

THE EUROPEAN CARTEL ENFORCEMENT REGIME POST-MODERNIZATION: HOW IS IT WORKING?

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INTRODUCTION

The European Commission's (the "EC" or the "Commission") project to modernize cartel enforcement, five years in the making, became a reality on May 1, 2004. While it was undeniably a bold step, many practitioners saw it as a leap in the dark. Even the Commission and national officials who administer the new regime are still feeling their way.

The Member States reined in the Commission's ambitious agenda of abolishing national competition law for all but the most parochial transactions.¹ The agreed compromise—application of EC rules by the national competition authorities ("NCAs"), courts and the Commission, alongside national law—does not make a bright-line demarcation of responsibilities.

The basic scheme of the new regulatory structure is that the Commission and NCAs now share responsibility for public enforcement of Article 81 and 82 of the EC Treaty. When enforcing their national competition laws, the NCAs and national courts are also obliged to assess the matter under Articles 81 or 82.² Each of the authorities is thus able to enforce EC rules of competition, although they are enjoined to do so "in close cooperation."³ This exhortation is translated into a loose structure of cooperation involving information sharing and consultation on case allocation as part of the European Competition Network ("ECN"). For their part, courts will be mainly concerned with the private enforcement of Articles 81 and 82 through litigation—under national procedures and legal rules—"save where they judicially review the decisions of NCAs."⁴

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¹ The original draft of Article 3 of Regulation 1/2003 reads: "Where an agreement . . . within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community Competition law shall apply to the exclusion of national competition laws." Council Regulation (EC) No. 2000/0243, 2000, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2000/com2000_0582en01.pdf.

² Commission Regulation 1/2003, 2003 O.J. (L 1) 8.

³ Commission Regulation 1/2003, 2003 O.J. (L 1) 10.

⁴ Stephen Blake & Dominik Schnichels, *Leniency Following Modernisation: Safeguarding Europe's Leniency Programmes*, EC Competition Policy Newsletter, Summer 2004, at 7, available at http://ec.europa.eu/comm/competition/publications/cpn/cpn2004_2.pdf.

According to upbeat pronouncements from Commission officials, “For the first time not only the Commission but also the national competition authorities of the Member States (NCAs) together with the national courts, have the power within their respective territories to apply the competition rules of the Treaty in full.”⁵ While the penalties and sanctions that the Commission may impose are set out in Article 23 of Regulation 1/2003, the sanctions that may be applied by the NCAs for breach of the EC rules of competition are left up to the national laws of each Member State: “The sanctioning regimes of the Commission and the NCAs are not therefore harmonised by the Regulation.”⁶

EC competition rules have thus been incorporated into the legal systems of the Member States and will be administered by national institutions. This gives rise to concerns about both legal and operational consistency generally, although this article will focus on cartels enforcement.

I. ISSUES IN FEDERALISM

A. *Basic Philosophical Differences*

The various Member States take greatly disparate approaches to punishing cartel behavior. Some regard even the most egregious cartels as an economic phenomenon, to be regulated by administrative law, while others view price-fixing as tantamount to theft. Other countries have introduced criminal sanctions against the most egregious cartel behavior. To some extent the split follows the civil law/common law divide, and possibly attitudes to the concept of “conspiracy,” with the continental jurisdictions being less inclined to impose jail sentences on price fixers. In the EU, until they were joined by Cyprus and Malta, only the UK and Ireland shared a common law tradition. Yet even the original two common law countries have taken totally different approaches to criminalization. Ireland has criminalized the breach of its Competition Act and of Articles 81 and 82,⁷

⁵ *Id.*

⁶ *Id.*

⁷ Sections 6 and 8 of Ireland’s Competition Act of 2002 made violations of Section 4(1) of the Act (prohibition of anti-competitive agreements) or of Article 81 of the Treaty an offense punishable by up to five years imprisonment for individuals and a fine of € 4 million for corporations. Competition Act, 2002 (Act. No. 14/2002) (Ir.) available at http://www.irishstatutebook.ie/2002_14.html (last visited June 16, 2006).

while the UK deliberately made its “cartel offence” as distinct as it could from competition law.⁸

With so much scope for diversity of legal interpretation, one might have envisaged a fall-back control in the form of a unified system of appeal or judicial review at European level. Yet the appeal route in matters of community law will remain with the national courts that currently exercise appellate or supervisory jurisdiction over the national competition authorities.

B. *Federalizing EC Competition Law Without Federal Courts*

The new regime has thus “federalized” competition law in Europe, but without a system of federal courts. In the United States, while state courts may be competent to administer state antitrust laws, the application of the Sherman Act is the exclusive province of the federal system. Even there, with over 600 district court judges and thirteen Circuit Courts of Appeals all supposedly applying and interpreting the same law, federal courts often reach opposite conclusions on the same set of facts, and the interface with state antitrust enforcement is not always problem free.

In the specific area of anti-cartel criminal law enforcement, the Department of Justice has a monopoly on prosecution in the United States. Before Modernization, the Commission was likewise the primary cartel hunter in Europe, but now it will be just one of the twenty-six or more agencies entitled to investigate and penalize price-fixing activities under Article 81. NCAs may enforce Article 81 on their own or as part of a group of any number, with or without the Commission.

C. *No Binding Rules on Jurisdiction*

There are no binding jurisdiction rules. The Commission and NCAs are supposed to work together to implement the loose principles of allocation set out in the Network Notice.⁹ According to Commission officials, the principles set out in paragraphs 8 to 15 of the Notice

[E]nvisage the possibility of parallel action by a maximum of two or three NCAs, each acting for its respective territory. Where the effects of the infringement are felt in more than three Member States, on the other hand, the Network notice indicates that the Commission is

⁸ See Enterprise Act, 2002, c. 40 § 188 (Eng.); DEPARTMENT OF TRADE & INDUSTRY, PRODUCTIVITY AND ENTERPRISE: A WORLD CLASS COMPETITION REGIME, 2001, Cm. 5223.

