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Recent Developments in Cartel Enforcement at EC and UK Levels—Adjusting the Mix of Carrots and Sticks

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I. INTRODUCTION & OVERVIEW

The detection and prosecution of cartels continues to be a key competition enforcement priority of the European Commission ("Commission") and continues to grab headlines. In 2007 the Commission imposed the highest cartel fines in its history—close to €1 billion—on members of the elevators and lifts cartel and 2008 to date has seen six dawn raids launched in relation to alleged cartel conduct involving over 30 undertakings. Although financial penalties and the offer of leniency in return for reduced penalties undoubtedly continue to be the cornerstone of the EU policy approach to the detection and deterrence of cartels, the Commission has explored additional measures including the recent launch of an administrative settlement procedure for cartel cases while work on measures to encourage private actions for damages for breach of EU competition law continues. Despite these measures, the EU regime lacks the strongest weapon in terms of cartel deterrence and the aspect most frequently lauded as the cornerstone of the U.S. cartel enforcement regime: the threat of criminal prosecution and imprisonment of individuals.

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The mix of incentives and punishment factors ("carrots" and "sticks") differs at member state level. In this paper we have considered recent developments in the UK given that, in common with only a handful of other member states, it has a criminal regime in addition to a European style civil regime. In the UK, there have been no cartel decisions in the last 18 months and the level of fines imposed (in the last 18 months solely as a result of administrative settlements) does not come close to the magnitude of EC fines; however a number of recent developments have bolstered the deterrent effect of the UK regime. First and foremost these include: the first criminal prosecutions under the Enterprise Act cartel offence. In addition in the UK steps are being taken toward legislation aimed at further encouraging private damages claims (and in particular "stand alone" rather than simply "follow on" claims following the Office of Fair Trading's ("OFT") November 2007 recommendations to the UK government); there has been significant use of administrative settlements to incentivize parties to accept rather than challenge infringement decisions in return for a reduction in fines; and the introduction of a controversial pilot scheme to pay cartel informants for information on cartel activity. The OFT has also sought to provide greater transparency in relation to its pursuit of competition law infringements. In September 2007 it launched a public consultation on its prioritization principles[1] explaining that it sought to "optimize the impact of its public enforcement by increasingly focusing on high-impact outcomes rather than the number of investigations."

[1] The draft OFT prioritization principles are available at: http://www.oft.gov.uk/shared_oft/consultations/oft953con.pdf.

This article provides an overview of the policy mix of "carrots" and "sticks" which form part of the arsenal available to EC and UK authorities in their fight against cartels and considers the recent developments in relation to the initiatives undertaken by the Commission and the OFT in terms of the twin policy objectives of detecting and deterring cartels.

II. STICKS

A. Fines—The Traditional Deterrent

In antitrust enforcement, as in business, money talks. For this reason fines remain the cornerstone of the EC's enforcement policy against cartels. Indeed, research suggests that a formal infringement decision from the EC against a company, including imposition of a fine, can result in a company's share price falling up to 3.3 percent.[2]

2007 saw the highest fines ever imposed by the Commission in relation to cartel conduct. Of these, the most notable were fines imposed on members of the lifts and escalators cartel in February 2007 which represent both the highest aggregate fine (€992 million) and highest individual fine (€479 million for ThyssenKrupp) ever imposed by the EC, even after leniency reductions were applied. There are currently twelve appeals pending in the Court of First Instance against the EC's decision, with all appellants alleging that the EC made errors in calculating the fines imposed and some alleging specific breaches of the EC's fining guidelines.

[2] Langus and Motta, *The effect of EU antitrust investigations and fines on a firm's valuation*, CEPR Discussion Paper No. DP6176 (March 2007), *available at* SSRN: http://ssrn.com/abstract=1133820.

The trend for high fines continued, as the EC wasted no time in flexing its revised powers under its 2006 Penalty Guidelines,[3] which were first applied in November 2007 in the calculation of fines for the participants of the professional videotapes cartel. The Commission imposed its fifth highest fine ever later that month, imposing fines totaling €486.9 million on four flat glass producers accused of coordinating price increases and other commercial conditions for deliveries of flat glass in the EEA.

