EUROPEAN COMMISSION

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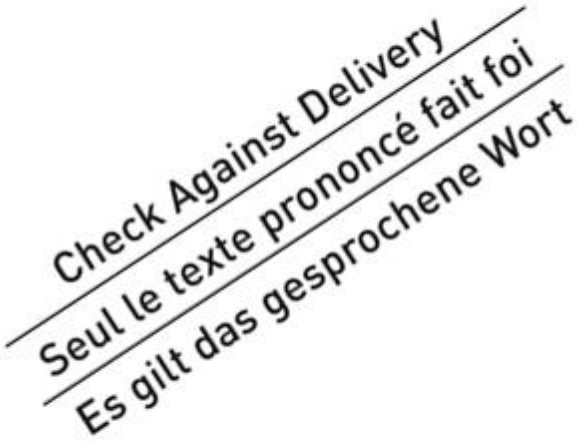
EU cartel enforcement in the international context



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Competition

Good morning. I am very thankful to the Northwestern Law School, to Director Spitzer, to Roxane C. Busey and the organizers and sponsors of the Chicago Forum for the opportunity to cross the Atlantic and address this American audience. Allow me to warn you that when I provide opinions, they do not necessarily reflect the position of the Commission.

I. International cooperation, poles of convergence:

Panellists ahead of me will dissect challenges faced by lawyers in navigating multiple jurisdictions. Anti-cartel enforcement is probably the area most concerned with the proliferation of competition regimes, because fighting cartels is the top priority for agencies around the world. Most agencies have developed reflexes to coordinate the initial investigative steps to keep the surprise effect for all. We also pay increasing attention and devote substantial efforts to avoid or mitigate distortions in incentives, conflicting timing and incompatible demands in parallel investigations.
We detect a natural selection of effective enforcement features and, inevitably, patterns arise in the international scene… However, enforcers make a deliberate effort to accelerate the process by identifying divergences, their rationale and impact and by actively fostering convergence around best practices in comparable models. We come together in specialized fora (the ICN, the OECD, the UNCTAD) and we invest in bilateral contacts. Younger agencies logically inspire themselves in the experience of more mature ones.

While there is still plenty of scope for improvement in simplifying this global complexity, there is no single ideal system which fits for all at the end of an evolution ladder. Anti-cartel enforcement regimes are incorporated in a certain culture and legal order. Rendering legal enforcement choices effective partly depends on whether the public perception and judicial consensus in a given jurisdiction favours the view that cartels are crimes or rather considers them to be egregious civil infringements. There is no best way, except that the sanctions envisaged by the law are better enforced when they are widely perceived to be commensurate to the violation. Hence, at least two paramount paradigms of anti-cartel enforcement are likely to co-exist, with variations and combinations:

- The prosecutorial judicial system, where case is brought to a court which decides (this model is inherent in systems imposing criminal sanctions on individuals). US anti-cartel enforcement is the most eminent – and probably the most accomplished example of the criminal prosecutorial model.

- The administrative system, where the agency makes all the way to the binding decision subject to judicial review. I am here to bring an insight in some prominent features of the administrative system run by the European Commission, which often serves as reference in this regard.

II. A vigorous administrative system

Now, running an administrative procedure imposing exclusively administrative fines on companies does not mean that we lack vigorous means or a robust record. We can fine undertakings up to the level of 10% of their last year world-wide turnover per infringement, often capturing in the calculation the turnover of the ultimate parent company. This has translated in liabilities for 580 undertakings (each typically covering several legal entities) since 2000 in 91 decisions amounting to EUR 19.2 Billion in fines, all cooperation benefits already discounted. Our highest fine to date on a group amounts to EUR 715 Million (Saint Gobain in Carglass) and the highest total fine imposed in a single decision was EUR 1.4 Billion (TV & computer monitor tubes).[1] Recidivists receive 100% fine uplift per infringement. Reaching a given level of fines is not an aim in itself. These data are meant to show you that EU fines are commensurate to the gravity and duration of the infringements and companies are well advised to take this into account. And they do so. We are in the very first line of authorities contacted by companies requesting leniency for international cartels.

We have a wide array of investigative powers including the power to conduct dawn raids at business premises and private homes. Obstructions during the investigation can either increase the final fine by several percentage points or receive a separate penalty up to 1% of the world-wide turnover, irrespective of whether we finally prove the company's participation in the cartel. Breaching a seal during an inspection cost E.ON EUR 38 M.