⁹ Commission Notice on Cooperation within the Network of Competition Authorities, 2004 O.J. (C 101) 43 [hereinafter Commission Notice C 101].

likely to be considered best placed to act, although there is admittedly no guarantee that it will do so.¹⁰

The fact that another authority is dealing with the case constitutes sufficient grounds for other authorities or the Commission to suspend proceedings but there is no obligation to do so.¹¹

Under the old regulations, NCAs (if allowed by national law, and few were) could apply Article 81(1) so long as the Commission had not initiated proceedings.¹² Apart from this, the only provisions in the old regulation on the relationship between the Commission and national authorities related to the Advisory Committee and the conduct of investigations.¹³

However, the previous Notice on cooperation between the NCAs and the Commission in handling cases within Articles 81 and 82 of 1997 stipulated: “[I]n principle, national authorities will handle cases *the effects of which are felt mainly within their territory* and which appear on preliminary examination unlikely to qualify for an exemption under Article [81(3)]. However, the Commission reserves the right to take on cases displaying a particular Community interest.”¹⁴ It went on to define “mainly national effects,” stressing that while the only cases at issue were those which fell under Articles 81 and 82, “the effects of the agreement or practice must be deemed to occur mainly within that state even if, theoretically, the agreement or practice is capable of affecting trade between Member States.”¹⁵

This made the demarcation of responsibilities very clear. Member States having no jurisdiction to exempt—this being the sole province of the Commission—they could deal only with infringements of EC competition rules that were (a) clear and (b) confined to national territory. Now the scope for the NCAs, in terms of work allocation, is considerably widened. The ECN Notice requires only that an authority be “well placed,” which requires only effects or implementation in that state (and that the NCA can gather evidence in that state), not that the effects are felt *mainly* there.¹⁶ The

¹⁰ Blake & Schnichels, *supra* note 4, at 11.

¹¹ Commission Regulation 1/2003, 2003 O.J. (L 1) 11; Commission Notice C 101, *supra* note 9, at 45-46.

¹² Council Regulation (EEC) No. 17, 1962 O.J. (13) Article 9(3), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31962R0017:EN:HTML>.

¹³ *Id.* Articles 10, 11, 14(4) and 14(6).

¹⁴ Commission Notice on Cooperation Between National Competition Authorities and the Commission in Handling Cases Falling Within the Scope of Articles 85 or 86 of the EC Treaty, 1997 O.J. (C 313) 3, § 26, *available at* [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:3197Y1015\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:3197Y1015(01):EN:HTML) [hereinafter Commission Notice C 313] (emphasis added).

¹⁵ *Id.* § 28.

¹⁶ Commission Notice C 101, *supra* note 9, at 44.

concept of “mainly national effects” has survived, but now gives rise to a presumption that where the arrangements are primarily felt in a single Member State, that agency is “well placed.”¹⁷ If two countries are involved, both an NCA and the Commission, acting either unilaterally or in tandem, may be “well-placed.”¹⁸ Only if more than three Member States are involved will the Commission considered “particularly well-placed.”¹⁹

Leaving aside leniency issues, any potential jurisdictional conflicts should surely be resolved *before* an investigation is started. Yet the rules allow NCAs to begin an investigation without informing the Commission. According to Article 11(3) of the Regulation, an NCA acting under Articles 81 or 82 shall inform the Commission “before *or without delay after* commencing the first formal investigative measure.”²⁰ When an investigation is triggered by a complaint from an aggrieved customer, even “worldwide” cartels may look national in scope when viewed through the wrong end of the telescope. The risk is that premature raids on firms’ local agents by a national authority acting alone could ruin the whole investigation of what may actually be a global cartel.

D. *Everything is Going to Plan, Say Officials*

Commission officials praise the ECN as a great success.²¹ They stress that it is not intended to decide which cases should be pursued or which authority or authorities would be well placed to do the investigation: rather it is a forum for exchanging information, sharing experiences and providing mutual support in fact-finding and investigations. However, there is not much independent evidence yet of how this body actually operates in practice. According to anecdotal evidence, not vigorously denied by Commission officials, case allocation, in some instances, seems to owe more to improvisation than any principled rule.²²

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Commission Regulation 1/2003, 2003 O.J. (L 1) 10 (emphasis added).

²¹ *E.g.*, Céline Gauer & Maria Jaspers, *The European Competition Network Achievements and Challenge—A Case In Point: Leniency*, EC Competition Policy Newsletter, Spring 2006, at 7, available at http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_1.pdf.

²² Vanessa Turner, Freshfields Bruckhaus Deringer, *International Cartel Enforcement: Multijurisdictional Defense Strategies*, Paper to the American Bar Association Section of International Law, 4 (Oct. 26, 2005) (“In a number of cases, allocation of a particular case . . . has, rather than being dependant on these principles, appeared to depend more on the question of availability of resources in the authorities and the ‘sexiness’ of the case.”) (Practitioner); Céline Gauer, *Due Process in the Face of Divergent National Procedures and Sanctions*, LAW. EUR., Autumn 2005, at 14 (Commission official). Gauer and Jaspers confirm that the Commission has never used its powers under article 11(6) to relieve

So far, Member States have informed the Commission of about thirty-five envisaged decisions, of which over half concerned Article 81 and about ten related to cartels. The Commission has not yet had occasion to use its power under Article 11(6) to relieve a national authority of a case.

II. EXCHANGE OF INFORMATION INSIDE THE ECN

Articles 11 and 12 of Regulation 1/2003 provide for the exchange and sharing of information among members of the ECN for case allocation and coordination and for use as evidence in the procedures themselves.²³

A. *Coordination and Allocation*

Article 11 declares that the Commission and NCAs shall apply the Community competition rules in close cooperation.²⁴ The Commission is required to transmit copies of the most important documents it has collected with a view to applying the rules of competition.²⁵ Article 11(3) sets out Member States' obligations.²⁶ These provisions apply equally to leniency applications, a process for which confidentiality is absolutely critical, and so special rules are laid down in the Network Notice.²⁷

B. *Pooling Evidence*

Article 12 provides for the pooling and sharing of information among the members of the ECN for use as evidence in actual proceedings.²⁸ This is only an "enabling" provision, and no *obligation* is imposed on network

a national authority of competence but note that on several occasions there have been "creative, informative and productive dialogues" with the NCA concerned. Gauer & Jaspers, *supra* note 21, at 9.

²³ According to the Commission's Notice on Cooperation, information submitted to the Network by a member in relation to a leniency application it has received may not be used by other members as a basis for starting an investigation on their own initiative, even as a road map. Commission Notice C 313, *supra* note 14, at § 47. This derogation from the general rule in Article 12(1) of Regulation 1/2003 (allowing the Member States wide powers to "provide one another with and use in evidence any matter of fact or law, including confidential information") does not seem to have a firm foundation in the Regulation itself. Commission Regulation 1/2003, 2003 O.J. (L 1) 11.

²⁴ Commission Regulation 1/2003, 2003 O.J. (L 1) 10.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Commission Notice C 101, *supra* note 9, at 48-49.

²⁸ Commission Regulation 1/2003, 2003 O.J. (L 1) 11.

members to share evidence.²⁹ The curious result is that the intra-community cooperation provisions are thus less binding than mutual legal assistance treaties between independent nations that impose an obligation to render assistance on request.

There are the customary user restrictions. The information exchanged may only be used in evidence (a) for the purpose of applying Article 81 or 82 and (b) in respect of the subject matter for which the transmitting authority collected it.³⁰ This information can also be used to enforce national competition law in the same proceedings if such use “does not lead to a different outcome.”³¹ Just what leads “to a different outcome” is not exactly clear, however.