The upward trend seemed likely to continue. The 2006 Penalty Guidelines were introduced (replacing the 1998 Guidelines) "with a view to increasing the deterrent effect of fines."[4] Nevertheless, to date the highest fines levied by the EC remain those calculated under its 1998 Penalty Guidelines. The fines imposed by the Commission thus far in 2008 have been relatively modest, with none exceeding €80 million.

The Commission also claims that the calculation of fines under the 2006 Penalty Guidelines better reflects the overall economic significance of the infringement. However, while fining calculations are based on both the cartelist's turnover in the products and services related to the alleged infringement and the duration of the offence, the Commission does not aim to align the fine with a quantification of the cartel overcharge. Cartel fines in the EC are still not intended to approximate either the profits gained by the cartelist through participation in the cartel or the consumer loss suffered by those who purchased the cartelized products.

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[3] EC Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2) of Regulation No.1/2003.

[4] EC Commission Press Release, *Commission revises Guidelines for setting fines in antitrust cases* (IP/06/857).

Indeed, academic research has shown that even the significant cartel fines imposed under the 1998 Penalty Guidelines would need to be several times higher to be at an optimal deterrence level, taking into account both the aggregate consumer loss suffered as well as the probability of detection.[5] The OECD has reported that global cartel fines remain substantially below the level of harm that cartels are estimated to have caused, and that based on conservative estimates, a cartel fine would need to be three times higher than the actual gain realized by the cartel to be an effective deterrent.[6] Nevertheless, there is a clear danger that the imposition of fines at this optimal deterrence level would be impractical, pushing firms into bankruptcy and reducing both the ability of the EC to recover the penalties imposed and imposing undesirable social costs in terms of impact upon employees, suppliers, customers, creditors, and tax authorities.

It is against this background that antitrust authorities have increasingly sought to look beyond fines to enhance the effectiveness of their enforcement against cartels.

B. Criminalization—The Most Effective Weapon Against Cartelists?

In a Deloitte study commissioned by the OFT in relation to the deterrence effect of its competition enforcement,[7] both companies and practitioners identified criminal penalties as the single most important sanction in deterring competition law

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[5] Cento Veljanovski, *Cartel Fines in Europe, Law, Practice and Deterrence*, World Competition, Vol.29, March 2007.

[6] OECD Hard core cartels - Third Report on the Implementation of the 1998 Recommendation 2005; OECD Implementation of the Council Recommendation Concerning Effective Action against Hard Core Cartels: Second Report by the Competition Committee 2002.

[7] OFT 962, *The deterrent effect of competition enforcement by the OFT - A report prepared for the OFT by Deloitte*, November 2007.

infringements. Indeed, companies considered that criminal sanctions, director disqualification, and adverse publicity were all more powerful deterrents than fines.

Criminal sanctions have been available to the U.S. antitrust agencies for violations of Sections 1 and 2 of the Sherman Act since the original enactment of that legislation in 1890. By contrast, European antitrust regulators have been slow to criminalize cartel activity. Only in recent years have certain EU Member States adopted criminal sanctions for hardcore cartel activity—namely, the UK, Ireland, France, Estonia, Hungary, Romania, the Slovak Republic, and Slovenia.[8]

The U.S. Department of Justice ("DOJ") is of course streets ahead of other antitrust authorities in its active prosecution of individuals for antitrust violations. In his review of 2007 U.S. antitrust enforcement, Scott Hammond of the DOJ's Antitrust Division stated that "the Division has long emphasized that the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences."[9] The Antitrust Division of the DOJ imposed a record number of jail days in fiscal year 2007, with 31,391 jail days imposed on defendants, more than doubling the previous annual high in 2005. With the maximum jail term for offences under the Sherman Act now raised from three to ten years for cartel activity that began or continued on or after June 22, 2004, the upward trend in the length of U.S. antitrust sentences is likely to continue. In addition, the DOJ has shown increasing willingness to prosecute foreign nationals for cartel offences. In 2007, the DOJ imposed a 14-month sentence on a

[8] The competition law enforcement regimes in Austria and Germany provide for criminal sanctions for bid-rigging activity only.

