

III

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Searches Beneath the Cherry Tree in the Garden: European Thoughts on How to Enhance the Task of Uncovering and Thereby Deterring Cartels

A. Introduction

These annual gatherings in the beautiful setting of the European University Institute have significantly shaped how competition law in Europe has been interpreted and structured. After an invigorating debate from 1996 to 1999 on the purpose and scope of the Treaty's core provisions on unlawful agreements and the European Commission's idiosyncratic interpretation of Article 81(1) and (3) EC, we moved to discussing how the Commission could achieve better and more consistent enforcement by harnessing the resources of other competition authorities and other agencies, without making unacceptable sacrifices in terms of quality. The debate about the wisdom of Regulation 1/2003 is now concluded, and we may presume that the regulatory basis for the new regime is not going to change significantly in the professional lifetimes of most of us.² The topics selected for discussion at previous gatherings have been very challenging. However, a number of people have said to me this year that cartels are a rather routine topic, a matter of proof and evidence, not intellectually difficult. In one sense, it is true that the prosecution of cartel-like activity may be "merely" an issue of gathering evidence and demonstrating to the requisite standard of proof that punishable wrongdoing has occurred. But genuinely difficult choices are presented. Do we wish to maximise the number of cartels unearthed in the expectation that participants will discontinue? Do we wish to punish a maximum number of those who engage in cartel behaviour? Do we wish to maximize the pain of those who are discovered to have engaged in cartel activity? Is punishment a more or less important goal than cessation? Are the enforcement targets equally those companies ("undertakings" in the cumbersome language of the Treaty) and the men or women

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² Claus-Dieter Ehlermann presciently observed: "Regulation No. 17 contains all the basic procedural rules for Community competition policy. If and when it is revised, it will only be revised once for the foreseeable future." See "Developments in Community Competition Law Procedures", *EC Competition Policy Newsletter* 2 (1994).

162 *Session A – Unearthing Cartels—The Evidence*

who are employed by those companies? Do we wish to maximise the chances of “genuine victims” (as opposed to those putative victims whose true situation gives their lucky counsel a ticket to financial rewards) to obtain indemnification? Should the penalties for such behaviour be savagely economically painful, more painful than negligently causing the death of a worker?

These choices cannot be pursued simultaneously. (Indeed, I submit that we are not usually made aware that choices lie before us.) The current processes by which the European Commission investigates possible offences and decides what to do about them are inadequate to the preparation of criminal prosecutions. We cannot expect DG Competition officials to be trusted with powers to perform electronic surveillance; nor to be expected to prove their accusations to the level of near certainty demanded by criminal procedure; nor do they prove their case in a court; nor are we (yet) culturally disposed to regard cartels as they are regarded in the United States.

However, I think most of us would agree on two propositions. First, the United States is the world leader in successfully identifying and prosecuting those who engage in cartels. Secondly, while “Europe” fully endorses the general principle that cartel activity is socially and economically undesirable, the repression of cartels is handicapped by a lack of sympathy for a number of aspects of US antitrust practice.

It is interesting to reflect on a number of these emotional factors before making suggestions about how the Commission’s powers and priorities might change or be reinforced. This may help identify some weaknesses and opportunities in the current enforcement environment.

1. Cartels exist

I begin with a personal anecdote. Cartels in Europe exist. I have by chance personal knowledge through a member of my family of one victim. He was the owner of a small British company in a wholesaling business in a consumer product. He was informed by an employee of one of the company’s suppliers that several competing suppliers of his wholesale business had decided that the company’s business was disrupting suppliers’ activities too much, and that the company must therefore be eliminated from the marketplace if it would not change its behaviour. The interlocutor was not insulting, impolite; indeed, he was rather sympathetic. But since the company could not change its behaviour, its business was effectively extinguished within four months. The stock was liquidated and the owners sought new jobs. The boss of the business wrote to DG IV describing what had happened. Some weeks later, a reply was received, courteously stating that because of shortage of resources and the need to set priorities the Commission would not be pursuing the complaint. That was in 1989. About fifteen years later, the Commission

Enhancing the Task of Uncovering and Thereby Deterring Cartels 163

condemned a number of companies, including the former suppliers of the defunct business, for having engaged in cartel-like behaviour along the lines of the conduct complained of by my acquaintance. He is now endeavouring to extract some modicum of compensation for having seen his business ruined, but because of the applicable law on evidence of proof he faces formidable difficulty in obtaining any reparation. The cartel member is strenuously denying any duty to indemnify him.

The relevance of this story is that it illustrates the difficulty of redress, and the virtual dependence of European victims on enforcement by the public authorities. Even when a complainant is armed with specifics, it is not easy to obtain redress. Although the availability of damages for breaches of the competition rules has been a theoretical possibility for thirty years and more, awards by courts have been rare.

By far the best way of getting details of an infringement is from an insider. How to induce insiders to volunteer information involves exploiting a mixture of fear and self-interest. The Commission has an interest in encouraging those who are participants in industry-wide agreements to tell the public authorities; in encouraging non-participants to be aware of the illegality of engaging in such behaviour; in recalibrating the perceived benefit of coming forward with evidence by making penalties more predictable; and treating more fairly those who have chosen to volunteer information. However, I submit that the European Commission has been less successful than the US authorities in developing a regime to induce confessions.

The goal of any cartel regime should be to induce a wise general counsel to rush to confess the very day that the counsel hears of a problem. To that end, a well-working leniency programme is crucial. Among the inhibiting factors which have made European leniency programmes less attractive are lack of confidence in the Commission's fairness in setting fines; the dangers of creating huge civil liabilities in the United States; the relative slowness of the procedures and their non-transparency; and the lack of predictability of the steps following the making of a confession. It is extraordinarily interesting that the Commission is adopting creative means to palliate the problems occasioned by the distortions of analysis due to US civil litigation, notably the rules on treble damages. I shall be submitting that the Commission might consider additional targets, powers or practices that could assist its enforcement activity. Some of these suggestions are not very bold, and some are likely to be dismissed as unthinkable.

In order for a leniency programme to be truly successful, it must offer a huge incentive to take the risk of volunteering the truth as opposed to waiting and hoping in silence. This implies total immunity from penalty if the public authority hears about it for the first time from the confessing party, a continuing receptiveness to receiving confessions from a participant even after the public authority knows of the cartel, as well as a readiness to extend concessions to late-comers in order to complete the public authority's files

164 *Session A – Unearthing Cartels—The Evidence*

revealing the nature of the infringement (Julian Joshua elegantly calls this the principle of only one first prize with less attractive prizes for runners-up).

How should this review fit within the modernization package and the reshaping of the Commission's administrative enforcement powers?³ The decentralisation aspect of modernisation increased the resources of the European Commission by enlisting the support of national competition authorities (NCAs) and national courts in the enforcement of EC competition law, and the procedural reforms actually provided the Commission with new tools. A review of Chapters V. to VIII of the new Regulation⁴ and of the accompanying Regulation 773/2004⁵ and Notices readily demonstrates that in the new system the Commission enjoys a much stronger procedural framework for an effective enforcement of the competition rules.⁶ However, the Commission has sought to develop an array of new methods, outside and beyond the confines of Regulation 1/2003, to complement its new investigative arsenal. These initiatives have ranged from increasing reliance on NCAs and private enforcement, to the more novel possibilities of fining undertakings that facilitate a cartel and the use of trustees to monitor the implementation of its decisions. While these initiatives may be to ensure the "optimal enforcement" of the competition rules, it is open to debate whether they are appropriate. I invite us to reflect on the penalties visited upon those found to have engaged in cartel activities. The sums of money are immense: they have totalled €99 million (December 1999, steel tubes); €110 million (June 2000, lysine); €218 million (July 2001, graphite electrodes); €855 million (November 2001, vitamins); €313 million (December 2001, carbonless paper); €478 million (November 2002, plasterboards); €222 million (September 2004, copper plumbing tubes); €290 million (November 2005, industrial bags); €388 million (May 2006, hydrogen peroxide); €266 million (September 2006, road bitumen).

Comparing the wages of different sins is always unsatisfactory, but the effort is not foolish as it reveals whether our society officially considers it worse to put out rubbish on the wrong day, to drive at an excessive speed, to assault another supporter at a football match, or to use hateful language towards an ethnic minority. By that imperfect standard it would seem that

³ See Forrester I. (2001): "The Reform of the Implementation of Articles 81 and 82 Following Publication of the Draft Regulation", 28 *Legal Issues of Economic Integration* 173; Riley A. (2003): "EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part One: Regulation 1 and the Notification Burden", 24 *European Competition Law Review* 657, at p. 604; Venit J. (2003): "Brave New World: The Modernization and Decentralization of Enforcement Under Arts 81 and 82 of the EC Treaty", 40 *Common Market Law Review* 545.

⁴ *Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ L 1 [2003].

⁵ *Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty*, OJ L 123 [2004].

⁶ See Forrester I. (2004): "Modernisation: An Extension of the Powers of the Commission?", in Geradin D., ed., *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Intersentia, Brussels, pp. 83–97.