A distinction can be drawn between the use of information as a “road map” or “intelligence” in an investigation and its being “given in evidence.” The former—and less official—type of exchange is a fact of life and largely escapes scrutiny. And if the strict common law rules of evidence on provenance and the “chain of custody” are relaxed or not an issue, transmitting evidence between agencies engaged in the administrative enforcement of competition rules presents few problems.

However, it is very different when the criminal law becomes involved. Here, very strict prohibitions and restrictions apply. To be sure, in certain circumstances Article 12(3) allows shared information to be “used in evidence to impose sanctions on natural persons” at the national level (despite the fact that only “undertakings” can be the subject of EC competition rules³²) because Article 5 leaves the question of penalties to national law.³³ Ireland has made a breach of Articles 81 and 82 by individuals a serious *criminal* offence,³⁴ but under the rules, the use of exchanged evidence in an Irish prosecution, in which a prison sentence could be imposed, would be extremely restricted.³⁵

Other jurisdictions subscribing to the Code Napoleon rather than the common law may foresee the imposition of some kind of “administrative”

²⁹ Blake & Schnichels, *supra* note 4, at 9.

³⁰ Commission Regulation 1/2003, 2003 O.J. (L 1) 11.

³¹ *Id.*

³² Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 64-65.

³³ Commission Regulation 1/2003, 2003 O.J. (L 1) 11.

³⁴ Competition Act, 2002 (Act. No. 14/2002) (Ir.) available at http://www.irishstatutebook.ie/2002_14.html.

³⁵ Article 12 allows “exchanged” evidence to be used in evidence only where the law of the transmitting authority foresees sanctions “of a similar kind” in relation to an infringement of Article 81. Commission Regulation 1/2003, 2003 O.J. (L 1) 11. Article 12 does not apply to the UK’s “cartel offence.” *Id.* As Ireland is the only Member State which has legislated for prison sentences for a violation of Article 81, it is currently in the position of having nobody with which it is able to exchange information.

finer on individuals as well as companies for Article 81 or 82 infringements. Interestingly, the “exchanged” evidence may not be used for the purpose of imposing penalties on individuals under national competition law but only for a breach of Articles 81 or 82. Even less information, for a whole catalogue of reasons, could be used as evidence in a UK prosecution for a “cartel offence,” which the British government kept conceptually as far from EC and national competition rules as possible and which could result in a five-year prison term.³⁶

There are several further limitations on evidence pooling in the criminal enforcement area:

* The law of both jurisdictions must foresee penalties “of a similar kind” for an infringement of EC rules, or, if this is not the case, the information must have been collected in a way that respects the same level of rights of defense as provided for in the national rules of the receiving authority. In the latter case however, the evidence exchanged may not be used by the receiving authority “to impose custodial sanctions.”³⁷

* The use of evidence in a prosecution that could lead to custodial sanctions being imposed is thus only allowed when both the transmitting and receiving authority may impose jail sentences for a breach of EC competition rules. This excludes any transmission by the Commission because it has no criminal law powers. Because the only Member State where jail sentences may be imposed for a breach of Articles 81 and 82 is Ireland, that Irish authorities may be restricted to transmitting/receiving information only among themselves.

Instances in which evidence could legitimately be transmitted from one authority to another for use in serious criminal prosecutions for which jail is a sentencing option would thus be rare indeed.

And whatever the Commission’s desire to expand its cooperation with the United States and other nations in international cartel investigations, both it and Member States are strictly precluded from disclosing to non-European authorities any information collected in investigations under Articles 17 to 22, whether or not the non-European jurisdictions have criminal law sanctions.³⁸

³⁶ Enterprise Act, 2002, c. 40 § 190 (Eng.); *see supra* note 8.

³⁷ Commission Regulation 1/2003, 2003 O.J. (L 1) 11. This formulation in the active voice seems to presuppose that it is the “receiving authority” itself which imposes the prison sentence, and to be sure, Article 35 of the Regulation allows courts to be designated as responsible for enforcing Articles 81 and 82. Commission Regulation 1/2003, 2003 O.J. (L 1) 21. In the common law system, however, it is the prosecution, and not the court, which collects and presents the evidence, and of course the prosecution does not impose any sentences.

³⁸ Commission Regulation 1/2003, 2003 O.J. (L 1) 20.

C. *Criminalization: Conflicts and Divergence?*

While tensions between the EC and national competition laws within a single administrative procedure may ultimately be manageable, the trend towards criminalization will generate conflicts of interest. A system that gives one body, for example, Britain's Office of Fair Trading, investigative and decision-making functions in EC and national administrative procedures and, at the same time, an investigative and prosecutorial role in national criminal law enforcement is bound to raise new complexities.³⁹

D. *Issues*

- * How is the ECN working in practice?
- * Are greater guarantees of confidentiality necessary?
- * Should there be clear jurisdictional rules?
- * Should the Commission be reestablished as the primary enforcer against EC wide cartels?
- * What conflicts arise from the dual (triple for the OFT) role performed by NCAs?

III. THE LENIENCY NOTICE

The Commission's "new" leniency notice has been in force for more than four years.⁴⁰ It has been hailed by officials, press and the legal profession as a prolific generator of cases.⁴¹ In an enthusiastic welcoming speech, Scott Hammond of the Department of Justice saluted it as "the single most important contribution to *U.S.* anti-cartel enforcement of 2002."⁴²

³⁹ See Julian Joshua, *The UK's New Cartel Offence and Its Implications for EC Competition Law: A Tangled Web*, 28 EUR. L. REV. 620, 627-31 (2003).

⁴⁰ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C 45) 3.

⁴¹ E.g., Bertus Van Barlingen, *The European Commission's 2002 Leniency Notice After One Year of Operation*, EC Competition Policy Newsletter, Summer 2003, at 16, available at http://ec.europa.eu/comm/competition/publications/cpn/cpn2003_2.pdf; see, e.g., D. Jarrett Arp & Christof R. A. Swaak, *Immunity from Fines for Cartel Conduct Under the European Commission's New Leniency Notice*, ANTITRUST, Summer 2002, at 59, available at http://www.gibsondunn.com/fstore/documents/pubs/EU_Leniency_Notice.pdf.

⁴² Scott Hammond, Dir. of Criminal Enforcement, U.S. Dep't of Justice, Opening Remarks at the ABA Section of Antitrust Spring Meeting (April 2, 2003). Many U.S. lawyers were convinced that the inherent lack of certainty in the EC's 1996 program was deterring potential immunity candidates from applying anywhere, including the United States.

