appears prominently on the agenda of all cartel enforcers these days. It is definitely one of *the* topics for the future of cartel enforcement.

International co-operation in cartel cases is a necessity given that we are increasingly faced with cartels that have a truly global dimension. I can see two main forms of international co-operation that will render the fight against cartels more effective.

Firstly, there is the international – multilateral - co-operation as regards the principles that are to be applied in the pursuit of hard-core cartels. Discussions take place within the OECD, WTO and the relatively new ICN (International Competition Network), of which the Commission is one of the main sponsors. All of these initiatives serve the useful purpose of arriving to commonly accepted standards of scrutiny when it comes to hard-core cartels, and it is important that these various initiatives be continued.

A second form of co-operation – bilateral - exists as regards actual cases. There one can distinguish between co-operation on an ad-hoc basis or based on an institutionalised agreement. The way we are currently co-operating with the United States Department of Justice as well as the Canadian authorities is based on such an agreement. We will also have very soon an agreement in place with Japan. These agreements have proven to be a solid basis for effective co-operation, albeit that we are always bound by the limits of confidentiality in the information can be exchanged. Especially with the US Department of Justice we have established a very solid relationship which has, for instance, to various co-ordinated enforcement actions in the recent past.

### **Fining policy**

Before concluding, I want to briefly touch upon the future policy of fines. The trend is clearly one of increasing fines, in order to achieve a genuine dissuasive effect on firms. In 2001, the heaviest individual fine yet, € 462 million, was imposed against Hoffman-LaRoche in the *Vitamins* case. In 2002, the second highest amount ever, € 250 million, was imposed against Lafarge for its participation in the *Plasterboard* cartel. Other significant fines were those imposed on and BPB, also in *Plasterboard*, € 139 million and € 118 million for Degussa for its role in the *Methionine* conspiracy.

We apply the 1998 fines guidelines which, whilst setting out the principles, leave sufficient scope for flexibility. That flexibility is important, since we do not want to provide an excessive degree of ‘legal security’, so that companies could attempt to engage in a cost/benefit analysis for participating in a cartel. As stated, our policy for the future is to provide for a very strong disincentive for antitrust infringements.

### **Conclusion**

Ladies and gentlemen, Mr. Chairman, I have come to the end of my overview of what the European Commission has in store where it comes to combating cartels. What I hope has become apparent is that the odds for companies that think they can successfully organise and sustain a cartel have significantly changed over the past few years. Not only our own record, but also that of the Member States, that of the US Department of Justice and of other competition agencies proves that more and more cartels are being uncovered. The high priority given to the fight against cartels will be maintained. Furthermore, the attractiveness of leniency programs greatly increases the risk that one of the other cartel participants will run to the authorities. In short, the chances of getting away with rigging markets to the detriment of consumers are getting slimmer by the day.

Ladies and gentlemen, the time available, and I hope I am still within limits Mr. Chairman, only allowed me to touch upon certain issues that will be very important topics for the future of cartel enforcement in Europe, but also globally. Today’s program will allow you to elaborate on most of these issues, which should provide for a challenging and interesting discussion. I can only hope that I have sufficiently frightened you and that you will pass on the message to the corporate world. I thank you for your attention.

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