Enhancing the Task of Uncovering and Thereby Deterring Cartels 165

attending industry-wide meetings at which prices and customers are agreed is an offence graver than causing death by negligent maintenance of a railway track, selling meat contaminated by fatal *E-coli* bacteria, or evading taxes or excise duties.

It may be the case that the current administrative system of investigation has reached its limit. At this stage of the legal process, the more Europe moves to the criminalization of competition law infringements, the more it will be necessary to give better protection and elaborate more rigorous procedural rules. These other, probably unwelcome, reforms might sharply slow matters down, and would trigger calls for fundamental changes in how the Commission investigates and reaches decisions in quasi-criminal cases.

This article will review the current investigative powers of the Commission in relation to its fight against cartels and whether they are sufficient. It will first compare the new powers given to the Commission by Regulation 1/2003 with those under Regulation 17/62⁷ in the fight against cartels. It will then review the Commission's recent initiatives to extend its investigative arsenal beyond the strict scope of Regulation 1/2003 through the use of novel tools, and then make some suggestions.

B. Current Commission Tools

Under Regulation 17/62, the Commission had two main investigatory powers at its disposal: the power to request information in a two-stage process (Article 11 of Regulation 17) and the power to carry out inspections (Article 14 of Regulation 17). However, in the words of Regulation 1/2003, "The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented."⁸ Consequently, Regulation 1/2003, while maintaining and enhancing these existing powers, granted the Commission a series of new powers. These include:

—The power immediately to request information from undertakings (Article 18(1)).

⁷ OJ 13 [1962].

⁸ Recital 25 of Regulation 1/2003. See also Monti M. (2000): "Why and How? Why Should We Be Concerned With Cartels and Collusive Behaviour?", speech delivered at the 3rd Nordic Competition Policy Conference Stockholm, 11–12 September 2000: "[. . .] in a global economy where infringements become more and more sophisticated, it is of a paramount importance that the Commission is properly equipped with investigative powers that allow it to effectively detect infringements of the Community competition rules. To do so, we must make the Commission's inspection powers more biting."

166 *Session A – Unearthing Cartels—The Evidence*

- The power to interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation (Article 19).
- The power to seal any business premises and books or records for the period under inquiry and to the extent necessary for the inspectors to ask any representative or member of staff for explanations on facts or documents relating to the subject matter and purpose of the inspection, and to record the answers (Article 20(1)(d) and (e)).
- The power to search private homes, where the Commission has a reasonable suspicion that books or other records related to the business and to the subject matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 EC, are being kept in any other premises.

These increased powers are complemented by the significant increase in fines which the Commission may impose on undertakings for non-compliance: fines of up to 1% of global turnover under Article 23 to periodic penalty payments of up to 5% of global turnover under Article 24. The tariff prior to Regulation 1/2003 was in tens of thousands of Euros; a daily fine of €2 million per day is being threatened in June 2006 for alleged non-compliance against at least one company.⁹

1. Information requests

Information requests (“Article 18 requests”) are widely used by the Commission as a means of obtaining information from companies and third parties.

The Commission can now issue simple non-obligatory information requests to undertakings. Although not obligatory, these are unlikely to be treated as trivial or as capable of being disregarded. Alternatively, the Commission can adopt a formal decision, compelling the delivery of certain information. (At the same time, Article 18(4) now recognizes that such information can be supplied by a company’s legal representatives, although the company still remains fully liable if the information supplied is incomplete, incorrect or misleading.)

At the same time, the case law¹⁰ has also recognized a limited right to undertakings against self-incrimination. Two early judgments, *Solvay v.*

⁹ Microsoft: a fine of €280,500,000 was imposed under Article 24 by a Decision of 12 July 2006.

¹⁰ Case 374/87 *Orkem SA v. Commission* [1989] ECR 3283; Case T-112/98 *Mannesmannröhren-Werke* [2001] ECR II-729; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v. Commission* (“PVC II”) [2002] ECR I-8375; Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon Co. Ltd and others v. Commission of the European Communities* (“Graphite Electrodes”) [2005] ECR II-10.

Enhancing the Task of Uncovering and Thereby Deterring Cartels 167

*Commission*¹¹ and *Orkem v. Commission*¹² raise the question of whether there is something akin to the privilege against self-incrimination in responding to decisions requesting information under Article 11 of Regulation 17/62. The Court noted that Regulation 17/62 by its terms recognizes no such right, and indeed instead calls for active cooperation from the party investigated. Examining the question from the point of view of fundamental rights, the Court found that while the legal systems of the Member States generally recognise a right for a physical person in a penal procedure not to testify against himself, they do not recognise such a right for legal persons (companies) accused of infringing economic law, and competition law in particular. It reached similar conclusions with regard to the European Convention on Human Rights, and the International Convention on Civil and Political Rights.

However, a somewhat different result was reached in examining the status of the rights of the defence:

“While . . . the Commission is entitled to oblige the company to furnish all necessary information relating to facts of which it is aware and, if necessary to communicate to it the relevant documents in its possession even if these may be used to prove anti-competitive behaviour by it or by another company, it may not, by a request for information, compromise the rights of defence of a company.

Thus the Commission may not oblige a company to furnish replies by which it would be induced to admit the existence of the infringement which it is for the Commission to prove.”¹³

Based on these criteria, the Court approved requests for factual information concerning meetings, the identity of the participants, and the documents relating thereto. Questions relating to initiatives on prices were approved to the extent that they related to the subject and modalities of these initiatives, but disapproved to the extent that they related to their objectives.

This has been codified by Recital 23 of Regulation 1/2003.¹⁴ On the one hand, undertakings must actively cooperate with the Commission’s investigation. On the other, the Commission may not compel an undertaking to provide it with answers that may involve an admission on the undertaking’s part of the existence of an infringement. As to the so-called “gap” between the

¹¹ Case 27/88 *Solvay v. Commission* [1989] ECR 3355.

¹² Cited above. See more generally, Forrester I. and Norall C. (1990), in Barav. A. and Wyatt D., eds., *1989 Yearbook of European Law*, Clarendon Press, Oxford, p. 305.

¹³ *Orkem*, paras. 34 and 35.

¹⁴ “The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the EC Treaty or any abuse of a dominant position prohibited by Article 82 of the EC Treaty. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.”

168 Session A – Unearthing Cartels—The Evidence

Luxembourg Courts' case law and Article 6 of the Strasbourg ECHR, Advocate General Geelhoed in the *Graphite Electrodes* appeal¹⁵ dismissed the notion that a request for documents is contrary to the right to remain silent, guaranteed by Article 6. I am not completely convinced that there is no problem of fundamental rights. In my view, it remains sensitive to compel a company to reply truthfully and helpfully to detailed questions and then to punish the company for what its answers reveal.

2. Power to take statements

The power to take statements is not to be confused with the Commission's power to ask for on-the-spot oral explanations during a dawn raid. Article 19 of Regulation 1/2003 grants the Commission the power to take statements from any natural or legal person. However, the extent of this power is fairly limited. The Commission must obtain the consent of the person to be interviewed. The information sought and collected from the statements must relate to the subject matter of the investigation. And Regulation 1/2003 does not provide for any sanctions if false or misleading information is given in these statements.

Article 19 statements should not be underestimated: the discussion may be a bit tense, but the exchange can still be useful. I think experienced practitioners would generally say that a company is more likely to be cooperative and truthful than Commission officials tend to expect. Asking a question is likely to elicit information.

3. Dawn raids

The Commission's powers in relation to dawn raids under Article 20 of Regulation 1/2003 are largely similar to those previously granted under Article 14 of Regulation 17/62. Most adjustments and changes have been in favour of the Commission. For example, Article 20(2)(b) now reads "officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered to examine the books and other records related to the business, irrespective of the medium on which they are stored," confirming the Commission's previous contention that it could inspect all

¹⁵ See the opinion of AG Geelhoed of 19 January 2006 in Case C-301/04 P *Commission of the European Communities v. SGL Carbon* (*Graphite Electrodes* appeal), paras. 65–67.

Enhancing the Task of Uncovering and Thereby Deterring Cartels 169

records, even in electronic format. Similarly, Article 20(2)(c) now allows the Commission “to take or obtain in any form copies of or extracts from such books or records”, there being no need for the Commission to get permission to use the undertaking’s photocopying facilities.

Article 20(2)(d) of Regulation 1/2003 is entirely new and allows the Commission to “seal any business premises and books and records”. The seal can be placed “for the period and to the extent necessary for the inspection” and Recital 25 confirms that “seals should normally not be affixed for more than 72 hours”. Article 20(2)(e) allows the Commission “to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers”. Inspectors can therefore target the people they believe are the best placed to give answers to their questions.