A. *Not so Clear*

To the extent that potential leniency applicants in the United States who fail to come in to the U.S. Department of Justice (“DOJ”) as quickly as it would like can no longer attribute their tardiness in the United States to the absence of a guarantee of a zero fine in Europe, Mr. Hammond’s observation may well be accurate. But while the first company to qualify will get guaranteed full immunity, the process of obtaining immunity (or a fine reduction) is riddled with uncertainty. Far from a model of transparency, the Notice relies largely on a bluff for its effectiveness.⁴³ Although the Commission vaunts as a radical improvement over the previous regime the possibility that full immunity may still be available even after a (*unsuccessful*) raid, this is the case only if the raid was not the result of an “8(a)” leniency application.⁴⁴ With very few cases being generated these days otherwise than by the Notice, the odds are that post-raid, an application for full immunity would be refused. According to the Notice, a company may withdraw its application when it is told that first place has already been taken, but if the Commission does confirm that leniency is still available, this tells a post dawn-raid applicant two things: (a) there was no informant and (b) the raid was a failure. In such circumstances, companies may not want to talk themselves into a certain fine, even at a fifty percent discount.⁴⁵ Hence the Commission’s strong expectation, contrary to the wording of the Notice itself, that if a company’s application for full immunity is refused, it *should* “go forward” and apply for a fine reduction.⁴⁶ Fearful that wily lawyers will game the system, the Commission does not even allow a marker to be put down, thus diluting the message that “getting in first is all.”⁴⁷

The subjective language in which the two “alternative” tests for qualifying are couched does not engender the certainty that ought to lie at the core of any effective leniency program. What is “sufficient” for a dawn raid under 8(a)? No evidential standard or probable cause is required for the Commission to order a surprise investigation.⁴⁸ And it is difficult to see how the Commission could judge under 8(b) whether it can proceed to a

⁴³ Julian Joshua, *Hold or Fold? The Commission’s New Leniency Notice*, EUR. ANTITRUST REV., 2003, at 1, available at <http://www.howrey.com/docs/CartelsLeniency.pdf> [hereinafter *Hold or Fold*].

⁴⁴ See Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C 45) 3.

⁴⁵ *Hold or Fold*, *supra* note 43, at 4.

⁴⁶ The Commission will not now inform the undertakings whether full leniency is still available unless they commit in advance to converting their amnesty application into one for a reduction in fine.

⁴⁷ See, e.g., Michael J. Reynolds & David G. Anderson, *Immunity and Leniency in EU Cartel Cases: Current Issues*, 27 EUR. COMPETITION L. REV. 82, 85 (2006).

⁴⁸ Nat’l Panasonic (UK) Ltd. v. Comm’n, Case 1365/79 ECR 2033 [1980], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61979J0136:EN:HTML>.

decision before it has heard the defense. Perhaps the 8(b) test should include the words *prima facie*, but that is not what the Notice says. In either case, the drafting gives the Commission wide discretion and the decision on whether or not to grant immunity must be intuitive rather than automatic.

The burden of having to supply evidence up-front, at the time of the application, to qualify brings its own difficulties. The first rule in the international leniency “game” is that speed is everything, but some companies may not wish to risk a refusal by going in to the Commission prematurely and without a full deck. In the United States, a “proffer” is sufficient to obtain the conditional immunity grant, with the necessary cooperation coming later.⁴⁹ Timing issues are raised, and nothing could be worse for a leniency applicant than coming in first in the United States and then being “beaten at the wire” in Europe. A leniency program that favors completeness over immediacy may chill applications across the globe.

The Notice sets up a game of poker regarding the run-off for consolation prizes, with the Commission having the advantage of seeing all the cards. How can a company know when it comes in that its contribution will “add value,” especially if it takes the time to investigate thoroughly and provide the maximum of detail and so finishes near the end of the pack? The company’s contribution may be dismissed as of limited or no added value. And if the best a company can hope to get is a ten or fifteen percent reduction on a yet-to-be-quantified fine, why wouldn’t it keep its options open, stay out of the race, and hope that the Commission makes a mistake?⁵⁰

B. *The Leniency Logjam*

The Modernization project was intended to free scarce resources to concentrate on cartel cases. Commission officials have disclosed that as of September 2005 there had been some eighty applications for immunity and a similar number for fine reductions under the 2002 Notice. According to the same source, forty-nine conditional grants of immunity had been made

⁴⁹ Scott D. Hammond, Dir. Criminal Enforcement, U.S. Dep’t of Justice, Speech at the National Institute on White Collar Crime: When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual’s Freedom? (March 8, 2001), available at <http://www.usdoj.gov/atr/public/speeches/7647.htm> (describing the U.S. marker system).

⁵⁰ Some 80 applications for a fine reduction had been made under the new Notice as of September 2005. Of these, 18 applicants had been informed on a preliminary basis of the Commission’s intention to apply a reduction within a specified band, indicating that relatively few Statements of Objection had been issued. Van Barlingen, *supra* note 41, at 6. In a number of cases, the Commission has decided that no significant added value had been provided, a disincentive (one would imagine) to cooperation.

since February 2002.⁵¹ There have only been seventy-nine applications for a fine reduction in those cases, a low take-up rate as there are on average five or six members in each cartel. Only a handful of Statements of Objections (“SOs”) have been issued as a result of the Notice, and just four decisions adopted finally disposing of the case.⁵² Even when cases are decided, the long delay in the publication of Commission decisions will give little guidance to practitioners and the deletion in the published version on business secret grounds of virtually all useful figures, sometimes even those in the cartel documents, makes any attempt to find the rationale for the fines a difficult exercise.

The institution of a leniency program and the large number of “transatlantic” cartels has led to an exponential increase in the number of investigations, and yet cases still take at least three years, and usually five, before reaching a final decision. What goes in does not always come out.

The statistics on cartel decisions speak eloquently to the logjam of cases that threatens to rival the notorious “notification” backlog of the early 1980s.

<u>Decisions</u>	<u>Start of investigation</u>
2006: 2	2000 (1); 2002 (1)
2005: 5	1999 (1); 2001 (1); 2002(3)
2004: 6	1999 (2); 2000 (1); 2001 (2)
2003: 5	1998 (1); 2000 (1); 2001 (3) ⁵³

Commission practice is to grant conditional immunity under the lower 8(a) threshold even if the application is complete enough to qualify under 8(b).⁵⁴ Besides “loss of leniency” for failing to cooperate, three other outcomes are possible when immunity is not granted: “non-eligibility letters,” “rejection decisions,” and “no action letters.”⁵⁵ The non-eligibility letter was invented to deal with cases in which the application was hopelessly misconceived (e.g., the case in point did not even involve a cartel but was a misguided attempt to obtain what used to be negative clearance under the

⁵¹ *Id.* The program got off to a somewhat inauspicious start as the first company to receive a conditional grant had it revoked in the final decision for warning the other cartel members that it had gone in to the Commission. See Raw Tobacco Italy, Case COMP/C.38.281/B.2 (2005), at 102-08 available at <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38281/en.pdf>.

⁵² See Van Barlingen, *supra* note 41. Raw Tobacco Italy, *supra* note 51; Rubber Chemicals, Decision of 21 December 2005, IP/05/1656; Bleaching Products, Decision of 3 May 2006, IP/06/560; Acrylics, Decision of 31 May 2006, IP/06/698.

