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# Parallel Antitrust Investigations: The Long Arm of the DOJ from the Perspective of an E.U. Defense Counsel

Roderick Lambert \*

## I. Parallel Investigations

The main emphasis of this paper is upon practical aspects of parallel cartel investigations by the United States and the European Union antitrust authorities. The current debate on the role of portfolio theory in cross-jurisdictional merger cases is a matter of particular concern in the U.S., given the European Commission's ("Commission") decision to block the proposed *GE/Honeywell* merger.<sup>1</sup> Ironically, this dispute is one of the very few cases where the respective authorities in E.U. and the U.S. have reached opposite conclusions. In the field of merger control, there has been successful cooperation in the past, as demonstrated by the *WorldCom/MCI* and the *BT/AT&T/Japan Telecom* cases,<sup>2</sup> and in the field of antitrust enforcement, the U.S. and E.U. regulators have developed a close working relationship.

The campaign against international cartel activities is now on the agenda of a myriad of international organizations. The United Nations Conference on Trade and Development, the World Trade Organization, the Organization for Economic Cooperation and Development ("OECD"), and the recently launched International Competition Network are all examples of bodies with a dedicated

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<sup>1</sup> Case COMP/M2220, General Electric/Honeywell, 2001 O.J. C 46/6. The Commission found that the notified concentration could fall within the scope of Regulation (EEC) No. 4064/89, but reserved final decision on the matter.

<sup>2</sup> Case 99/287/EC, WorldCom/MCI, 1999 O.J. (L 116) 1-35; Commission Decision declaring a concentration to be compatible with the common market, Case COMP/M.1510, AT&T/BT/Japan Telecom 1999 O.J. C 181/14.

interest in the field. To those outside of the U.S., the International Competition Policy Advisory Committee ("ICPAC") report considers the global problem of enforcement, and, in effect, reads as if addressed to all antitrust authorities rather than just the Antitrust Division of the Department of Justice.<sup>3</sup>

There is now extensive cooperation between antitrust authorities who attend regular meetings, at which they concentrate on the multilateral convergence of enforcement policies.<sup>4</sup> In Europe, for example, the Commission is proposing a series of modernization reforms, which will allow it to focus its efforts upon cartel detection and prevention. These reforms will free up resources by removing the system of mandatory notification of restrictive agreements, as well as by removing the current monopoly, in relation to the grant of exemptions from Article 81.<sup>5</sup> This freed up resource can then be directed towards cartel detection and antitrust enforcement. The Commission currently proposes an extension of its information-gathering powers and wider questioning powers. The Commission also seeks the authority to impose more significant fines in circumstances where it finds that there has been some obstruction of its investigation (currently a mere 5,000 euros.)

In the U.K., the proposals for reform are even more radical. The Enterprise Bill will be introduced in 2002 and will include a new criminal offense for individuals who engage in significant cartel activity. The precise wording of the offense has yet to be confirmed, but most likely, the offense will be independent of any finding of an Article 81 infringement and will focus on "dishonest" involvement in cartel activity as defined by the OECD. This proposition suggests that ignorance of the law may be a defense, which would be a novel proposition in U.K. criminal law. It is currently envisaged that conviction will lead to custodial sentences of between 3 and 5 years, which is similar to other jurisdictions such as Canada. There are proposals in the soon to be revived Criminal Justice and Police Bill that allow for covert surveillance and the disclosure of confidential business information to overseas antitrust authorities for criminal

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<sup>3</sup> International Competition Policy Advisory Committee Report, at 18 (2000).

<sup>4</sup> *E.g.*, International Cartel Workshop held at Brighton, U.K., Nov. 2000 and Ottawa, Canada, Nov. 2001. Information regarding this Workshop is available at <http://www.oft.gov.uk/html/trading/ft29-03.htm>. (last visited on Feb. 8, 2002).