III. Due process, rights of defence, equality of arms, judicial control

Because the European Commission is the decision maker, our system complies with a wide range of safeguards and due process duties. I will spare you the web of multiple internal checks and balances a case team goes through before the Commission takes a final position on any case. Instead, I will dwell on the most prominent safeguards reining Commission powers:

A) To ensure equality of arms, we play with the cards on the table:

- Parties may have access to the full Commission's file in the ordinary antitrust procedure[2] (with the exception of business secrets and other confidential information). Even in the framework of the settlement procedure, the Commission cannot adopt a decision against any company without having allowed it the opportunity to access at least all evidence in the file regarding all parties concerned by the alleged cartel.

[1] http://ec.europa.eu/competition /cartels/statistics/statistics.pdf

[2] This means having access to leniency statements at our premises and to the rest of documents on the file (concerning all parties to the same cartel), with the exception of internal notes, business secrets and other confidential information.

- Access to the file takes place before the companies argue their case against the Commission provisional conclusions. Those preliminary findings have to be set out in a motivated written statement (so called "Statement of Objections") explaining which evidence supports which provisional conclusion.

- We cannot compel self-incriminating statements from companies (it is not just individuals who have the privilege not to incriminate themselves).

B) The Commission is under close judicial scrutiny. Commission decisions are subject to two instances of enhanced scrutiny by review courts with expert knowledge of competition (first the European General Court, then the European Court of Justice):

- EU review courts have unlimited jurisdiction to change our fines (even when the motivation and legality of the decision is upheld).

- We document all our procedures and reason our decisions so that their motivation and legality can be effectively reviewed on all matters of fact and law. Courts also control that there has been no misuse of powers.

- EU courts also verify that companies have not been discriminated in the process :

    - Differences in the treatment of parties to the same infringement must be motivated objectively;

    - So we investigate all parties at the same time in one procedure and normally adopt a single compound decision. When you read our statistics, you need to take into account that a single decision may cover many companies and, sometimes, several cartels.

IV. Who enforces EU anti-cartel rules?

Often you hear references to the European Commission and to DG COMP without telling them apart. Let me explain as simply as I can how it works:

The College of Commissioners is at the top of the European Commission. Ms Margrethe Vestager is the **Commissioner for Competition,** supported in her tasks by the Directorate General for Competition (DG COMP). DG COMP consists of a stable multinational force of Commission officials independent from our Member States of origin. We come in all shapes, backgrounds and accents, since we number 28 nationalities and 23 official languages of the European institutions.

We are not alone in enforcing EU law: EU antitrust prohibitions can be directly invoked before **national judges** and the **national competition authorities** can also enforce those provisions unless the European Commission is already acting on the case. We work closely together to ensure we apply EU law in a coherent way. Our co-enforcers cannot take decisions in contradiction with past or forthcoming decisions of the Commission in a given case.

Because we share the task of enforcing the same rules, we have in Europe the closest existing cooperation network of competition authorities: **the European Competition Network (ECN)**. Amongst us, we can exchange information and evidence (with due safeguards and exceptions), we assist each other in investigations, share experience and advice and allocate cases.

V. Leniency and settlements

I invite you to explore the links to our website and the slides in the materials for CLE of this conference. As for now, my aim is to make you aware that what your European counsel or my colleagues back in Brussels mean with the words "leniency" and "settlement" is different from what you expect from an American background[3].

- Leniency

Our special duty not to discriminate between companies prevents us from showing a preference by asking one company rather than another to apply for leniency. Instead, what we have is a race left to companies' initiative based on incentives.
Only one undertaking may receive immunity from fines per infringement. The company has to be the first to uncover a cartel to the European Commission and provide information and evidence enabling it to conduct targeted inspections. If we happen to be already investigating, immunity requires providing evidence enabling us to make the final infringement decision on the cartel.

If you are ever struggling with the choice to come forward, once you have lost the race to be first-in in our jurisdiction and/or elsewhere, please consider the following:
Under our leniency programme there are also concrete fine-reduction bands available for undertakings according to the order in which they apply for leniency. In the first band, one undertaking may qualify for a 30% to 50% fine reduction, in the second band another undertaking could receive 20% to 30% reduction and other companies may qualify for up to 20%.