⁵³ This data came from analyzing the published text of cartel decisions and Commission press releases. It is current as of July 1, 2006.

⁵⁴ Van Barlingen, *supra* note 41, at 7.

⁵⁵ *Id.* at 10-13.

old Regulation No. 17). Unlike the non-eligibility letter, the “rejection decision” and “no-action letter” raise concerns that cases are being dealt with “administratively,” in order to cut the Commission’s backlog. Obviously, the Commission requires an admission of guilt to grant immunity, but when applications are rejected for lack of detail, companies may be deterred from applying at all. Still worse, given the premium on speed and the relatively low threshold of up-front detail that a “proffer” requires in the United States, an application could be successful before the DOJ but rejected by the Commission. According to Commission officials, companies whose applications have been rejected for lack of sufficient evidence have chosen to apply for a reduction in fine,⁵⁶ a curious position for them to have taken since that presumably requires them to provide “value-added” evidence while a successful immunity application in principle needs only an 8(a) roadmap.

A no-action letter—quite different from a “no-action letter” issued to an individual by the OFT that guarantees non-prosecution under the Enterprise Act in return for active cooperation in the criminal or civil case—is used when the Commission feels its priorities lie elsewhere and the case does not in any event merit further consideration. Basically, deciding whether the applicant truly qualifies for leniency would be too time-consuming in view of the likely outcome. The application is put on ice, but the letter does not even provide a guaranteed marker and another company could still come in and receive immunity instead if the first application is deemed “incomplete.” The Commission’s dark hints to applicants that if they really insisted on a formal decision they would probably get a rejection do not promote certainty either. “Applicants have until now been satisfied with the protection offered by the ‘no-action letter,’” the officials note.⁵⁷

The Leniency Notice described neither of these convenient measures for shelving an application “administratively,” so once again the lack of certainty gives real cause for concern.

C. *Get a Reduction, Then Appeal!*

Even if none of the participants substantially contest the allegations, there is no machinery for a streamlined decision process. The Commission still has to issue a SO, give full “access to file,” and hold a hearing.⁵⁸ The

⁵⁶ *Id.* at 12. Under paragraph 17 of the Notice, they would have the option of withdrawing the application.

⁵⁷ *Id.*

⁵⁸ Commission Regulation (EC) 773/2004, 2004 O.J. (L 123) 18.

procedure is, if anything, even more protracted and unwieldy than in pre-leniency days: 150-page SOs with thousands of document references are issued in several languages, and the hearing may well degenerate into a squabble about who applied when with the juiciest denunciation.⁵⁹

Moreover, the fact that the Commission fixes the starting-point fine according to no clearly enunciated rules means that the question “30-50 percent off *what?*” is only answered at the very end in the decision.⁶⁰ Apart from those winning full leniency, applicants are invariably dissatisfied. In the Modernization exercise, the Commission created a Byzantine web of conflicting and overlapping processes, but missed the opportunity to streamline the cumbersome procedures of Regulation 17/62. Companies get substantial fine reductions, and yet ninety percent of them still appeal anyway, winning eighteen percent on average off the fines in the Court of First Instance.⁶¹

The corollary of a leniency program is a system of negotiated settlements. There are no compelling reasons why, if nobody contests, there should not be a short form procedure, including agreed penalties and waiver of any right to appeal.

D. *Radical Reforms are Needed*

Without radical reforms of the enforcement process, the formation of a dedicated Cartel Directorate in late 2005 will by itself change little. After just one hundred days in office, EC Competition Commissioner Neelie Kroes announced her intention to explore introducing guilty pleas and negotiated settlements.⁶² She also promised to review the Fine Guidelines and their disproportionately harsh punishment of one-product companies, which often end up with the maximum fine of 10 percent of their previous year’s turnover.⁶³ However, Commissioner Kroes inclines to the Commission po-

⁵⁹ Under the Commission 1998 Fines Guidelines, undertakings that fail to obtain full immunity may apply for a reduction in fine by providing “added value” evidence and are placed in different percentage “bands” according to their finishing order in the leniency race. Guidelines on the Methods of Setting Fines, 1998 O.J. (C 9) 3.

⁶⁰ Under the Fine Guidelines, the start point “x” for all the fining calculations is determined by the Commission as a matter of discretion. *Id.* There is no machinery for a negotiated settlement.

⁶¹ Case Associates, *Penalties for Price Fixers: A Survey of Fines Imposed in 43 Cartels by the EU Commission*, May 2006, <http://www.casecon.com/data/pdfs/casenote41.pdf>.

⁶² Neelie Kroes, Eur. Comm’n Competition Comm’r, Speech at 40th Anniversary of Studienvereinigung Kartellrecht: The First Hundred Days (Apr. 7, 2005) *available at* <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/205&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁶³ As in Pre-Insulated Pipes Cartel, far greater weight is given in the Guidelines to the size of the market in which the companies operate and hence their sales in the product than to the overall size of

sition, from an earlier age, that making fines more predictable will lead companies to make cynical calculations of the risks of cartel behavior and weight them against the benefits.⁶⁴ This has not occurred in the United States, where the starting point under the Federal Sentencing Guidelines is twenty percent of the volume of affected commerce,⁶⁵ and not an indeterminate “x”.⁶⁶ Predictability is no bad thing: certainty that fines will always be unacceptably high coupled with an enhanced risk of deduction should indeed enhance deterrence.

Furthermore, if guilty pleas are introduced, it would seem necessary to have a benchmark against which to negotiate settlement. Plea bargaining takes place in the shadow of litigation, not in a bazaar. This being said, any guidelines should not be a mechanical operation, and there should be flexibility to allow for full recognition of the “real impact,” which the current Notice asserts is an essential characteristic of the fining process.

E. *Issues*

- * Should there be greater transparency in the EC leniency process?
- * Is the current regime effective?
- * Should the Commission introduce a system of negotiated penalties?
- * Should the Fine Guidelines be made more predictable?

IV. THE PAPERLESS LENIENCY APPLICATION

U.S. civil discovery issues drove the move to entertain the “oral only” leniency application. Since written corporate statements to the Commission are potentially discoverable in triple-damages actions, the requirement in the old Notice for such a narrative was seen as a disincentive to would-be applicants in Europe.⁶⁷

the corporations. Commission Decision, 1990 O.J. (C 24) 1.

⁶⁴ Kroes, *supra* note 62.

⁶⁵ United States Sentencing Commission, *Guidelines Manual* § 2R.1.1 (Nov. 2005), available at <http://www.uscc.gov/2005guid/CHAP2-4.pdf>.

⁶⁶ Guidelines on the Method of Setting Fines, *supra* note 59.

⁶⁷ Van Barlingen, *supra* note 41, at 20.