[9] Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division U.S. Department of Justice, *Recent Developments, Trends and Milestones in the Antitrust Division's Criminal Enforcement Program* (March 26, 2008).

Korean executive for participation in the international Dynamic Random Access Memory price-fixing cartel, two further 14-month sentences on French executives who participated in the international marine hoses cartel, as well as filing plea-bargain agreements with three British nationals, calling for 30-month, 24-month and 20-month prison sentences for their participation in the international marine hoses cartel. As some EU Member States have adopted their own criminalization legislation for cartel activity and others are discussing that possibility, coordination between the DOJ and European antitrust regulators to seek the extradition of European nationals is likely to become ever more prevalent.

The UK is one of a minority of EU Member States that has moved towards the U.S. antitrust enforcement model, buttressing the fining powers of its regulators with exposure to criminal sanctions for individuals. In the UK, the criminalization of the cartel offence is enshrined in Section 188 of the Enterprise Act 2002 and has been part of the legislative landscape since June 2003. However, as the results of the OFT's 2007 deterrence study have demonstrated, while the mere existence of a criminalized cartel offence has some deterrent impact, this needs to be translated into actual prosecutions to have full deterrent effect.

In June 2008, the OFT secured its first criminal cartel convictions, with the sentencing of three British executives in the English criminal courts for their participation in the international marine hoses cartel. The long custodial sentences imposed (ranging from two and a half to three years) were surprising in light of guilty pleas from the

defendants and the five-year statutory maximum established for the offence.[10] On handing down the sentences, the presiding judge stated that he had taken into account that these were the first prosecutions under the Enterprise Act 2002, but that this would not be a mitigating factor going forward and future sentences for this offence would likely be higher. All three defendants were also disqualified from being company directors for between five and seven years, and confiscation orders were imposed on the two defendants who had derived personal financial benefit from the cartel, in order to disgorge the profits that had been made. All three defendants are appealing their sentences.

Marine hoses was lauded as a landmark case for the OFT and evidence of its willingness to use its full arsenal of available antitrust weapons against cartelists. In a press release, John Fingleton, Chief Executive of the OFT, stated "this first criminal prosecution sends a clear message to individuals and companies about the seriousness with which UK law views cartel behavior. The OFT will continue to investigate and prosecute cartels vigorously with the aim of ensuring strong competition within the UK economy."[11] For those practitioners in the courtroom and the business community alike, it was a sobering sight to see executives incarcerated in the UK for practices which some had inherited from their predecessors, and which were criminalized during the course of their tenure. However, the prosecutions in this case had been spearheaded by the U.S.

[10] Under UK sentencing guidelines, in order to reach the sentences imposed, the judge's starting point was a sentence of around four and a half years (of a five year maximum).

[11] OFT press release, *Three imprisoned in first OFT criminal prosecution for bid rigging (*72/08).

DOJ and, as a result of the U.S. plea agreement,[12] it was evident that guilty pleas from the defendants would be secured in the UK even before the defendants were returned to the UK for committal. Court proceedings in the UK comprised solely of sentencing hearings, rather than a contested trial on the facts.

As a result, the OFT's mettle in criminal investigations will not be truly tested until it successfully prosecutes a contested case. The test case in this regard is likely to be the prosecution of four former employees and directors of British Airways in relation to price fixing of fuel surcharges on long-haul passenger flights. This is expected to be a contested case with the individuals likely to stand trial either at the end of 2009 or in early 2010.