<sup>5</sup> Proposal for a Council Regulation on the implementation of the rules of competition set forth in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No. 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86, and (EEC) No. 3975/87, COM (00) 582, final at 284-85.

investigations or proceedings abroad.<sup>6</sup>

Additionally, high level international meetings now regularly take place on antitrust policy. For example, the European Competition Commissioner Mario Monti met with Charles James, the Assistant Attorney General for Antitrust and the Chairman of the Federal Trade Commission, in Washington on September 24, 2001.

Increasingly global antitrust authorities are looking to invoke jurisdiction on the basis of an anti-competitive effect within their domestic territories. For instance, since the enactment of the U.K. Competition Act on March 1, 2000, the Office of Fair Trading in the U.K. has had the power to investigate all parties involved in anti-competitive agreements, regardless of whether a company has business premises in the U.K. The Office of Fair Trading must prove, however, that the parties implemented the agreement in the U.K.<sup>7</sup>

Similarly, in the E.U., with regard to jurisdiction under Article 81, it is irrelevant whether or not the firms involved in the cartel have their seats inside or outside the E.U.; rather, the issue is whether an effect is felt within the E.U. Where there are subsidiary companies operating without any real autonomy, it is irrelevant under E.U. law that the parent company is situated in a territory outside the E.U. Any acts that have an immediate, substantial, and foreseeable effect within the E.U. will give the Commission jurisdiction to apply Article 81 to international cartels that produce such effects on the market.<sup>8</sup>

In addition to this expansive effects-based reasoning regarding jurisdiction, antitrust authorities also rely upon the international law notion of positive comity (for example, the 1998 E.U.-U.S. positive comity agreement).<sup>9</sup> This doctrine allows an adversely affected state to appeal to other states to take steps against businesses even if no offenses have been committed in that foreign territory.

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<sup>6</sup> The White Paper, *Productivity and Enterprise: A World Class Competition Regime*, Presented to Parliament by the Secretary of State for Trade and Industry, Department of Trade and Industry (July 2001) [hereinafter *Productivity*]; see also *Proposed Criminalisation of Cartels in the U.K.*, Sir Anthony Hammond KCB QC and Roy Penrose OBE QPM, Office of Fair Trading, at 25 (Nov. 2001).

<sup>7</sup> Competition Act, 1998, Chapter 41 (U.K.).

<sup>8</sup> Case T-102/96, *Gencor Ltd. v. Comm'n of the European Cmtys.*, 1999 E.C.R. II-753, 4 C.M.L.R. 971 (1999).

<sup>9</sup> Agreement between the E.C. & U.S. on the application of positive comity principles in the enforcement of their competition laws, 1998 O.J. (L 173) 28, 30 [hereinafter *Comity Agreement*].

Moreover, the aggressive investigation and fining policy of the Department of Justice (with over six \$100 million plus fines already imposed) is now being mirrored by the European Commission who, in 2001, issued 12 price-fixing decisions with the fines imposed totaling 1.940 million euros.<sup>10</sup>

Notwithstanding the importance to the world economy of eradicating international cartel behavior, it is nevertheless important to highlight the need for this task to be accomplished in a manner consistent with the protection of the fundamental human rights of those suspected of cartel involvement. This task must also be completed in a manner consistent with procedural fairness, a fundamental principle of E.U. law.

In this context, antitrust authorities outside the U.S. should welcome the recent decision in *Kruman v. Christie's International*.<sup>11</sup> The plaintiff's complaint related to acts outside the U.S. and, from an E.U. perspective, the court correctly commented that a finding of jurisdiction in the U.S. would have been an unwarranted assertion of U.S. judicial power.<sup>12</sup> Similarly, in *Den Norske Stats Oljeselskap v. Heeremac VOF*,<sup>13</sup> the court rejected the claims of a foreign plaintiff injured in the foreign marketplace and confirmed that for the Sherman Act to apply, a substantial effect on U.S. commerce itself must give rise to any antitrust claim. A number of future cases are in the pipeline, and hopefully, the more conservative view on the scope of the Sherman Act outlined above will prevail. If the U.S. courts permit forum-shopping by foreign entities where the dispute has little causal connection with the U.S., then that can only operate to the detriment of other antitrust enforcement systems which may take a different view on matters such as treble damages and contingency fees. A private litigation-based system is not the only plausible system of ensuring compliance with the goals of the antitrust laws.