A reliable urban myth tells us that there is a cherry tree in the garden of the director of a German company beneath which snooze embarrassing documents related to a serious infringement of the competition rules. And so last but not least, “in order to safeguard the effectiveness of inspections” Article 21 extends the Commission’s power of investigation to the search of the private homes of individuals. According to Recital 26, this was because “[e]xperience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking”. Many practitioners would not disagree. The decision to conduct such a search cannot be executed without prior authorisation from the national judicial authority of the Member State concerned. The anxiety of the drafters is clear enough—to avoid a sympathetic court’s annulling the Commission’s investigative initiative. A national court requested to issue such a warrant cannot review either the legality of the Commission’s decision or the necessity of the inspection. Nor may it request access to the content of the Commission’s file. All it is free to consider is whether the Commission’s decision is authentic and whether the envisaged coercive measures are neither arbitrary nor excessive with regard to the subject matter of the investigation.¹⁶

Fundamental rights of defence during a dawn raid include the right not to be subject to an unauthorized investigation, the right to obtain legal advice, the right to withhold the provision of legally privileged documents (that category is the subject of debate) and the right to protection against self-incrimination. However, the penalties for non-cooperation with a dawn raid are fierce: an undertaking may be liable for fines up to 5% of its average daily turnover in the preceding business year.

¹⁶ This article is a codification of the judgment in Case C-90/00 *Roquette Frères* [2002] ECR I-9011.

170 *Session A – Unearthing Cartels—The Evidence*

4. Are companies rightly feared to be rogues?

I suspect that the Commission underestimates the degree of scrupulousness with which corporate candidates for investigations, especially very large ones, conduct their affairs. More specifically, any large company is under multiple duties to report to various agencies, to have systems in place that will facilitate the detection of improper or corrupt payments, and to ensure compliance with environmental, regulatory, stock exchange, fiscal and safety rules. From my own experience I submit that Commission officials who conduct inspection visits are likely to suspect, or even to expect, that destruction of evidence will occur unless the inspectors rapidly take precautions to secure the premises. Though such fears are understandable, and in certain past cases well founded, I believe they are mistaken in the vast majority of cases.

I further submit that there have been occasions when raids were conducted not to discover vulnerable evidence but to demonstrate the Commission's toughness or energy, or perhaps to suggest that the target company may be guilty of something.¹⁷

5. Leniency

Confessions are the commonest method through which the Commission first learns about the existence of a cartel that it is subsequently able to investigate. Leniency is thus an upstream asset, the attractiveness of which is essential for Commission policy. The US was the first jurisdiction to realise the potential of such a system in 1978. The Department of Justice's 1993 amnesty programme for whistleblowers has had great success in revealing the existence of many cartels.¹⁸ The EU's experiments with leniency have had more uneven success. In the first version of the Leniency Notice, adopted in 1996,¹⁹ there was no guarantee for the first company that came forward with "decisive evidence" of the existence of a cartel that it would obtain 100% immunity. Instead, the 1996 Notice provided that the undertaking could obtain either complete immunity from fines or a reduction in the level of the fine of at least 75%. Since the level of fines was not revealed till the moment when the

¹⁷ I name as an example the now ancient case of football, when national football associations were "raided" for information about the charges made to suppliers of footballs for affixing a tournament logo, information which was neither secret nor sensitive, and could have been obtained by a telephone call or a letter.

¹⁸ For example, both the *Citric Acid* cartel and the *Vitamins* cartel were brought to light because of whistleblowing.

¹⁹ *Commission Notice on the non-imposition or reduction of fines in cartel cases*, OJ C 207 [1996].

Enhancing the Task of Uncovering and Thereby Deterring Cartels 171

Commission actually issued its final decision,²⁰ the promise of a discount from an unknown and unpredictable figure was not very meaningful.

The Commission chose to adopt a new Notice in 2002²¹, a more sophisticated approach to its treatment of whistleblowing. The 2002 Notice now guarantees 100% immunity to the initial whistleblower, provided the whistleblower complies with several other conditions.²² The 2002 Notice has created incentives for undertakings to confess.²³ But the increasing use of leniency by companies confronting cartel problems has raised a number of questions.

5.1. *The discoverability of EU leniency statements in US civil proceedings*

Potential leniency applicants are increasingly reluctant to seek leniency in Brussels because of the risk that the information provided to the Commission may be discoverable in actions brought by third parties in the US,²⁴ as this will make more likely civil exposure to treble damages claims in the US.²⁵ Tactical choices about what to do, when and how are greatly influenced by the US situation.

Mandatory treble damages awards to successful civil antitrust plaintiffs have been a cornerstone of US civil antitrust enforcement since the enactment of the Sherman Act in 1890. The Clayton Act incorporates the treble damages provision. Congress created treble damages awards in order to advance four goals: (1) compensation; (2) deterrence; (3) disgorgement of illegal profits; and (4) punishment.²⁶ From 1890 to 1940, plaintiffs brought just 175 private actions. But from 1941 to 1985, plaintiffs brought nearly 30,000 private actions.²⁷ The

²⁰ See Joshua J. (2004): "EC Fining Policy Against Cartels After the *Lysine* Rulings: The Subtle Secrets of X", *Global Competition Review* 5.

²¹ *Commission Notice on Immunity from fines and reduction of fines in cartel cases*, OJ C 45 [2002].

²² Provided the whistleblower fully cooperates on a continuous basis throughout the procedure, immediately puts to an end to its participation in the cartel and has not coerced other undertakings to participate in the cartel.

²³ See Jephcott M. (2002): "The European Commission's New Leniency Notice—Whistling the Right Tune?", 23 *European Competition Law Review* 378, at p. 380; Arp J. and Swaak C. (2003): "A Tempting Offer: Immunity From Fines for Cartel Conduct Under the European Commission's New Leniency Notice", 23 *European Competition Law Review* 9.

²⁴ Although the potential worldwide exposure of undertakings regarding the ability of foreign purchasers to assert treble damage claims under the US antitrust laws for injuries sustained in foreign commerce where the underlying anti-competitive "conduct" also caused effects in the US marketplace has been limited by the US Supreme Court in *Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 2004 WL 1300131 (2004). Foreign purchasers are now precluded from bringing suit in US courts where their foreign injuries are "independent of any adverse domestic effect."

²⁵ See Nordlander: K. (2004): "Discovering Discovery—US discovery of EC Leniency Statements", 24 *European Competition Law Review* 646.

²⁶ *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982).

²⁷ Jones C. (2004): "Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market", 16 *Loyola Consumer Law Review* 409, at pp. 410–11.

172 Session A – Unearthing Cartels—The Evidence

wisdom of treble damages is by no means generally endorsed.²⁸ In criminal cases, the US government may seek fines equal to double the conspirators' gain or the victims' loss. Additional civil treble damages awards could in theory result in penalties five times greater than the injury.)

The prospect of huge recoveries provides a lucrative incentive for plaintiffs' lawyers to bring claims. Indeed, I am told by fellow practitioners in the US that "normal" business tort claims have been re-characterized as antitrust claims in order to increase the pressure and the potential gains. I suggest that the concept of damages as a remedy for victims of antitrust law breaches cannot credibly be challenged. US arrangements can credibly be challenged.

5.2. The litigator as privateer

A distinctive characteristic of the US court system is the use of litigation as a vehicle for the personal enrichment of lawyers acting for plaintiffs whose relationship with the lawyer is that of asset rather than client. Entrepreneurial counsel in personal injury cases may hire cameramen dressed as firemen to photograph smoking debris (I know personally of one such episode!); they find persons susceptible of being called experts on various disciplines and have on at least one matter procured from these experts written statements confirming the existence of damage, sometimes scores or hundreds of such statements being issued in a very short time; and in many cases they seek discovery of immense volumes of documents from the defendant, partly to inflict administrative pain and partly (secondarily maybe) to seek for damaging evidence. The vaster the class of plaintiffs, the greater the burden on the defendant. These are very broad generalizations, and of course meritorious claims exist alongside weak claims, and of course the plaintiffs' bar consists of talented lawyers zealously advancing their clients' interests. Nevertheless, it is reasonable to note a widely spread sentiment in Europe and elsewhere that Things Have Gone Too Far.

One vivid example of litigious excess that still drags on are the claims brought against manufacturers of asbestos-related products. 850,000 claims were brought, most of the later ones on behalf of claimants without symptoms, and indeed without awareness of any lung impairment. A number of large enterprises have been rendered insolvent by the claims, and many employees lost their jobs as a result.²⁹ The benefits to victims of asbestosis, in

²⁸ See, for example, Cavanagh E. (1987): "Detrebling Antitrust Damages: An Idea Whose Time Has Come?", 61 *Tulane Law Review* 777, at p. 789; Easterbrook F. (1985): "Detrebling Antitrust Damages", 28 *Journal of Law and Economics* 445.

²⁹ Brickman L. (2005): "An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005", 27 *Cardozo Law Review* 991, at p. 992. Asbestos litigation has been described as "the gift that just keeps on giving to trial lawyers." Remarks of Bob Nardelli, White House Economy Conference Discussing Lawsuit Abuse (December 15, 2004), available at <http://www.whitehouse.gov/news/releases/2004/12/20041215-11.html>.