The past year in the UK has also seen criminal cartel convictions being pursued outside the framework of the statutory cartel offence, under the common-law offence of conspiracy to defraud. Under English law, this offence is committed where conspirators dishonestly agree to bring about a state of affairs which they realize will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss, or his economic interests will be put at risk.[13] In March 2008, in the cases of *Norris v Government of the United States of America*[14] and *R v GG plc and Others*,[15] the House of

[12] The defendants had been apprehended by U.S. officials in Houston in May 2007 and had entered plea bargains with the DOJ on December 12, 2007, pleading guilty to offences in the U.S. and agreeing to return to the UK, assist the OFT with its investigation into the cartel, and plead guilty to offences under the Enterprise Act 2002. The defendants were returned to the UK in custody and were charged by the OFT with violations under the Enterprise Act 2002 on December 18, 2007.

[13] *Wai Yu-Tsang v The Queen* [1992] 1 AC 269.

[14] [2008] UKHL16.

[15] [2008] UKHL 17 (unreported).

Lords addressed the question of whether the offence of conspiracy to defraud could be applied to price fixing agreements.

In the *Norris* case, the U.S. Government seeks the extradition of Mr. Norris, a UK national and formerly CEO of the carbon products manufacturer, Morgan Crucible, on charges including conspiring to operate a price-fixing agreement from 1998-2000, contrary to section 1 of the Sherman Act. One of the defenses argued by Mr. Norris was that cartel participation had not been criminalized in the UK until June 2003, when the cartel offence under the Enterprise Act 2002 came into force. Therefore, at the material time (1998-2000), the relevant conduct was not an offence under English law and thus could not found the basis for an extradition request. The U.S. government countered that Mr. Norris' conduct amounted to conspiracy to defraud, which is a crime of long standing at common law.

In the *GG* case, the UK's Serious Fraud Office brought conspiracy to defraud charges—on a corporate and individual basis—against five pharmaceutical manufacturers and distributors as well as nine individuals who were employees or directors of those companies at the relevant times. The prosecution alleged that the defendants had entered into dishonest price-fixing agreements for warfarin and antibiotics between 1998 and 2000, as part of a fraudulent scheme to artificially inflate the price lists submitted to the Department of Health (the Department of Health used these lists to calculate the reimbursement it paid out). As in the *Norris* case, the defendants mounted the argument that the conduct in question was not criminal at the material time, as the Enterprise Act

establishing the statutory cartel offence was not yet in force.

In the *Norris* case, the House of Lords concluded that "mere price-fixing" without other aggravating features such as fraud, misrepresentation, violence, intimidation, or inducement of breach of contract was not a crime in the UK at the material time, although Mr. Norris may still be subject to extradition on other grounds. The outcome of the *GG* case is subject to reporting restrictions and therefore cannot be discussed further here. The issue of whether cartel conduct can be prosecuted as a charge of conspiracy to defraud has practical significance in the UK for a number of reasons. First, both individuals and corporations can be charged with the conspiracy to defraud offence, whereas the cartel offence only applies to individuals. The cartel offence can only be applied to the exhaustive list of arrangements laid out in section 188(2) of the Enterprise Act, whereas the conspiracy to defraud charge is not restricted in this way. The conspiracy to defraud charge is also not restricted temporally, whereas the cartel offence can only apply to conduct which took place after June 20, 2003. [16] It remains to be seen whether prosecuting authorities will continue to seek to rely on conspiracy to defraud after the House of Lords judgment in *Norris* and whether the interpretation of dishonesty under the common law in the *Norris* case will influence the interpretation of dishonesty for the purposes of the statutory cartel offence, and require the prosecution to establish further evidence of aggravating features in order to effectively found a criminal cartel charge under the Enterprise Act.

[16] For useful discussion of the conspiracy to defraud offence, see Maya Lester, *Prosecuting Cartels for Conspiracy to Defraud*, Competition Law Journal 7(2), 2008.