The references below to parallel investigations should be taken as referring to concurrent, rather than anything as precise as simultaneous, investigations.

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<sup>10</sup> For further details, please see Appendix A below.

<sup>11</sup> 129 F. Supp. 2d 620, 626 (S.D.N.Y. 2001).

<sup>12</sup> *Id.*

<sup>13</sup> 241 F.3d 420, 429 (5th Cir. 2001).

## **II. Subpoena**

From an E.U. perspective, the breadth of a grand jury subpoena in a Sherman Act proceeding is truly breathtaking. While no doubt a product of the word-processor age, one cannot help but think that such an overly expansive approach offends the fundamental principles of fairness and is liable to lead to an unfocused inquiry. Such breadth can only be explained by either a failure to properly define the extent of the exercise at the outset, or else it is an unwarranted fishing expedition that ought to be condemned. The definitions of documents and subject matter covered are invariably exhaustive. One grand jury subpoena has, in my experience, actually covered every single document (electronic or otherwise) in the possession of a corporate defendant. In other instances, requests for documents have related to a period of 10 years, while in other cases, whole categories of information have been sought without any time limitation.

At first glance, it seems of doubtful constitutional legitimacy to exercise such draconian powers in so broad a manner. The management time and legal costs involved in responding to requests of this nature could be oppressive. In the E.U., there is no recognized procedure for negotiating the scope of an Article 11 request for information. These requests, however, are a good deal more narrowly defined than their grand jury equivalent.

The U.K. Office of Fair Trading (the equivalent of the Department of Justice) has power under Section 26 of the U.K. Competition Act of 1998 to request categories of documents. A recent request involved requiring the recipient to download 25 gigabytes of computer stored information. This exercise necessitated the downloading and analyzing of around 3 million e-mails. The U.K. Office of Fair Trading has now agreed to a procedure that will narrow the scope of the Section 26 request before it attempts a response. It is detrimental to the investigation system to require investigators, lawyers, and other advisors, such as expert economists to examine a vast number of irrelevant documents.

Furthermore, there must be some consistency with other search procedures in criminal cases or quasi-criminal cases. In the U.K., if a search warrant in a general criminal matter is to be obtained, it is imperative that the suspected offense is quite clearly delineated. The judiciary generally refuses to issue wide ranging warrants. In the U.K., the area in which warrants issued under Section 28 of the Competition Act 1998 are most likely to be challenged in court is where they have been too widely drawn.

### III. Protection of Attorney-Client Privilege

The protection of legally privileged documents is one of the most important functions that the defense counsel in attendance at a dawn raid investigation can undertake in the context of an investigation by the antitrust authorities. One example is described in detail below.

The Department of Justice, through grand jury proceedings in the U.S., commenced a recent investigation of an E.U.-based corporation. Using its powers under Regulation 17, the European Commission subsequently raided the corporation.<sup>14</sup> It was not disputed that the European Commission had conducted the raid essentially at the insistence and request of the Department of Justice under the 1998 Positive Comity Agreement. The Commission investigators demanded that attorney-client correspondence regarding the U.S. investigation be handed over and threatened corporation officers and external defense counsel with obstruction proceedings when they refused to hand over such documents. The corporation refused to hand over the correspondence because it saw no bar upon such information finding its way into the hands of the Department of Justice, whether by formal or informal procedures. Additionally, there was a clear risk that this material could have ended up being used to jeopardize the defendant's position in the U.S. criminal proceedings. The Commission and the Office of Fair Trading's legal officers both threatened to seek a High Court warrant to require delivery of the documents in circumstances where obstruction would have then constituted a criminal offense itself and contempt of court. The defense counsel, citing human rights legislation, refused to hand over the documents.