Let's make no mistake: In our jurisdiction no company is *entitled* to a reduction only because it reports a cartel in a given order or just because it uses its best

[3] My understanding is that in the US, the first-in amongst the members of a cartel can qualify for leniency (amnesty, no finding of liability). Other companies, at different moments in time, may enter into settlement agreements which take into account the companies' cooperation to the investigation and their admissions. Those agreements are joint pleas presented for judicial approval. Where no settlement is reached, the case can be tried in court.

endeavours to cooperate with us. In addition to that, companies must provide evidence which offers significant added probative value compared to what the Commission has at that moment already on file. It is a race because the submission order makes a big difference as to the band available to you, but also because speed affects your ability to still provide significant added value to qualify in that available band. And even the concrete reduction level within your band depends on what you add to the file as it stands and when.

Remember that all EU leniency rewards are conditional upon the genuine, prompt and complete cooperation of applicants with the Commission during the investigation, by contributing contemporaneous evidence, corporate statements and information.

Please, if you apply, think of providing us with confidentiality waivers to coordinate with other agencies to whom you report. We recommend using the ICN model for waivers.

This leniency system has worked very well for us. Even in cases started ex-officio, we typically get leniency requests for reduction from parties willing to cooperate. Therefore, when we introduced EU settlements, we applied the logic in one of your idioms: *"If it ain't broke, don't fix it"*, and we left untouched the leniency programme with its effective incentives balance.

- Settlements

EU Settlements are not meant to gather evidence for the investigation. They came along as an efficiency tool. They make possible a voluntary choice for a lighter procedure in cartel cases. The choice is feasible only once the investigation has crystallised, possibly with the help of leniency applicants. Leniency reductions and settlement rewards target different forms of cooperation and are cumulative.

Since the first settlement decision in May 2010, settlements have become a real alternative to the ordinary procedure: they represent 20 out of 38 cartel decisions, accounting for 205 out of 514 legal entities and close to half of the cartel fines imposed. If all parties settle, we gain two years on average in procedural savings, plus the practical absence of litigation thereafter (out of 205 settling legal entities, there is only one appeal pending).

Parties are often eager to explore settlements. This is not just to receive the 10% fine reduction, but also to have the possibility to discuss all matters with the Commission team, ahead of the formal issuing of charges, deploying their arguments and entering into an immediate exchange with the team. They also seek to have a streamlined decision and avoid litigation costs.

The common feature with US settlements is that companies have bilateral discussions with the case team and the outcome thereof appears in separate settlement submissions. Settlement submissions receive the same protection

against discovery as leniency statements: they can only be consulted at our premises and no mechanical copy thereof can be made. They contain the acknowledgment of the undertaking's participation in the cartel described with its legal assessment, the acceptance of liability and an agreement to pay a penalty. In our case, the penalty is a fine up to a maximum amount, yet to be imposed by the Commission.

In a successful EU settlement, the Commission will follow up with streamlined statement of objections and final decision along the lines of the companies' settlement submissions.

VI. Final remarks

The application of **EU competition law** has an objective of its own: to facilitate the **integration of 28 European market economies into a single European market** which adds to the more universal competition goal of **having markets deliver for consumers**.

In order to ensure a level-playing-field for all operators in the European Union, we are able to proceed not only against **outright agreements**, but also against **concerted practices**, decisions of associations of undertakings, and combinations thereof with the object to cartelize. Basically we can address as a cartel any form of hard-core collusion chosen by competitors to coordinate their behaviour or influence the relevant parameters of competition. Those practices can be the coordination of prices or other trading conditions, customer allocation, market sharing in the form of territories, quotas or other, including bid-rigging; restrictions of imports or exports, collective boycotts… This extra possibility to address a wide range of intentional anticompetitive collusion irrespective of the form chosen by the parties is an opportunity to discourage those harmful practices whatever their shape.

Arguably, **there are concrete complementarities in having two robust models of anti-cartel enforcement co-existing in the global scene in the joint fight against cartels**. The DoJ and DG COMP cooperate usefully on cases of common interest on a regular basis. Personally I suspect that the difference of standard and scope between our systems could serve deterrence better than if we were to convict the same individual yet again for the same cartel, only to face the need to share the prison term. Partly because we are both different and compatible, **our actions are not redundant** even when we look into the same international cartels.
Many thanks for your kind attention.