It seems very unlikely that the Commission will add criminalization to its weaponry. Article 23(5) of Regulation 1/2003 establishes that Commission decisions which impose fines on undertakings for violations of Articles 81 and 82 "shall not be of a criminal law nature." The situation is obviously different at a national level, as shown by the British and other European examples, because under Article 5 of the same regulation, EU Member States are given latitude to apply Article 81 or 82 through any penalty provided for in their national law. Nevertheless, the Commission does not currently have criminal powers in any area and it is highly unlikely that it will do so in the near future mainly because of, inter alia, the difficulties of establishing the necessary legal infrastructure for hearing and enforcing criminal offences at a European level. Arguably this void in terms of deterrence at the EC level can be at least partially addressed if European institutions can convince (at least) the most significant EU jurisdictions to adopt criminal sanctions for cartels. In this case, the vexata questio of whether the EU system should adopt criminal sanctions would become moot. This route seems to have been hinted at by the European Court of Justice in a recent judgment on environmental infringements where it acknowledged that although criminal law does not fall within the Community's competence "the Community legislature may require the Member States to introduce [criminal] penalties in order to ensure that the rules … are fully effective" because "the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious

environmental offences."[17] Similarly, the European Parliament is currently assessing the necessity of criminal measures for intellectual property right infringements.[18]

C. Private Enforcement—An Essential Complement to Public Enforcement

A detailed discussion of the existing and mooted mechanisms required to stimulate private enforcement of competition law is outside the scope of this article. However, it is important to note that both the Commission and UK regulators are seeking to encourage the introduction of measures to stimulate the private enforcement of competition law. The distinct benefit of private over public enforcement is that, if effective, the disgorged profits should find the "right pockets," i.e. the victims of the cartel, rather than finding their way into consolidated revenue. In addition, as the U.S. example shows, proactive and efficient private enforcement can constitute an important added factor to achieve an optimal level of deterrence.

While not going as far as encouraging opt-out class actions of the type seen in the U.S., both the EC and the UK have in the past year published recommendations to encourage the use of private enforcement, namely, the EC's White Paper on damages action for breach of EC antitrust rules (April 2008), and the OFT's recommendations to government on private actions in competition law (November 2007)[19] which followed its

[17] Case C-440/05, para 66.

[18] The Commission has started a study to find out whether criminal measures against infringements of intellectual property rights are actually needed and on March 20, 2008, the Official Journal of the European Union published a controversial and contested version of the IPRED2 (Second Intellectual Property Rights Enforcement Directive) European Parliament (EP) consolidated text.

[19] OFT Recommendations on private actions in competition law: effective redress for consumers and business, available at http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916resp.pdf.

April 2007 Discussion Paper.[20] In addition, the Department for Business, Enterprise and Regulatory Reform in the UK has prepared a draft consultation paper on a draft Competition Bill that would include measures to encourage stand alone private actions in the UK (including expanding the scope of representative actions, allowing opt out cases, and bringing into force Section 16 of the Enterprise Act 2002 allowing cases raising competition issues to be transferred from the High Court to the Competition Appeal Tribunal). Timing for release of both the consultation paper and the Competition Bill is uncertain but the Bill could come before the UK parliament as early as next year.

III. CARROTS

A. Leniency—The Most Important Tool For Detection

Statistics show that leniency regimes are the single most effective measure in the detection of cartels. Since the 2002 Leniency Regime began, the Commission has received more than 100 leniency applications and more than 60 percent of the EC cartel decisions adopted since January 1, 2003 have been based on immunity applications. The widespread consensus of the regulatory and legal community on the efficacy of leniency to fight cartels has resulted in almost every member state of the EU having some form of leniency policy in place in relation to cartels (with the exception of Malta and Slovenia).

The Commission's 2006 Leniency Notice[21] was intended to enhance the effectiveness of Commission cartel investigations and provide more guidance and clarity for leniency applicants. Although there is scope for further improvement in terms of, inter

[20] OFT Discussion Paper on Private actions in competition law: effective redress for consumers and business, available at http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916.pdf.