The Commission argued that the only material subject to legal privilege under E.U. law was as defined by *AM&S v. Commission*.<sup>15</sup> This Court of Justice decision confirmed that only communications from external legal advisors, and not in-house counsel, were covered by legal privilege.<sup>16</sup> Strictly, the Court did no more in that case than confirm that legal advice tendered by legal practitioners qualified to practice within the European Community was subject to the

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<sup>14</sup> Article 14 EEC Council Regulation 17 First Regulation implementing Articles 85 and 86 of the EC Treaty, 1962 J.O. (013) 0204.

<sup>15</sup> Case 155/79, *AM&S Europe Ltd. v. Comm'n of the European Cmty.*, 1982 E.C.R. 1616.

<sup>16</sup> *Id.*

protection of legal privilege.<sup>17</sup>

The defense counsel argued, however, that in circumstances where parallel investigations were taking place, documents recording legal advice tendered to U.S. lawyers relating to the conduct and strategy to be adopted in U.S. proceedings must, as a matter of both European and U.K. law, be covered by the doctrine of legal professional privilege. The *AM&S* case was not apt to cover the factual circumstances, in that there was no question in that case of there being a parallel investigation by another antitrust authority. The *AM&S* decision also pre-dated significant developments in the protection of human rights at both the European and U.K. levels.

It was successfully advanced that the requirement to hand over communications from U.S. lawyers instructed specifically to advise on the U.S. investigation infringed upon the corporation's rights under Article 6 and/or Article 8 read in conjunction with Article 18 of the European Convention of Human Rights, the U.K. Human Rights Act, and the client's fundamental rights under European Community Law. Quite clearly, however, the protection outlined in the *AM&S* case is no longer sufficient. It is noteworthy that the U.S. counsel, who are qualified to practice in the European Union, would be able to take advantage of privilege rules in circumstances where fellow counsel, who are not qualified in Europe, would not have that benefit.

This case highlights the importance of a coordinated defense strategy where the procedural impropriety in the E.U. investigation could no doubt have provided a 14th Amendment due process argument for defense counsel in the U.S. proceedings.

#### **IV. Confidentiality**

At first sight, the confidentiality protection under E.U. law seems quite strong. The Commission treats business secrets as information that firms keep secret in order to prevent third parties from obtaining an insight into the essential interests and operational development of their business. To date, the list includes methods of assessing manufacturing and distribution costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, costs, price structure, sales policy, and information on the internal organization of

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<sup>17</sup> *Id.*

the firm.<sup>18</sup>

This fairly expansive list, however, is subject to a major caveat – business secrets are no longer protected when they are known outside the firm to which they relate, if owing to the passage of time, or for any other reason they are no longer commercially important. In practice, the Commission has placed heavy reliance in conducting its investigations on the argument that material can be no longer commercially important in circumstances, where the companies subject to investigation might take a different view.

Antitrust authorities often comment that the restrictions on dealing with confidential information in formal agreements between the E.U. and U.S. is a source of concern that prevents information being routinely exchanged through these formal channels. In practice, the European Commission does not seek formal waivers, as required under the 1991 agreement.

When conducting dawn raids, the Commission refuses to allow documents to be stamped as confidential and takes a very narrow approach to any subsequent claim for confidentiality. In circumstances where the Commission provides no undertaking regarding confidentiality, the only course of action available for the defense counsel would be to refuse to hand over material and suffer the threat of obstruction proceedings. Furthermore, it is instructive in this context to note that the ICPAC report in Annex 1C acknowledges that the Antitrust Division now prefers to use informal procedures rather than requests under formal treaty arrangements.

The protection of confidential information is an obvious concern to European businesses in light of a defendant's constitutional rights, under *Brady v. Maryland*, to have access to all information relied on by the prosecuting authorities.<sup>19</sup> The law on access to information is not nearly as well developed in either Europe or in the U.K., where there generally are no entrenched constitutional rights that can be relied upon to back up a claim for access to information.