A. *Not so Convergent*

Lawyers and enforcement agencies initially welcomed the perceived “convergence” with DOJ procedure, in which applications are made orally in the form of a “proffer” and no discoverable admissions are generated.⁶⁸ The analogy should however not be taken too far. What the cooperating party tells the DOJ is of course not admissible evidence in the United States, and if the matter ever did go to trial, the informants could be required to testify under oath in court, probably pursuant to an immunity grant.

In the EC, however, the oral process has slipped from the provision of information sufficient to trigger a raid - that is, the information gathered is used as no more than a road map to the evidence⁶⁹ - to being treated by the Commission as itself conclusive evidence of the violation.

The Commission now relies in its SO on an “out-of-court” oral account from lawyers as proof of the violation itself, rather than just the trigger for a raid—despite the absence of any oath, any penalties for giving misleading or inaccurate information, or any opportunity for cross-examination of sources who have an incentive to embroider the truth.

Moreover, the oral procedure is applied not only in the case of the “first—in,” but has become the regular method of taking statements from “also-rans:” fine-reduction applicants who lost the race to the Commission’s door and who, in the U.S. procedure, would be outside the leniency program. Such statements are being used not only as a “confession” admissible against the maker, but also as evidence against other alleged cartel members.

B. *Calls for Further Reform*

U.S. defense lawyers who had vigorously advocated the introduction of the so-called “paperless procedure” soon began calling for further reform.⁷⁰ They had of course viewed the oral procedure from the perspective of the first-in immunity applicant. Their later initiatives may have been

⁶⁸ Scott Hammond, Dir. Criminal Enforcement, U.S. Dep’t of Justice, Speech at the Conference Board’s 2002 Antitrust Conference: A Review of Recent Cases and Developments in the Antitrust Division’s Criminal Enforcement Program, (Mar. 7, 2002), available at <http://www.usdoj.gov/atr/public/speeches/10862.pdf>; Arp & Swaak, *supra* note 41, at 59.

⁶⁹ Under paragraph 8(a) of the Notice. Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C 45) 3.

⁷⁰ Philip Mansfield, Gary Spratling & William Baer, The EU Leniency Program: The Need for Procedural Reform, American Bar Association International Cartel Workshop (Feb. 5, 2004).

motivated by the fear that the “oral” technique would not be fireproof against U.S. class action discovery. True, if the information is communicated orally and the makers do not keep minutes, there is no permanent written record. However, oral depositions of the declarants are still not impossible, and the “work product” privilege in any drafts or speaking points could be open to challenge on good cause grounds.

It is, however, a subsequent part of the procedure that gives rise to a more obvious discovery danger for “oral” applicants. Because the story will be set out in the SO, and more damagingly, in the transcript of the tape-recorded interview that will be attached to the SO, the Commission helpfully ensured that the admission will be discoverable to class action lawyers at the very time, several years down the line, when settlement negotiations with the most determined “opt-outs” are at their most fraught.

Paperless application champions therefore pressed the Commission to reform its procedures and use the information not as discoverable “testimony” but purely as an internal investigative resource, or “road map,” as in the United States. According to them, the Commission would still be able to get all the necessary evidence in usable form through raids. The Commission, having discovered the attractions of a relaxed evidential standard, is leery about putting the genie back in the bottle.

C. *The Calls Do Not Go Unheeded*

Initially, it seemed that the Commission was going to devise a system limited to ensuring it could obtain an “8(a) roadmap” from the immunity applicant and ensure that it was not discoverable. A new “Access to File” notice was issued, by which a transcript of an interview would be “evidence” only if it is signed or attested by the maker; otherwise, the transcript would remain an internal Competition Directorate General document, not to be disclosed with the SO and hence not discoverable in the United States.⁷¹

The Commission is now proposing, in a draft Amendment to the 2002 Leniency Notice, to formalize the use of the oral procedure not only as a pragmatic means of obtaining a non-discoverable roadmap, but also as a means of taking and receiving “testimony” both from the immunity applicants and from fine-reduction candidates.⁷² Given the absence of a mechanism for entertaining guilty pleas, the cooperating latecomers have to provide more than a simple confession of their own misconduct to win recog-

⁷¹ Commission Notice on the Rules for Access to the Commission File, 2005 O.J. (C 325) 7.

⁷² Draft Amendment of the 2002 Commission Notice on Immunity from Fines and Reduction of Fines in Cases, (Feb. 22, 2006), available at http://ec.europa.eu/comm/competition/antitrust/legislation/leniency_en.pdf.

nition for “added value.” In an attempt to protect the oral statement from disclosure demands from hovering class action lawyers, the Commission has put together an elaborate procedure for access to file by which the transcript of the “oral statements” on which it now so heavily relies are not sent out with the SO but may only be consulted visually at its premises without the opportunity to take a copy.⁷³

Commission officials are clearly concerned that discoverability will act as a deterrent to companies coming forward to cooperate, not only as the “Number One” but also as runners-up in the leniency race, right down to the last to ask for a fine reduction. Discovery in the United States of an “admission” will certainly severely hamper any negotiation strategy with civil plaintiffs. To be sure, plea negotiations with the DOJ are handled in the United States in such a manner as not to generate discoverable materials, but it is worth pointing out that a guilty plea is, in any case, *prima facie* evidence of guilt. The DOJ affords full confidentiality only to immunity grantees and not to those who negotiate a guilty plea.⁷⁴

D. *Issues*

* What are the policy reasons for affording protection from U.S. discovery to applicants for a fine reduction (as opposed to full immunity applicants)?

* Is the oral-only application discovery-proof against a determined class action lawyer? Has the concept been oversold?

* What is the precise status in a cartel case of oral statements from defense lawyers or company employees? Should use of the oral procedure be confined to providing a “roadmap,” or ought it to be of more general application?

* Are there due process implications in relying as proof of the violation on out-of-court statements by a co-conspirator, which are unsworn, not subject to cross-examination, and made without any penalty for untruthfulness?⁷⁵

⁷³ See *id.* at 2.

⁷⁴ See e.g., Gary R. Spratling, Deputy Assistant Attorney Gen., *Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg?* Address to Twelfth Annual National Institute on White Collar Crime, (March 6, 1998), available at: <http://www.usdoj.gov/atr/public/speeches/212581.htm>. The Department of Justice, however, has been prepared as a rare exception to guarantee non-disclosure to other agencies where the evidence is crucial to the prosecutions and there is no other way of obtaining it. See Gary R. Spratling, Deputy Assistant Attorney General, *Criminal Antitrust Enforcement against International Cartels: Highest Priority of the Antitrust Division*, Advanced Criminal Antitrust Workshop (Feb. 21, 1997) (explaining the Haarmann and Riemer plea agreement in the Citric Acid Conspiracy).

⁷⁵ Julian Joshua, *Oral Statements in EC Competition Proceedings: A Due Process Short-Cut?*,

* What are the implications of the new Notice on Access to File and the proposed amended 2002 Leniency Notice?