[21] Commission notice on immunity from fines and reduction of fines in cartel cases, Official Journal C 298, 8.12.2006, p. 17.

alia, improving the predictability of the outcome of leniency applications, the Commission seems to be moving in the right direction. At both EU and UK levels, leniency programs are more generous than their U.S. analog in that second and subsequent applicants can secure a reduction in fines provided they can add value to the evidence already in the authorities' possession. Perhaps perversely, such generosity arguably means that European leniency policies lack the same level of destabilizing strength of their U.S. analog with its grounding principle of "first in takes all."

B. Administrative Settlements—The New Kid On the Block

1. EU Settlement Procedure

Another perhaps perverse impact of the leniency program is that the Commission is on the verge of becoming a victim of the program's success. Although, in the past few years, the number of cartel decisions—and the level of fines—has increased, the Commission's resources are being strained by a considerable backlog of cases.[22]

As recently noted by Commissioner Kroes[23] by introducing a settlement process,[24] the Commission hopes to "escape" from some of the burdensome procedural requirements (with abridged statements of objections and decisions, a related reduction of

[22] E Sakkers, *The Commission's fight against cartels: two years with Neelie Kroes*, CLA, January 31, 2007. The Commission indicated that its then staffing levels of approximately 55 case handlers, combined with the duration of cartel investigations (a best case scenario of 30 months from the start of the case to the taking of a final infringement decision) meant that the Commission is currently limited to around seven to ten cartel decisions a year, with a potential annual backlog of five to eight decisions.

[23] Commissioner Kroes, *Settlements in cartel cases*, 12th Annual Competition Conference, Fiesole, September 19, 2008, SPEECH/08/445.

[24] Commission Regulation (EC) No 622/2008 of June 30, 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171, 1.7.2008, p. 3–5) and Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ C 167, 2.7.2008, p. 1–6).

documents to be screened for confidentiality purposes for access to file, and with time saved by reducing the correspondence burden and oral hearings) and to utilize resources freed up in this way to reduce its backlog and to take on new cases.

Settlement is an "atypical carrot" in that unlike other incentive-based enforcement tools it is not directed at detection but deterrence, as recently acknowledged by Commissioner Kroes: "the settlement package will increase overall deterrence because deterrence is a function of the probability of being detected and prosecuted quickly, as much as it is about fines."[25] In principle, an effective settlement program also, of course, enhances deterrence via an increased number of enforcement actions.

The Commission's settlement procedure in essence involves an abbreviated investigation with respect to those parties who are willing to settle, a requirement for parties to acknowledge liability and waive certain procedural rights (such as access to the file and a formal oral hearing) in return for a fine reduction of 10 percent.

The Commission will have the discretion to determine which cases may be suitable for settlement (inviting all parties to express interest in settlement before issuing the statement of objections) and with whom it wishes to explore the possibility of settlement. The Commission's substantial discretion in deciding whether or not to pursue and endorse a settlement will create uncertainty for settlement candidates. If the Commission eventually decides not to engage in a settlement process, its notice provides that the acknowledgments would be deemed withdrawn. Nonetheless, the parties will have shown their hand. Since the "settlement team" is the same as the "case team," there

[25] Kroes, *supra* note 22.

is of course a risk that settlement discussions will influence the remaining procedure even after they have been terminated.

Settlement regimes must of course be carefully calibrated so as not to undermine the most effective carrot available to a cartel regulator: leniency. If incentives to settle are set too high (i.e. the reduction in fines available is very significant) this may lead to would be leniency applicants making trade offs between leniency and settlement which could undermine leniency as an investigative tool. The impacts on the leniency regime are most acute in cases where a party would be eligible for less than full immunity. Settlements of cartel cases can also raise concerns about deterrence if they result in substantially lower fines and can also negatively impact the ability of claimants to bring follow on claims (given the abridged nature of decisions and, in the case of the UK, in some cases the exclusion of any admission as to effect of the cartel on prices[26]). On the other hand, if incentives to settle are set too low then the regulatory authority will not achieve the procedural efficiencies which an early settlement program is aimed at.