Enhancing the Task of Uncovering and Thereby Deterring Cartels 173

the sense of having contracted a disease caused by workplace exposure to asbestos have been uneven and disputed. The economic damage to many employees of otherwise prospering companies is significant and undisputed.

The Antitrust Criminal Penalty Enhancement and Reform Act was enacted in June 2004.³⁰ The legislation limited the civil liability of a cooperating leniency applicant by “detrebling” damage awards to actual damages. This legislation was driven by concerns that the imposition of civil treble damages on top of criminal fines discouraged potential applicants from cooperating with the government. Senator Orrin G. Hatch remarked that despite the success of the DOJ’s Leniency Program, “a major disincentive to self reporting still exists[:] the threat of exposure to a possible treble damage lawsuit.”³¹ Senator Herb Kohl—maybe optimistically—also stated that the detrebling provision “will result in more antitrust wrongdoers coming forward to reveal antitrust conspiracies, and thus the detection and ending of more illegal cartels.”³²

The Standards Development Organization Advancement Act³³ provided that standards development organizations (“SDOs”) whose activities have been disclosed to, and approved by, the DOJ and FTC would be subject to only single damages. During debate in the Senate, Senator Hatch observed that “the threat of treble damages deters SDOs from their pro-competitive standard-setting activities.”³⁴ Similarly, in the House of Representatives, William Delahunt argued that the detrebling provision of the legislation would remedy the fact that SDOs were frequent targets of frivolous lawsuits. He stated that despite their “pro-competitive effects, these SDOs can find themselves named as defendants . . . Once they are sued, these organizations are forced to expend considerable resources on protracted discovery proceedings before they . . . finally . . . prevail on motions for summary judgment which occurs in 100 percent of the cases, from my information.”³⁵ So the wisdom of treble damage claims is doubted by those with real expertise.

5.3. Current practice in handling leniency requests in Washington and Brussels

The Antitrust Division has a policy of granting leniency in certain conditions to corporations which report their unlawful conduct on certain conditions. It grants automatic leniency from criminal prosecution to the first corporation that reports it automatic leniency from criminal prosecution, and a limitation

³⁰ Pub. L. No. 108–237, §§ 201–21, 118 Stat. 661 (2004) (codified in scattered sections of 15 U.S.C.).

³¹ 150 Cong. Rec. S3610-02, S3614, 2004 WL 714783 (April 2, 2004).

³² *Id.* at S3616.

³³ 15 U.S.C. §§ 4301–05 (2006).

³⁴ 150 Cong. Rec. at S3614.

³⁵ 149 Cong. Rec. H5104-01, H5106, 2003 WL 21339488 (June 10, 2003).

174 *Session A – Unearthing Cartels—The Evidence*

of liability to victims of actual damages. It will grant leniency, before the launching of its own investigation, if the corporation took prompt and effective action to terminate its part in the activity and if it reports its conduct with full cooperation. After an investigation has begun, a corporation may also receive leniency if the DOJ does not have evidence against the corporation likely to result in a sustainable conviction. There are other limiting conditions. Most importantly, directors, officers, and employees also receive leniency if they cooperate.³⁶

Since amnesty is granted to the first-comer, there is a race to confess. Counsel, who is trying to digest the story, clarify the facts and get management to reach a decision, may telephone the DOJ to get a “marker” to secure the corporation’s place in the queue. A successful amnesty claim of course eliminates threat of jail for corporate executives.³⁷ Thus, crucial to the success of the US leniency regime is the invocation of criminal sanctions against company executives; their natural desire to avoid jail is a powerful driver of leniency applications; The company’s interests are exposed to a serious threat in exchange for the removal of a different, but even more acute, threat to its executives. This phenomenon, at the heart of the Washington regime, has no counterpart in Brussels. Civil damages claims are accelerated by the seeking of leniency, which purchases no immunity in their regard.

Now, there is a deterrent to seeking leniency in Brussels: will it accelerate liability in the United States? The European Commission has confirmed its intention to reinforce the protection of leniency applicants from disclosure. It has reasserted that any written statement made under the 2002 Leniency Notice forms part of the Commission file and, as such, may not be disclosed or used for any other purpose than the enforcement of Article 81 of the EC Treaty. Secondly, the Commission will continue to intervene as *amicus curiae* in civil proceedings in the US where discovery of leniency corporate statements is at issue.³⁸ These may be welcome but are not likely to be effective. Finally, and most interestingly, undertakings can make corporate statements in oral form in order to avoid the threat of discovery of written statements in civil litigation. Under the 2002 Notice, a corporate statement can take the form of a written document signed by or on behalf of the undertaking or of a statement made in oral form, of which the Commission makes a recording

³⁶ Dep’t of Justice, Antitrust Div., Corporate Leniency Policy (1993), available at <http://www.usdoj.gov/atr/public/guidelines/0091.pdf>.

³⁷ Hammond S. (2001): “When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual’s Freedom?”, presentation at National Institute on White Collar Crime 3–8 (Mar. 8, 2001), available at <http://www.usdoj.gov/atr/public/speeches/7647.htm>.

³⁸ The Commission has intervened before the US Courts as *amicus curiae* in the course of litigation in both the *Vitamins* (*In Re Vitamins Antitrust Litigation*, Misc. No. 99-197 D.D.C. Jan. 23, 2002 and Sept. 30, 2002) and *Methionine* cartel cases (*In Re Methionine Antitrust Litigation*, No. C-99-3491-CRB N.D.Cal.).

Enhancing the Task of Uncovering and Thereby Deterring Cartels 175

and a transcript. For example, in its *Citric Acid*³⁹ Decision, it granted a leniency applicant a 90% reduction on the level of its fine on the basis of the oral evidence that the applicant had disclosed during a meeting with the Commission. The legitimacy of such a practice has now also been confirmed by the CFI in the *Graphite Electrodes* case where it stated that “not only ‘documents’ but also ‘information’ may serve as ‘evidence’ which materially contributes to establishing the existence of the infringement”.⁴⁰

To formalize this practice, the Commission has recently proposed an amended version of the Leniency Notice.⁴¹

“The main purpose of the procedure for corporate statements is to provide, in a clear, transparent and legally secure manner means by which undertakings that want to confess their participation in a cartel to the Commission can do so without undue fear of such corporate statements being used against them in procedures that are not in application of the European competition rules.”⁴²

Under the new procedure, companies would make oral confessions to the Commission, which will record and prepare its own transcript. Applicants will then be required to confirm that the transcript is a correct rendering of the oral statement. This confirmation may be given orally and recorded. The transcript will serve as evidence, supplemented if necessary before the Community Courts by the original recordings. The draft amendment also makes clear that there would be very limited access to the file and that no other mechanical copies of the oral statements can be made.

However, whether such an amendment will be sufficient to avoid disclosure in all circumstances is open to question. As has been highlighted by Kerse & Kahn,⁴³ the fact that a document is created by the Commission and that a leniency applicant retains no copy of the document does not necessarily mean that discovery of the corporate statement will be impossible in civil proceedings in Europe or the United States.

The Commission has stated that under normal circumstances, it will not accept requests under Regulation 1049/2001⁴⁴ for access to documents that it receives under the 2002 Leniency Notice. This policy has been the subject of a challenge in Case T-2/03 *Verein für Konsumenteninformation v. Commission*⁴⁵ where a national consumer association requested access to the

³⁹ OJ L 239 [2001].

⁴⁰ Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/ Tokai Carbon v. Commission, [2004] ECR II-1181, at para. 431.

⁴¹ Proposed amended 2002 Commission Notice on Immunity from fines and reduction of fines in cartel cases, http://ec.europa.eu/comm/competition/antitrust/legislation/leniency2_en.pdf.

⁴² Draft amendment of the 2002 Commission Notice on Immunity from fines and reduction of fines in cartel cases, http://ec.europa.eu/comm/competition/antitrust/legislation/leniency_en.pdf.

⁴³ *EC Antitrust Procedure*, 5th edition, Thomson (2005), at p. 422.

⁴⁴ *Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents*, OJ L 145 [2001].

⁴⁵ [2005] ECR II-1121.

176 *Session A – Unearthing Cartels—The Evidence*

Commission's file in the context of the *Austrian Banks*⁴⁶ cartel case. The Commission refused access to parts of the file, including in relation to documents submitted under the 1996 Notice because it argued that "allowing third parties access to those documents would deter undertakings from cooperating with the Commission and would be detrimental to inspections and investigations in future cases. The same reasoning applies to documents drawn up by third parties."⁴⁷ However, the CFI, while not ordering access to specific documents, stated that in principle, the Commission must carry out a concrete assessment of the content of each individual document in order to determine whether access to a document can be denied under the specific exceptions of Regulation 1049/2001 and that

"[. . .] it is only in exceptional cases and only where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required, that a derogation from that obligation to examine the documents may be permissible."⁴⁸

The Commission must therefore make an individual analysis of a request for access to each individual document and may be forced to allow discovery of certain documents in cases of private litigation where a leniency applicant has been found to have breached Article 81 EC.