V. NO SINGLE-STOP SHOP FOR LENIENCY IN THE EU

Since modernization, the Commission is no longer the sole enforcement authority for prosecuting cartels. Most cartels are now uncovered as a result of leniency applications, leniency having proven a formidable case generator. Any one of the NCAs could, in theory, investigate a suspected cartel and offer leniency under Article 81—if, that is, it has a leniency program.

A. *Too Much Leniency?*⁷⁶

The one thing about which the Notice is clear is that an application to one authority is not to be considered as an application to any other member of the network.⁷⁷ Member States have their own immunity or leniency programs, each one different from the others' and from the Commission's, and several have none. Even if an applicant could contrive to apply to all the jurisdictions that might be interested, it is by no means a sure thing that an applicant will qualify under all programs. What is more, when a violation is discovered during an internal audit, its precise geographic scope may take some time to determine. The U.S. system encourages applicants to get in first through the courthouse door, start cooperating, and perfect their application as the picture evolves. It is easy to imagine a scenario in Europe under which an application by one company to the Commission or a number of NCAs sets off a series of "tit-for-tat" applications in the remaining jurisdictions by the losers of the race.

Leniency applicants and their advisers have to make several judgment calls, often under immense time pressure:

* To which authority or authorities should they apply, and when? Should applications be made simultaneously (or as near as possible to simultaneously) in each jurisdiction? How should an application be coordi-

COMPETITION LAW INSIGHT, December 7, 2004 at 5-7, available at http://www.howrey.com/docs/oral_statementdec2004.pdf.

⁷⁶ WILLIAM SHAKESPEARE, THE THIRD PART OF KING HENRY THE SIXTH act 2, sc. 6 ("And what makes robbers bold but too much leniency?").

⁷⁷ Commission Notice C 101, *supra* note 9, at 48.

nated with an application to other enforcement agencies, and principally the United States if there is a transatlantic element?

* What evidence should be submitted, and in what form? What evidence is sufficient to earn leniency?

* Should the application be made under national as well as EC competition laws?

* Should the applicant give consent for information or evidence provided under a leniency application to be transmitted to other authorities, whether in the ECN or abroad?⁷⁸

B. *No Problem!*

Competition Directorate General officials seem relatively unconcerned by the complexities, noting that there are unlikely to be “more than three or four” NCAs involved in a case, and advising legal counsel to apply to all of them.⁷⁹ But managing a coordinated transatlantic leniency application involving only the DOJ and the Commission is complicated enough without bringing the NCAs into the game as well. The expense and bother of applying to multiple authorities, out of an expense of caution, is difficult for companies to understand and hardly conveys an impression of efficiency on the part of Community mechanisms.⁸⁰ Ultimately, the whole exercise of multiple applications across Europe might prove pointless even as a precautionary measure, because the Commission would probably pull the case back anyway.⁸¹ But if that does happen, and there have been different “first-in” leniency applicants in different jurisdictions, who will be deemed to have won the race?

⁷⁸ According to the Network Notice, consent is not required for transmission inside the ECN where (1) both authorities have received an application relating to the same infringement from the applicant; (2) where the receiving authority has signed up to a commitment that it will not use the information to impose sanctions; or (3) where the receiving authority is being asked under Article 22(1) of Regulation 1/2003 to carry out an investigation on behalf of the authority that received the application. *Id.* at 48-49. All the NCAs have signed the commitment but not all concerns have been allayed.

⁷⁹ Blake & Schnichels, *supra* note 4, at 11.

⁸⁰ Commissioner Kroes, however, publicly recognized within a few months of taking up her appointment that “the present system of multiple filings with all relevant authorities within the ECN costs time and money and that differences between programmes might dissuade potential applicants from applying.” Neelie Kroes, Member of the European Commission in Charge of Competition Policy, Taking Competition Seriously: Antitrust Reform in Europe, Speech at the International Bar Association /European Commission Conference (March 10, 2005), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/157&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁸¹ See Commission Regulation 1/2003, 2003 O.J. (L 1) 11. There is no obligation on the Commission, however, to employ its powers under this provision.

Commission officials maintain that if there are difficulties, they are not the result of Modernization: the situation in that respect is said to be “no different from that which existed previously.”⁸² The reality is that prior to Regulation 1/2003, the Commission was the only agency with the competence to investigate and sanction cross-border cartels under Article 81.⁸³ If the Commission was seized of the matter under Article 81, Member States did not in practice get involved. Although a handful of NCAs had been given power under their national laws to enforce the EC rules of competition, there was no rush for them to do so, and their competence was limited to cases of purely national impact. If the Commission took up a case, national authorities were loath to start proceedings under national competition laws. There was no need to trail around Europe making multiple leniency applications as there was little risk of multiple prosecutions. In order to secure an effective grant of immunity in Europe for a global, transatlantic, or EC-wide cartel, a company only had to go to Brussels.

C. *Issues*

* Is it as simple as the Commission appears to believe to apply simultaneously to the Commission and several NCAs?⁸⁴

* How has the leniency application procedure worked in practice?

* Are concerns about the confidentiality of material provided pursuant to a leniency application justified?

* Is there any good reason why the Commission could not set up the machinery for a single-stop leniency broker in the EU? How could this be achieved? Would it require an amendment of the Regulation?

⁸² Blake and Schnichels, *supra* note 4, at 8; *see also Q & A on Modernisation with Kris Dekeyser*, GLOBAL COMPETITION REV., April 2005, at 11-16.

⁸³ Council Regulation (EEC) No. 17, 1962 O.J. (13), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31962R0017:EN:HTML>; CHRISTOPHER KERSE & NICOLAS KHAN, EC ANTITRUST PROCEDURE 445 (4th ed. 1998) (“[T]he broad jurisdictional demarcation line between the community rules and national competition law is said to be ‘the effect upon trade between Member States.’”).

⁸⁴ *See* Blake & Schnichels, *supra* note 4; *Q & A on Modernisation with Kris Dekeyser*, *supra* note 82.