Given that the settlement discount is set so low in the case of the Commission's program, there would seem to be little scope for major impact on its leniency regime (and it has indicated that leniency discounts will be available in addition to a settlement discount). It remains to be seen, however, whether the offer of a 10 percent reduction (in light of potential concerns indicated above) will prove a sufficient incentive for parties at the European level. The test case in this regard may be the power transformers cartel,

[26] See, for example, Stephen Kon and Amy Barcroft, *Aspects of the Complementary Roles of Public and Private Enforcement of UK and EU Antitrust Law: An Enforcement Deficit?*, GCLR (11) 2008.

although at the time of writing the Commission has yet to decide whether to formally start negotiations with the undertakings concerned.

2. UK Settlement Procedure

In contrast to the nascence of settlements in the EU, the use of administrative settlements (or, in OFT parlance "early resolution") in relation to cartel cases in the UK is alive and flourishing (notwithstanding the absence of any notices or guidance on the process or expected content of a settlement agreement: parameters on process tending to be set, at least at present, on a case by case basis). The OFT deals with administrative settlements as an element of mitigation under Step 4 of its guidance as to the appropriate amount of a penalty,[27] namely: "co-operation which enables the enforcement process to be concluded more effectively and/or speedily." To date, the OFT has reached administrative settlements with some or all parties in four cases: *Independent Schools*, *Long-Haul Passenger Fuel Surcharges*,[28] *Dairy Retail Price Initiatives*,[29] and most recently, *Tobacco*[30] yielding total fines (before settlement discounts and leniency) of approximately £410 million. The OFT has also (taking a lesson from the Dutch competition authority's approach to its construction/civil engineering investigation) applied a "fast track/amnesty" program[31] in its largest cartel investigation to date in relation to bid rigging in the construction industry.

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[27] OFT 423, December 2004.

[28] With BA, Virgin obtained full immunity.

[29] Tesco and Morrisons dispute the OFT's provisional findings.

[30] The Co-operative Group, Imperial Tobacco, Morrisons, Safeway, Shell, and Tesco dispute the OFT's provisional findings.

[31] The fast track process differs from settlement in the sense that the offer of reduced financial penalties to those who had not applied for leniency occurred (at least in construction) prior to the issue by

As with the Commission's approach to settlements, the OFT requires settling parties to make an admission of liability and waive certain procedural rights (access to the file and lodging of a response to the SO (other than to correct "factual inaccuracies") in return for a reduction in fines. Unlike the Commission's program, the OFT has in the past offered significantly higher reductions in fines to settling parties (albeit for the reasons explained above, at a level designed to preserve the greater benefits of the least generous form of leniency (Type C leniency) pursuant to which an undertaking can secure a reduction of up to 50 percent of fines).[32] However, unlike the Commission, the OFT requires more by way of cooperation than a mere admission of liability and requires the parties to make its employees available to the OFT to bolster, with oral evidence and any documents not already provided to the OFT, the OFT's ultimate decision.

Settlements have, from the OFT's perspective, been used to great effect in the UK. However some concerns remain. As the OECD's recent Policy Brief on "Plea Bargaining and Settlement of Cartel Cases"[33] points out "… to maintain deterrence in cartel enforcement a competition authority must be able to impose stiff sanctions even in settled cases." This in turn depends on whether there is a credible threat that substantial sanctions could be imposed in a normal procedure or after a trial. The need to use settlements only against the backdrop of credible, substantial sanctions also suggests that

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the OFT of the statement of objections (which predated the offer of settlement in the *Independent Schools, Dairy,* and *Tobacco* cases).

[32] Type C leniency refers to a situation where an undertaking is granted a reduction of up to 50 percent of the level of financial penalty imposed under the CA98 in circumstances where the undertaking was not the first to apply and there was already a pre-existing civil and/or criminal investigation into the relevant cartel activity.

[33] September 2008.

this instrument should be used cautiously early in the development of a jurisdiction's anti-cartel enforcement efforts, before credible sanctions have been established and courts have been persuaded to approve or impose high fines.