5.4. *Parallel leniency applications in the European Competition Network*

There is said to be some uncertainty about problems associated with the possible exchange between the other members of the European Competition Network of the information contained in a leniency application made to one EU jurisdiction.⁴⁹ Although the Notice on cooperation within the Network of Competition Authorities⁵⁰ provides answers to a certain number of concerns, it remains silent on others. On the one hand, the Notice clearly states that:

- An application for leniency to one authority will not be considered as an application for leniency to any other authority. If this is taken at face value, it would be in the interest of an applicant to apply for leniency to all competition authorities that may be affected by the infringement.⁵¹
- Under Articles 11(2) and 11(3) of Regulation 1/2003, the Commission and the NCAs are under a reciprocal obligation to inform each other of cases

⁴⁶ Commission decision of 11 June 2002 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.571/D-1: *Austrian banks—“Lombard Club”*), OJ L 56 [2004].

⁴⁷ Para. 81 of the judgment.

⁴⁸ Para. 112 of the judgment.

⁴⁹ Swaak C. and Mollica M. (2005): "Leniency Applicants to Face Modernisation to EC Competition Law", 26 *European Competition Law Review* 507.

⁵⁰ OJ C 101 [2004].

⁵¹ Para. 38 of the Notice.

Enhancing the Task of Uncovering and Thereby Deterring Cartels 177

which have been initiated on the basis of leniency applications. However, information relating to leniency applications submitted to the network by one member of the network cannot be used by other members to open their own investigations.⁵²

- However, this information may be transmitted to another NCA if the leniency applicant gives its consent to such a transfer. NCAs are under a duty(!) to encourage leniency applicants to give this consent.⁵³
- The undertaking's consent is not required if another member of the network has (i) also received a leniency application from the undertaking relating to the same infringement or (ii) given a written commitment that neither the information transmitted or any other information it may obtain, may be used to impose sanctions on the leniency applicant, or on any employee or former employees.⁵⁴

The Notice does not decide how leniency applications in one jurisdiction may be affected by the potential reallocation of cases between members of the Network:

- Reallocation from Commission to NCA: where an undertaking, having approached the Commission and made a leniency application solely to it in the belief that the Commission would have sole jurisdiction, then sees the case being subsequently reallocated within the ECN to an authority where the leniency applicant had not or could not have applied for leniency.
- Reallocation from NCA to Commission: conversely, after a leniency applicant has made a leniency application to one NCA, the case is reallocated to the Commission to which no leniency application had been made.
- Reallocation between NCAs: a leniency applicant, has sought leniency before NCA's with a leniency programme, but then sees the case is reallocated to an NCA which either does not operate a leniency programme or operates a programme for which the company is ineligible.

I suspect these concerns are more theoretical than practical but it may be too early for confidence to be possible. It would be strange if a corporate group had to make applications to all 25 Member States, each with their own distinct features and procedures, and of course to the Commission! Certain Member States still do not even have a leniency programme. Consequently, it has been suggested that either a new Notice is required or that a "one-stop leniency shop" should be developed. This question can be revisited in a few years: it may prove to be a non-problem.

⁵² Para. 39 of the Notice.

⁵³ Para. 40 of the Notice.

⁵⁴ Para. 41 of the Notice.

178 *Session A – Unearthing Cartels—The Evidence*5.5. *The unfair treatment of smaller undertakings*

Finally, it has also been said that the Leniency Notice, while increasing the incentives for larger undertakings to come forward and blow the whistle, has had the perverse effect of reducing these same incentives for smaller undertakings. Trade association meetings have frequently occasioned accusations about illicit cooperation. Often the meetings have been attended by a range of small and large companies and by national associations. The industry leaders, commonly four or five national champions, can arrange their understandings privately on the fringes of plenary discussions on safe topics; and smaller players, who attend the official gathering but not the private ones, get an indication of the way the wind is blowing. Their goal in attending the gathering may often be to gather market intelligence, which good intentions do not immunise them from being accused of being a willing participant in the infringing conduct.

They will be reluctant to come forward to the Commission because they have more to lose from the discovery of a cartel than their larger rivals for several reasons, including the impact of the potential fine. When calculating the level of a fine, the Commission takes as the “basic amount” a lump sum determined without reference to the turnover of the undertakings involved.⁵⁵ As a result, this sum often reaches a level exceeding 10% of a smaller firm’s turnover (and not just its profits), enough to cripple it. For a larger firm, the same lump sum represents a proportionally smaller amount of its turnover,⁵⁶ a serious inconvenience (and one increased by the possible use of multipliers for deterrence) but less grave a threat.

The application of the Leniency Notice aggravates this phenomenon. The realities of the business world are such that a smaller company runs more risk of being crushed in reprisal than a larger company which will be better able to weather the storm following its decision to incriminate others (and may indeed experience some benefit *vis-à-vis* customers when competitors are floundering in response to its accusations). As a result, not only will the level of the fine be

⁵⁵ For criticism of the manner in which the Commission sets fines, see Van Bael I. (1995): “The Lottery of EU Competition Law”, 4 *European Competition Law Review* 237, referring to practice under former rules. Case T-13/03 *Nintendo Co & Nintendo Europe v. Commission* is in my respectful opinion a recent example of an aberrantly severe penalty. (I am representing Nintendo in its appeal.)

⁵⁶ The unfairness of this lump sum calculation was considered by Advocate General Tizzano in his Opinion in Joined Cases *Dansk Rørindustri A/S* (Case C-189/02 P), *Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others* (Case C-202/02 P), *KE KELIT Kunststoffwerk GmbH* (Case C-205/02 P), *LR af 1998 A/S* (Case C-206/02 P), *Brugg Rohrsysteme GmbH* (Case C-207/02 P), *LR af 1998 (Deutschland) GmbH* (Case C-208/02 P) and *ABB Asea Brown Boveri Ltd* (Case C-213/02 P) v. *Commission of the European Communities* [2005] ECR I-5425, paras 91–133. Whilst he concluded that the pleas in law of the parties could not be supported, he did note that the “intensification, deriving as it does from a calculation method based on flat-rate amounts, is liable for the most part to hit small and medium-sized undertakings” (para. 131) and that such a result is not “fully consistent with the requirements of individualisation and progressiveness” of penalty setting (para. 130).

Enhancing the Task of Uncovering and Thereby Deterring Cartels 179

in relative terms more severe for a smaller company than for a larger one, but a smaller company is also less likely, in practice, to be granted either immunity or a reduction in the level of its fine. Either it keeps its head down and prays that a larger member of the cartel does not choose to blow the whistle, or it must take it upon itself actively to report to the authorities each activity in which it participates. If it bets wrong, it risks potentially crippling fines. Neither option is particularly appealing. The Commission should reconsider its fining policy *vis-à-vis* these companies, in order to ensure that they are not overly punished for the same sins (or lesser sins) as the leaders of the illicit behaviour.

C. Current Commission initiatives

Alongside the tools currently provided in Regulation 1/2003 and the Leniency Notice, the Commission has recently also sought to broaden the scope and efficacy of its investigative powers through the use of a number of more novel devices, which we will now consider.

1. Private enforcement

Article 81 EC has often been invoked by private litigants as a defence against actions for breach or performance of certain contractual obligations.⁵⁷ Under Regulation 17, agreements which were not notified to the Commission and which did not benefit from the provisions of a Block Exemption Regulation, were automatically void under Article 81(2) EC, even if it was later found that the agreement would have fulfilled the four conditions of Article 81(3) EC for individual exemption. This, in the eyes of some, pernicious use of Article 81 EC by persons who sought to escape their contractual duties has now been eliminated. It remains the case of course that a person who has signed an anti-competitive contract may still claim its invalidity, but not on the formal ground of its non-notification.

As to the possibility of using Article 81 EC as a “sword”, both Regulations 17/62 and 1/2003 are silent. Whilst both the European Parliament⁵⁸ and the Commission⁵⁹ had at various times expressed the view that Articles 81 and 82 EC could and should be interpreted as allowing the recovery of damages and that such actions would be a useful complement to the Commission’s own

⁵⁷ See in this regard, Wils W. P. J. (2003): “Should Private Antitrust Enforcement Be Encouraged in Europe?”, 26 *World Competition* 473.

⁵⁸ See its position on the Commission’s proposal for what later became Regulation 17, OJ 1410 [1961], para. 11.

⁵⁹ See the list of Commission statements referred to by Advocate General Van Gerven in his Opinion in Case C-128/92 *Banks* [1994] ECR I-1251, fn. 112.