VI. INTERNATIONAL COOPERATION

A. *Mutual Legal Assistance and More*

The Commission sets great store by its relationship with DOJ and the U.S. Federal Trade Commission. The Cooperation Agreements of 1991 and 1998 were groundbreaking developments, but they only allow for “soft” cooperation.⁸⁵ This has its limits in a contentious procedure when the cooperation of the subjects of an inquiry cannot be presumed. While the DOJ and the Commission can coordinate their cartel investigations, “pick up the phone” cooperation is now the watchword, and on one memorable occasion the United States, EC, Canada, and Japan timed their actions to begin on the same day. However, the prohibition on exchanging the product of their investigations ensures that cooperation is limited. By contrast, prosecuting and investigative agencies with criminal law jurisdiction have wide powers by statute or under Mutual Legal Assistance Treaties (“MLATs”) to pool evidence and even conduct searches on one another’s behalf.⁸⁶

Article 28 of Regulation 1/2003 repeats in updated language Regulation No. 17’s strict injunction that information collected by compulsion may only be used for the purpose for which it was acquired.⁸⁷ Even if the powers that be can be persuaded to revise Regulation 1/2003 to allow the exchange of evidence with overseas agencies, the visceral opposition of some Member States to using the evidence collected by the network in order to jail individuals for antitrust offences even inside Europe is apparent from the terms of Article 12(3).⁸⁸

The U.S. has, in the meantime, found willing coalition partners in its war against international cartels. A few countries, notably the UK, have made price-fixing a serious criminal offence.⁸⁹ Whether or not the CEO of a major UK company will ever stand in the dock at the Old Bailey to face an indictment under Section 188 of the Enterprise Act 2002 is a matter of conjecture. For the United States, the success of any prosecutions that might

⁸⁵ See U.S.-EU Agreement on the Application of Their Competition Laws, 1995 O.J. (L 95) 47, as supplemented by the Agreement on the Application of Positive Comity Principles, 1998 O.J. (L 173) 28.

⁸⁶ For a general view of the use of MLATs and other instruments of international cooperation in the criminal field, see AMERICAN BAR ASSOCIATION, HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS 261 (3d ed. 1978).

⁸⁷ Commission Regulation 1/2003, 2003 O.J. (L 1) 20.

⁸⁸ See Gauer, *supra* note 22, at 16 (referring to the working documents of the European Council).

⁸⁹ See Enterprise Act, 2002, s. 188 (U.K.); Competition Act, 2002, s. 6 (Ir.); In Australia, the Federal Government has proposed that criminal sentences of up to five years’ imprisonment be introduced against hard-core cartels.

one day be brought in London is not critical. What matters for the DOJ is that changing official perceptions of price fixing—so that it is regarded by the UK as unalloyed criminality—has opened avenues of cooperation that are only available in the criminal law area. On February 24, 2006, the U.S. won the latest round in its battle to secure the extradition to the U.S. of Ian Norris, former CEO of Morgan Crucible, on Sherman Act charges.⁹⁰ The Administrative Court dismissed his application for judicial review of the continued designation of the United States as a territory to which extradition does not require prima facie evidence.⁹¹ Mr. Norris' statutory appeals against the findings of the extradition judge that the offences on which his extradition was sought were "extradition offences" as defined in the Extradition Act 2003⁹² and the Home Secretary's decision to order his extradition are still pending. Crucially, given the time-frame of the alleged price fixing offences, which ran from 1989 to 2000 and thus pre-dated the UK's criminalization, British prosecutors arguing on behalf of the U.S. government could not invoke the "cartel offense" to provide the necessary dual criminality but instead relied on the old common law crime of conspiracy to defraud.⁹³

Mutual Legal Assistance and Extradition treaties are powerful weapons for fighting international crime. Dual criminality is essential for extradition. Only if the underlying conduct alleged is a serious crime in both jurisdictions will mutual legal assistance authorize the most coercive measures like house searches.

The United States, with its new focus on punishing individuals, may lose patience with the inability of the Commission to provide it with any meaningful evidence and quietly sideline it as a partner in favor of more obliging allies.

The Commission has raised as a priority the need to enhance cooperation with other agencies at a global level. No doubt this means primarily the United States, but the inability of the EU to conclude treaties, plus the absence of any European criminal law jurisdiction, remains a serious obstacle to providing the sort of hard cooperation, in the form of evidence sharing, that the United States expects. Executive agreements, such as the present U.S.-EU arrangements, cannot override U.S. or EC laws that prohibit evidence pooling. To be sure, machinery exists in the little-used shape of the

⁹⁰ R on the application of Norris v. Sec'y of State for the Home Dep't, [2006] EWHC 280 (Admin) (Eng.).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See Julian Joshua, *Extradition and Antitrust: The Latest Round in US v. Norris*, ABA INT'L ANTITRUST BULL., Spring 2006, at 19; Sir Jeremy Lever, Q.C. & John Pike, *Cartel Agreements, Criminal Conspiracy and the Statutory "Cartel Offence"—Part I*, 26 EUR. COMPETITION L. REV. at 90 (exploring the application of conspiracy to defraud to price fixing).

International Antitrust Enforcement Assistance Act (“IAEAA”) of 1994⁹⁴ for the U.S. antitrust agencies to conclude antitrust-specific international cooperation agreements (known as “Antitrust Mutual Assistance Agreements” or “AMAAs”) with overseas enforcers that actually allow for (1) the sharing of confidential information collected in pursuance of an antitrust investigation and (2) securing the other party’s assistance to gather evidence on its territory for use by the other—an MLAT in all but name. Under the IAEAA, the U.S. courts are able on a showing of “particularized need” to lift Grand Jury secrecy (Rule 6(e) of the Federal Rules of Criminal procedure) and allow disclosure to the overseas partner and even obtain documents by compulsory process for transmission overseas.⁹⁵ The beauty of this device is that the other agency does not have to be a criminal law enforcer.

So far, the United States has concluded only one AMAA—with Australia.⁹⁶ Reciprocity is the basis of the IAEAA. Given the distaste of several EU Member States for hardball criminal law enforcement in the antitrust area, the likelihood of the Council ever approving shipping to the United States of evidence gathered in an Article 81 investigation in order to prosecute and jail executives, including “their” own nationals, is remote.

B. *Issues*

* Does the current Cooperation Agreement with the United States need updating to allow for evidence sharing for use in Section 1 Sherman Act criminal proceedings?

* How could this be done given the inability of the EU to conclude an MLAT with the United States?

* Is an Antitrust Mutual Assistance Agreement under the IAEAA the only available vehicle?

* Is there any prospect of the Member States agreeing to share evidence with other jurisdictions, including those with criminal law systems, so as to meet the reciprocity requirement?

⁹⁴ 15 U.S.C. §§ 6201-6212 (1994).

⁹⁵ 15 U.S.C. § 6204(2)(A)-(B) (1994).

⁹⁶ Agreement on Mutual Antitrust Enforcement Assistance, U.S.-Austl., Apr. 27, 1999, available at <http://www.usdoj.gov/atr/public/international/docs/usaus7.htm>.

CONCLUSION

The Modernization project has set up a labyrinthine system for competition law enforcement and regulation in Europe. If the Commission wishes to remain in the driving seat, and maintain its leading position in the global antitrust community, it needs to undertake a deep and wide-ranging review of its present outmoded procedures and look beyond the Regulation's Eurocentric horizons. As Ms. Kroes says: "We need to look at wider systemic changes in the cartel area if we are to tip the balance back in favour of pro- rather than re-, activity by the European enforcer."⁹⁷

⁹⁷ Kroes, *supra* note 62.