In the UK, the highest cartel fines imposed to date have been via negotiated settlement rather than as a result of a contested case.[34] In addition, the OFT has not issued a cartel infringement decision (whether in relation to a settled case or otherwise) since 2006.[35] In addition, rather than enhancing procedural efficiencies and thereby increasing the number of investigations able to be taken on by the OFT, the number of cartel investigations opened by the OFT in its last financial year has actually fallen relative to previous years.

The OFT is alive to the potential impact of settlement on deterrence. As Laura Guttuso of the OFT has noted: "insofar as leniency is concerned, competition agencies are prepared to accept reductions in financial penalties, given the significant benefits which result in terms of cartel detection (leading to an increase in deterrence overall). As regards the impact of reductions in financial penalties imposed under settlements, however, the advantages are less clear. Indeed, absent a proven track record of strong and consistent enforcement, it is at least arguable that any reduction in financial penalty under the terms of the settlement could, in isolation, impact negatively on deterrence."[36]

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[34] The highest individual fine imposed by the OFT was the £121.5 million fine on BA for *Passenger Fuel Surcharges* as a result of a negotiated settlement. The highest "contested" cartel fine imposed by the OFT to date was in relation to Argos's involvement in the Toys case (£17.28 million reduced to £15 million on appeal to the CAT).

[35] *Independent Schools*, November 2006.

[36] Laura Guttuso, *Prioritizing and Settling Cases*, Competition Law Journal, 6(1), 2007, 67-78 at p.76.

In light of these (and other) issues it will be interesting to see whether settlements will continue to be as favored a tool in the OFT's enforcement kit in the future.

C. Paying Informants in the UK—Breaking the Silence by Furthering the Prisoner's Dilemma?

On March 3, 2008 the OFT launched a pilot initiative aimed at improving the detection of UK cartels: the offer of financial rewards of up to £100,000 (in exceptional circumstances) for information about cartel activity. The OFT has absolute discretion in determining whether information provided by an informant establishes a credible basis for further investigation and in determining the amount of any final reward and has indicated that the program is selectively targeted at those with "inside" information on a cartel such as junior employees and clerical staff and not those "directly" involved in cartel conduct or complainants with concerns about possible cartel activity by their competitors. This innovative but controversial measure has no parallel in the other Western world cartel enforcement regimes. On an international level, the only other anti-trust authority at present to have a similar reward program is South Korea, although it is understood that the European Commission is considering a similar scheme.

The scheme is innovative in that it furthers the prisoners' dilemma in a way in which the existing leniency regime does not—not only must cartelists consider the risks of their fellow cartelists blowing the whistle and/or of their own participating employees seeking individual criminal immunity (at the expense of their company), but now they must also be suspicious of secretaries and administrative staff coming forward to claim

individual rewards.

The OFT's informant reward scheme does, however, raise a number of questions for companies and their advisers to consider. There are significant unanswered questions as to whether the objectives of the regime are realistically achievable without resulting in unfounded investigations (and, in particular, abuse by disgruntled or uninformed employees) and what the introduction of the scheme says about the state of the OFT's leniency program.

IV. CONCLUSIONS

In recent years, Europe has seen rapidly escalating cartel fines and in the UK, the flexing of hitherto untested criminal enforcement powers. Rather than simply rely on headline grabbing fines, however, recent developments in Europe and the UK demonstrate that policy makers are prepared to consider more creative measures to bolster the mix of carrots and sticks at their disposal, ranging from measures to encourage private enforcement, increased usage (or at least, in the Commission's case, the creation of) a framework to permit administrative settlements, and the introduction of an innovative (but controversial) scheme to pay informants. The question which remains in Europe, however, is whether legislators (most realistically, at member state level) will be prepared to take the logical step in terms of maximizing the deterrent effect of cartel laws and criminalize cartel conduct. If they do not, the Commission (and other authorities in jurisdictions in which only administrative penalties apply) may be increasingly sidelined in terms of setting the pace of cartel policy and enforcement, by a cabal of global cartel

regulators with criminal powers and a track record of prosecutions.