180 *Session A – Unearthing Cartels—The Evidence*

administrative enforcement actions, no explicit provisions to this effect were included in Regulation 17. In practice, there had been relatively few cases where Articles 81 and 82 EC have been invoked in damage actions before national courts.⁶⁰ In 2001, the European Court of Justice confirmed, for the first time, the possibility of seeking compensation for loss caused by a contract or by conduct that was found to be in breach of EC competition law.⁶¹ The marathon *Crehan* cases in the English courts⁶² show how easy it is for skilled lawyers to find many reasons why damages for breach of the competition rules ought not to be awarded in any given case and how difficult it can be to separate the various causes of damage. Were the losses incurred due to bad business choices, bad luck or bad market conditions? Or were they caused by breaches of the competition rules? Did the operator of the pub pay too much for his beer because he unfortunately accepted worse terms than he could have obtained from another brewer, or were the terms caught by the prohibition Article 1(1), affecting trade between Member States? Before the European Court of Justice, *Crehan* confirms the need for an adequate remedy to be available in the national courts. The Commission sees a number of advantages to increased private enforcement of EC competition law.⁶³ In recent press releases in cartel cases, it has invited any person or firm affected by anti-competitive behaviour to bring the matter before the courts of the Member States and seek damages, submitting elements of the published decision as evidence that the behaviour did occur and was illegal.⁶⁴ It has also recently released a Green Paper⁶⁵ on how to facilitate actions for damages caused by violations of European competition law, with a specific focus on price fixing cartels.

Whether increased private enforcement is the best tool for the effective and efficient application of EC competition law is open to debate.⁶⁶ On the one

⁶⁰ Whish R. (2003): *Competition Law*, 5th edition, Butterworths, London, refers to some of the known examples of damages cases up until 2003. It is difficult to estimate the precise number of damages claims and awards as many cases are either not reported or are confidentially settled. In an attempt to address this issue, the Commission has created a National Court Cases Database, containing non-confidential versions of National Court judgments that are forwarded to it under Article 15(2) of Regulation 1/2003. http://europa.eu.int/comm/competition/antitrust/national_courts/index_en.html

⁶¹ Case C-453/99 *Courage v. Crehan* [2001] ECR I-6314.

⁶² *Courage v. Crehan* [2001] All ER (EC) 886.

⁶³ It argues that increased private enforcement will ensure that businesses and consumers harmed by anticompetitive activity are compensated for their losses; will enhance the overall level of respect for the EC competition rules by discouraging companies from engaging in anticompetitive activity; and will bring the benefits of Community law closer to the citizen.

⁶⁴ See the Press Releases in the two most recent cartel decisions: *Industrial bags* (IP/05/1508 of 30 November 2005) and *Rubber Chemicals* (IP/05/1656 of 21 December 2005).

⁶⁵ Damages actions for breach of the EC antitrust rules, Commission Green Paper, SEC(2005) 1732. For comment, see Diemer C. (2006): "The Green Paper on Damages Actions for Breach of the EC Antitrust Rules", 27 *European Competition Law Review* 309.

⁶⁶ On the basis of the assumption that the goal of competition law enforcement is to maximize the likelihood that the law is respected.

Enhancing the Task of Uncovering and Thereby Deterring Cartels 181

hand, authors such as Wouter Wils⁶⁷ dispute the need for increased private enforcement, arguing that there are several factors (the wider investigative powers of competition authorities, the divergence between the private and general interest, and the increased costs of private enforcement) that show the inherent superiority of public over private enforcement. Mr. Wils doubts whether private enforcement in the EU could play any useful supplementary role, either in terms of providing additional sanctions or in bringing additional cases. Granting enforcement agencies increased resources or allowing the imposition of individual penalties would be more effective, claim such sceptics, than private enforcement. However, the academic literature generally favours an increased role for private enforcement within the EU.⁶⁸ Private enforcement has a valuable role to play as a supplement to public enforcement and should become the primary means of compensating the victims of competition law infringements before the national courts. The theoretical economic arguments developed against private enforcement “are weak, insufficient, and lack an observable basis in the real world.”⁶⁹ As the anecdote with which I started would suggest, I consider that the obtaining of indemnification should not be impossibly hard. At the end of this paper, I suggest a mechanism at the moment of the taking of the Commission decision that could facilitate compensation.

However, I think it would be neither effective nor desirable for Europe to create a malignant legal industry in order to add another element of deterrence to the existing reasons to refrain from cartel activity. Civil private enforcement should be available as a vehicle to achieve justice, but not to deliver punishment. And litigation by endless discovery, by attrition, by abuse of process, should be no part of European law.

2. Fining the facilitators

Can a supplier of services to undertakings or associations of undertakings which facilitated their engagement in anti-competitive agreements or practices be held liable under Article 81(1), alongside the other cartel members? The Commission answered this question with a qualified “yes” in its recent *Organic Peroxides*⁷⁰ Decision. In addition to fining the participating companies, the

⁶⁷ *The Optimal Enforcement of EC Antitrust Law* (2003) Kluwer Law International, chapter 8, a very thoughtful piece.

⁶⁸ See among others Komninos A. (2002): “New Prospects for Private Enforcement of EC Competition Law: *Courage v. Crehan* and the Community Right to Damages”, 39 *Common Market Law Review* 447, a perceptive and thorough study; Ehlermann C.-D. and Atanasiu I., eds. (2003): *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford and Portland, Oregon.

⁶⁹ Jones C. (2004): “Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check”, 24 *World Competition* 13.

⁷⁰ Commission decision of 10 December 2003 (COMP/37.857—*Organic Peroxides*); http://ec.europa.eu/comm/competition/antitrust/cases/index/by_nr_75.html#i37_857.

182 *Session A – Unearthing Cartels—The Evidence*

Commission also fined AC Treuhand, a consultancy firm, for acting as secretary and essential organizer of the cartel.⁷¹ The Commission, referring to its prior Decision in *Italian Cast Glass*,⁷² concluded that Treuhand could also be held liable for the activity of the cartel as it met all of the requirements for the application of Article 81(1) EC. Treuhand is an undertaking within the meaning of Article 81(1) EC since it is a company that carries on an economic activity. It had participated in the agreement as an undertaking or took decisions as an association of undertakings. A sudden departure of AC Treuhand, would have, at least temporarily, disrupted the functioning of the agreement. Interestingly, the Commission stated that it did not consider it

“[. . .] necessary to prove the exact role of hybrid entities such as AC Treuhand, which clearly have infringed Article 81 of the Treaty. AC Treuhand participated in the infringement directly for the purpose of restricting competition in the sector of OP, even it does not produce OP itself, and/or it took decisions with that purpose. Hence AC Treuhand infringed Article 81 of the Treaty.”⁷³

Due to the novelty of the matter, the Commission imposed only a fine of €1,000 on Treuhand.

The Decision is noteworthy: the Commission may target independent companies that act as facilitators or organizers of cartel arrangements. However, the full implications of the Decision are unsure. Treuhand has appealed the Decision to the Court of First Instance,⁷⁴ alleging that as it was not a party to the cartel, it was unable to comment on the Commission’s allegations during the investigation, thereby infringing its rights of defence and acting in breach of the fundamental right to due process. It also submits that the Commission acted in breach of the principle of *nullum crimen, nulla poena sine lege* since Treuhand was neither a party, as an undertaking, to the agreement restricting competition nor was it a group of undertakings. On the other hand, the ambit of the Decision itself is unclear in so far as it seems to suggest that its scope of application is limited to cases where undertakings provide services that exceed that of a “purely secretarial function”.

On an extensive reading of the Decision, it could even be argued that hotel-owners should be under an obligation to report anticompetitive behaviour that occurs in the murky corners of their business centres or conference rooms. One might argue that a knowing host should be blameworthy for allowing such meetings to take place (some famous hotels are indeed regularly cited as cartel venues in Commission decisions!). It is to be hoped that the CFI’s judgment will shed some further light on this interesting and controversial issue.

⁷¹ For comment, see Forrester I., MacLennan J. and Komninos A. (2005): “EC Competition Law 2003–2004”, in *2005 Oxford Yearbook of European Law* at p. 557.

⁷² Commission decision of 17 December 1980 relating to *Italian cast glass*, OJ L 383 [1980].

⁷³ Paras. 345 and 346 of the decision.

⁷⁴ Case T-99/04 *AC-Treuhand v. Commission*, judgment pending.

Enhancing the Task of Uncovering and Thereby Deterring Cartels 183

Perhaps the reasoning in the *Organic Peroxides* Decision could also be applied to law firms in light of the lawyer's duty to encourage respect for the law.⁷⁵ Consider two examples. First, the law firm knowingly facilitates the organisation of the cartel, allowing it to hold meetings at the firm's premises and giving legal advice to the cartel on the best manner in which to organize the cartel in order to escape detection. That (improbable) law firm could also be held to be breach in Article 81(I) EC through its active participation and facilitation of the actions of the cartel. By contrast, consider a law firm which is asked by its client whether the client could use the law firm's premises to hold a meeting with several competitors, the aim of the meeting being the drafting of a common response to a proposed piece of legislation which the industry feels will hamper business conditions. Suppose the lawyer discovers after the meeting that one of the clients has forgotten a folder labelled "European Prices Task Force: *BURN* if DG Competition asks for a copy", revealing that the meeting was organized to work towards the setting up of a cartel?

This is a nice question, not likely to arise in practice. If ever European competition law modules contain an ethics module, one can imagine various twists to either scenario. It commonly happens that lawyers attend meetings between competitors, precisely to enhance the participants' understanding of the legal principles, and to keep a note of the proceedings for the avoidance of doubt and for the protection of participants. So it would be undesirable to try to convert the lawyer from counsellor of the client to zealous smiter of the unlawful.

3. The use of trustees

Under Regulation 1/2003, investigatory and enforcement powers in relation to Articles 81 and 82 EC are conferred exclusively upon the Commission (or national competition authorities).⁷⁶ Nowhere does the Regulation authorise the Commission to delegate its investigatory or enforcement powers to third parties, in particular private persons. In its Decision in *Microsoft*,⁷⁷ the Commission took the novel step of requiring Microsoft, as part of the remedy imposed upon it, to:

"[. . .] submit a proposal to the Commission for the establishment of a suitable mechanism assisting the Commission in monitoring Microsoft's compliance with this Decision. That mechanism shall include a monitoring trustee who shall be independent from Microsoft Corporation."⁷⁸

⁷⁵ See Riley A. (1991): "European Competition Law: The Client v. the Public Interest", 12 *European Competition Law Review* 39.

⁷⁶ Pursuant to Article 5 of Regulation 1/2003.

⁷⁷ Commission decision of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 *Microsoft*).

⁷⁸ Article 7 of the *Microsoft* Decision.

184 *Session A – Unearthing Cartels—The Evidence*

It is submitted that such a delegation of public enforcement powers is illegal. While the role of the Trustee may seem simply to assist the Commission in ensuring Microsoft's compliance with its obligations under the Decision, in reality the powers given to the Trustee in order to fulfil that task go far beyond those of a third party expert, and are more akin to those of a public authority. Articles 3.1, 3.3, 5.5 and 5.6 of the *Microsoft Trustee Decision*⁷⁹ indeed allow for the possibility that the Trustee may carry out investigations on its own initiative.

Article 3.1 provides generally that the Trustee shall monitor Microsoft's compliance, and adds detailed provisions about investigations that the Trustee would be required to carry out, apparently on its own initiative (see Article 3.1(c) and (d)). Article 3.3 makes it clear that the Trustee must accept third party complaints and investigate them on at least a preliminary basis before notifying the Commission. Article 5.5 provides that the Trustee will carry out tasks specified in a Trustee Mandate in addition to other tasks after having been specifically instructed by the Commission. Article 5.6 provides that the Trustee is to be "pro-active", and shall carry out tasks covered by a Work Plan as well as, in the absence of approval from the Commission, additional work that is not "significant".

Furthermore, as icing on the innovation cake, the Trustee is not subject to the material constraints under which the Commission operates. Not only does the Trustee have "the possibility to hire experts to carry out certain precisely defined tasks on his behalf (. . .) access to Microsoft's assistance, information, documents, premises and employees to the extent that he may reasonably require such access in carrying out his mandate",⁸⁰ but his entire costs, "including a fair remuneration for the Monitoring Trustee's activities" are also to be borne by Microsoft. The Decision therefore allows the Commission to outsource its investigative powers to an independent party, to whom the Commission delegates some of its investigative powers. This is a novel approach to inadequate resources. As the costs are paid by the defendant, this could have strong attractions. The enforcement implications of using outsiders to police compliance in big cases are enormous.

It is now for the CFI⁸¹ to decide whether such an initiative is legitimate and whether the phenomenon of outsourcing, so popular in current and political discourse, will also find favour in EC competition law.

⁷⁹ See http://ec.europa.eu/comm/competition/antitrust/cases/index/by_nr_75.html.

⁸⁰ Recital 1048 of the *Microsoft Trustee Decision*.

⁸¹ Case T-201/04 *Microsoft v. Commission*, judgment pending. The author is co-counsel for Microsoft in its appeals.

D. The current administrative system: can it ever be sufficient?

The current system of administrative enforcement of EC competition law is focused on setting and imposing sufficiently high corporate sanctions on undertakings to ensure that the undertaking is both sufficiently punished for its actions and that other undertakings are sufficiently deterred by the threat of such sanctions so as to comply with the competition rules. However, there is a growing realization that the limits of this administrative system are now being reached and that there may be a need to consider incorporating elements of a different nature. This section will consider different options, both theoretical and in place in other jurisdictions, and question how and whether these could be applied to the current Community regime.

1. Methods that involve further development of the existing system

1.1. “Amnesty Plus”

The idea behind “Amnesty Plus” programmes is to reward companies if they inform competition authorities about collusive activity in a market not yet being investigated. This encourages cartel participants caught in an ongoing investigation to come forward for amnesty for another cartel. The US Department of Justice has been using such a system since 1993. It provides that a company which does not qualify for leniency for the first cartel but discloses a second cartel (for which leniency conditions are satisfied) can receive amnesty for the second one and a substantial reduction in penalty for the first one, even though it was not first in the queue to confess that one. In 2001, more than half of the DOJ’s 30 global cartel investigations were the result of Amnesty Plus leads. A similar programme has also been implemented in the UK in paragraphs 3.10 to 3.11 of the Director General of Fair Trading’s Guidance as to the appropriate amount of a penalty.⁸² If a company which is the subject of an investigation by the OFT in relation to its participation in a suspected cartel, also provides evidence to the OFT of the existence of a separate cartel in another market, it will obtain not only complete immunity from fines in relation to its activities on the second market but will also receive a reduction in financial penalties which would have been imposed on it in the first market, in addition to the reduction which it would have received for its co-operation in the first market alone.⁸³

⁸² (OFT 423).

⁸³ For more detail, see Henry D. (2005): “Leniency Programmes: An Anaemic Carrot for Cartels in France, Germany and the UK?”, 26 *European Competition Law Review* 13.

186 Session A – Unearthing Cartels—The Evidence

In the EU, the benefits that could arise from an “Amnesty Plus” programme can be seen from the two Commission Decisions in the *Belgian*⁸⁴ and *Luxemburg*⁸⁵ *Breweries* cartel cases. The Commission’s investigation into the Luxemburg cartel was only made possible by Interbrew’s choosing to disclose the existence of a separate cartel on the Luxemburg market in the course of the Commission’s investigation into Interbrew’s participation in a cartel on the Belgian market. Whilst Interbrew was granted 100% immunity from fines under the 1996 Notice in the *Luxemburg Breweries* case, it received no further reduction in fines in the *Belgian Breweries* case in recognition of this extra information. It can therefore be argued that Interbrew’s decision to inform the Commission of the existence of a second cartel and its participation therein represents an incongruity. Undertakings will be unlikely to inform the Commission of the existence and their participation in other cartels unless they are given incentive, in the form of “Amnesty Plus” programmes, to do so.⁸⁶

1.2. Plea bargaining

It has also been suggested that a form of plea bargaining should also be introduced. Plea bargaining has been successfully used by the US Department of Justice in its prosecution of cartels.⁸⁷ In essence, the parties to the cartel and the enforcement agent together agree on the nature and scope of the illegal cartel activity and the appropriate penalty to be imposed.

A modified form of plea bargaining has also already been adopted in certain Member States. For example, the new French system of leniency⁸⁸ provides for a form of plea bargaining under what is called the “transaction procedure”. During proceedings before the Competition Council and after the notification to the parties of the statement of objections, a party can benefit from a reduction in fines (not full immunity) if it decides not to contest the existence of the alleged practices and offers sufficient commitments to modify its behaviour in the future, including a compliance programme.

There are signs that the Commission is also considering whether to create its own form of plea bargaining. A past disincentive to seeking leniency in Brussels has been the uncertainty over what fine the Commission might

⁸⁴ Commission Decision COMP IV/37.614/F3 *PO/Interbrew and Alken Maes*, 5 December 2001.

⁸⁵ Commission Decision COMP/37.800/F3, *Luxemburg Brewers*, 5 December 2001.

⁸⁶ McElwee D. (2004): “Should the European Commission Adopt “Amnesty Plus” in its Fight Against Hard-Core Cartels”, 25 *European Competition Law Review* 558.

⁸⁷ Although the success of the DOJ may now be called into question for the Supreme Court’s recent decision in *United States v. Booker* 543 220 (2005), which severed the previously mandatory Federal Sentencing Guidelines from the Sentencing Reform Act, thereby relegating the Guidelines to “advisory” status and reducing the amount of leverage in antitrust cases that these mandatory guidelines had given the DOJ in fine negotiations.

⁸⁸ Article L.464–2 II, III and IV of the Commercial Code and in Article 44 of the implementing decree of 30 April 2002.

Enhancing the Task of Uncovering and Thereby Deterring Cartels 187

choose to impose. Since fines in different cases could fluctuate to an extraordinary degree, the doubting company was unsure. It doubted the meaning of a “50% reduction” of an immense but incalculable amount. It has been widely believed that the Commission was non-transparent and unpredictable in its setting of fines, so to adopt plea bargaining would be a major change. In a speech on 7 April 2005,⁸⁹ Commissioner Kroes suggested that the Commission may look into developing some form of plea bargaining power with a view to negotiating direct settlement agreements with alleged cartel members if the measures adopted in the 2002 Notice are not sufficient “to deliver swift enforcement with timely punishment”.

The introduction of some form of plea bargaining would remove the need for the Commission to investigate each and every case. It could lead to faster enforcement decisions and also free additional Commission resources to focus on key areas, in line with the rationale behind the modernization regime.

The Commission has at the moment a considerable queue of leniency applications awaiting attention. The Commission would doubtless welcome a respite from the need to record in a formal, detailed, published and judicially-reviewable act, the comprehensive details of how a cartel functioned. The need for such thoroughness would be eliminated if the infringer had conceded its guilt and accepted its penalty.

1.3. Paying whistleblowers

The use of paid “moles” or *agents provocateurs* would seem to be the natural extension of the criminalization of cartel enforcement. If it is decided that cartels are so serious as to merit criminal penalties, then equally it can be argued that certain methods used to detect other types of criminalized behaviour such as fraud or tax evasion or theft, should also be allowed to facilitate the discovery of cartels.

In 2002, Korea became (and still is) the first jurisdiction in the world to create an informant reward programme to encourage insiders and market participants in upstream and downstream markets to provide crucial information to the Competition Authority relating to the existence of cartel behaviour. Such a system is seen as being cost effective as it will save investigative costs and induce voluntary compliance by the businesses. Under article 64(2) of the Korean Monopoly Regulation and Fair Trade Act, the authorities “may pay the compensation within the limit of the budget for the person who informs the Korean Fair Trade Commission of the violation of this Act and provides the evidence that proves this violation.” The level of reward is based on the level of sanction and the quality of evidence

⁸⁹ “The First Hundred Days”, speech delivered at the 40th Anniversary of the Studienvereinigung Kartellrecht 1965–2005, International Forum on European Competition Law, 7 April 2005.

188 *Session A – Unearthing Cartels—The Evidence*

provided.⁹⁰ First, a standard amount is derived according to the level of sanction. Where the surcharge in the price of the products due to the cartel is less than KRW 500 million, the standard amount is set at 5% of the surcharge, with a minimum of KRW 5 million; where the surcharge is between KRW 500 million and 50 billion, the standard amount is set at 1%; finally where the surcharge is over KRW 50 billion, the standard amount is set at 0.5%. Once the standard amount is calculated, the final amount will then depend on the quality of evidence provided to the Authority. “Top grade evidence” such as a signed agreement will bring the reward to 80%–100% of the standard amount. “Medium grade evidence” such as the minutes of the meeting is worth 60%–80% of the standard amount. Finally, “low grade evidence” includes supporting information of cartel agreement and coordinated action and is worth 40%–60% of the standard amount. Initially the maximum award was set at KRW 20 million (€17 000), but because there were not many reports, the maximum reward was raised to KRW 100 million (€85 000) in November 2003 and to KRW 1 billion (€850 000) in 2005.

2. If we consider a radical change is necessary

2.1. *Criminal sanctions*

The desirability of the criminalisation of the enforcement of EC competition law is much debated.⁹¹ Whilst Article 5 of Regulation 1/2003 allows Member States to provide for the imposition of criminal sanctions for violations of Articles 81 and 82 EC,⁹² such a power is lacking from the enforcement arsenal of the European Commission. It is unclear whether the European Community has the competence to criminalize certain violations of European competition law. In its recent judgment in Case C-176/03,⁹³ the ECJ ruled

⁹⁰ See *Annual Report on Competition Policy Developments in Korea 2004*, OECD Directorate for Financial And Enterprise Affairs, Competition Committee, DAF/COMP(2005)32/29.

⁹¹ See the discussion in Part IV of Ehlermann C.-D. and Atanasiu I., eds. (2003): *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford and Portland, Oregon, at pp. 453–462; Kolasky W. (2004): “Criminalizing Cartel Activity: Lessons from the U.S. Experience”, 5th lunch talk of the Global Competition Law Centre (Brussels, 29 September 2004), accessible at <http://www.gclc.coleurop.be/lunchtalk20040929.htm>, at 11–12; Rosochowicz P. (2004): “The Appropriateness of Criminal Sanctions in the Enforcement of Competition Law”, 25 *European Competition Law Review* 752; Wils W. P. J. (2005): “Is Criminalization of EU Competition Law the Answer?”, 28 *World Competition* 117, a very thoughtful review of the major issues.

⁹² “The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take (...) decisions (...) imposing fines, periodic penalty payments or any other penalty provided for in their national law.”

⁹³ Case C-176/03 *Commission v. Council*, [2005] ECR I-7879, at para. 48. For comment, see White S. (2005): “Harmonisation of Criminal Law under the First Pillar”, 31 *European Law Review* 81.

Enhancing the Task of Uncovering and Thereby Deterring Cartels 189

that the lack of Community competence in the field of criminal law and criminal procedure

“[. . .] does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious (environmental) offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.”

The Commission has since issued a Communication setting out how it intends to interpret and implement the judgment.⁹⁴ It proposes that “appropriate measures of criminal law can be adopted on a Community basis only at sectoral level and only on condition that there is a clear need to combat serious shortcomings in the implementation of the Community’s objectives and to provide for criminal law measures to ensure the full effectiveness of a Community policy or the proper functioning of a freedom.” This therefore implies the possibility that a similar line of reasoning may be applied to the field of competition. The need to ensure the effective enforcement of EC competition rules at national level can be interpreted as permitting the adoption of legislation under the Community pillar, requiring that Member States adopt “effective, proportionate and dissuasive criminal penalties” in the field of competition law.

Criminalization at EU level would ensure uniformity of available sanctions across Member States for similar violations of EC competition law. This might be thought to be an advantage. However, the criminalization of competition law also brings with it additional problems. In a recent interview,⁹⁵ Judge Vesterdorf highlighted that while the criminalization of EC competition law may have strong deterrent effect and lead to a reduction in the number of infringements, it would also have the potential to change the manner in which the Commission currently conducts its investigations. Because of the need to ensure a greater degree of protection of the rights of individual managers and directors, the nature of the cooperation between the Commission and investigated undertakings would necessarily change. Documents which under an administrative system would be handed over to the investigating body might now be withheld as they could subsequently be used in criminal proceedings. The criminalization of EC competition law will also require the Commission to cooperate with national judges during the criminal phase of its investigation as it cannot, as an administrative body, have the power to impose criminal sanctions. Consequently, while we must

⁹⁴ Communication on the implications of the Court’s judgment of 13 September 2005 (Case C-176/03 *Commission v. Council*), COM(2005) 583 final.

⁹⁵ Vesterdorf B. (2006): Interview given to the *Revue Lamy de la Concurrence*: “pouvoir donner une réponse utile au juge national peut demander une connaissance approfondie du marché”, RLC 2006/7 no. 493.

190 *Session A – Unearthing Cartels—The Evidence*

agree that the criminalization of EC competition law has the potential to reduce the number of infringements, the debate cannot stop there.

I seriously doubt whether current Commission procedures are adequate to the challenge of satisfying national criminal standards. Decisions are not immune to political pressure, they are taken by a college of Commissioners, not by a court of judges, and the evidential rigour deployed in their drafting is not always adequate. This does not mean any disrespect for those who have the important job of enforcing Community policy against cartels, which is a vital and laudable activity. Their limited resources and the necessity for their duty do not eliminate certain features of the current regime: undertakings must cooperate with the investigation; no trial occurs; administrative law governs and not criminal law; and the penalties are enormous.

2.2. Job losses for executives infringing competition law

An alternative to the potential criminalisation of EC competition law could be the professional disqualification of directors who are found to have participated in a cartel. Such a system is currently under consideration in several Member States as either a complement or as an alternative to criminal sanctions. In the UK, the disqualification of directors is used as a complement to the imposition of criminal sanctions. Section 9 of the Company Directors Disqualification Act 1986, as amended by Article 204 of the Enterprise Act 2002, provides that, on application from the OFT, a competent court must make a Competition Disqualification Order (CDO) against a director of a company if the undertaking which is a company of which he is a director commits a breach of competition law, and if the court considers that such conduct has made the director unfit to manage a company.

By contrast, in the Netherlands, the Dutch Parliament, supported by the Dutch Competition Authority (the NMA) has recently proposed to amend its Competition Act in order to introduce the possibility to remove from their jobs the executives of companies that are found to have participated in cartels. This is seen as an alternative solution to the introduction of criminal penalties, which many national judges may be reluctant, in practice, to enforce. The knowledge by directors that they risk losing their jobs would serve as a threat, whilst being easier to enforce than criminal sanctions.

2.3. Settlements

Consideration should be given to including in decisions terminating cartel infringements a provision whereby the infringing company promises to accept arbitration of claims from victims of the infringing conduct. This would have assisted the victim whose plight I described at the beginning.