There is anecdotal evidence in the U.K. regarding confidential information, obtained in the context of a merger investigation, which found its way into an Oregon newspaper notwithstanding its confidential nature. U.K. organizations such as the Confederation of British Industry remain very concerned by the limited ability to

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<sup>18</sup> Case 53/85, *Akzo v. Comm'n of the European Cmty.*, 1965 E.C.R. (1986); Cases 142 and 156/84, *B.A.T. and Reynolds v. Comm'n of the European Cmty.*, 4487 E.C.R. (1987).

<sup>19</sup> 373 U.S. 83, 87 (1963).

protect confidential information once into the U.S. system.

Where the act of stamping photocopies of documents seized in dawn raids can be done in a manner which does not alter or obliterate any of the evidence, it is difficult to see why such a request should be objectionable to antitrust authorities such as the Commission. A simple step of that nature would certainly provide some protection for the owner of the information and would place on notice any third party coming into possession of the information in the event of either unauthorized or accidental disclosure. Additionally, this practice may also lay the foundation for a civil claim for damages for breach of confidence.

## V. Information Exchange

Formal provisions for the exchange of information exist between the E.U. and the U.S. in terms of the 1991 Agreement and the 1998 Positive Comity Agreement.<sup>20</sup> It is possible, however, for entities to exchange information through direct participation in each other's proceedings. The Federal Trade Commission, for example, attended the Commission's oral hearings in the *British Oxygen Company/Air Liquide* case, and there would seem to be no reason why such an arrangement could not be extended to Regulation 17 procedure in cartel cases.<sup>21</sup> Article 19 of Regulation 17 provides that the Commission or the competent authorities of the member states may also hear "other natural or legal persons" and that "applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted."

Furthermore, there is regular exchange of information both on an informal basis and through the secondment of officials. Clearly, the International Competition Network is designed to facilitate the further exchange of information and this must be seen in the context of the international nature of much of modern day cartel activity.

It is possible to discern a change in emphasis away from formal antitrust cooperation agreements toward the use of the Mutual Legal Assistance Treaties ("MLATs") in criminal matters. By way of example, the U.S. and U.K. signed a MLAT on January 6, 1995, which was ratified on December 2, 1996. This instrument formalized

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<sup>20</sup> Comity Agreement, *supra* note 9; Agreement between the E.C. & U.S. regarding the application of their competition laws, 1995 O.J. L 132.

<sup>21</sup> See generally Case COMP/M.1630, *Air Liquide/BOC* (Commission Decision of Jan. 18, 2000 declaring a concentration to be compatible with the common market according to Council Regulation (EEC) No 4064/89).

cooperation between the two countries and covers the taking of witness statements, the provision of documents, the transfer of prisoners to give evidence, requests to search and seize property, and procedures in respect of the tracing, freezing, and forfeiting of the proceeds of serious crime.

The Treaty specifically excluded antitrust or competition investigations. Without any prior consultation, however, (or, for that matter, consideration by any legislative body), an exchange of letters took place on April 29, 2000 and May 1, 2000 whereby the carve-out in relation to antitrust or competition investigations was withdrawn.<sup>22</sup> Given that this transpired in circumstances where there is, as yet, no criminal offense in the U.K., it is difficult to understand this amendment as giving rise to any reciprocal benefits in the U.K.

It is also highly questionable under E.U. law for one member state to have entered into a bilateral competition law enforcement arrangement with a non-E.U. member state where there are already common rules at the E.U. level in the form of the 1991 and 1998 agreements.

It is instructive that the Annex to the ICPAC report notes that the Antitrust Division reports "positive experiences" using MLATs (Canada is often cited as an example).<sup>23</sup> It seems that details, however, are not publicly available under these mechanisms, which has added to the concern regarding the removal of the carve-out from an E.U. perspective. This point is given additional force by the fact that as a matter of law, U.S. authorities cannot presently guarantee that information received by them will be kept out of the public domain or that it will be used only for the purposes for which it has been passed to them. European business organizations such as the CBI have voiced particular concerns given their belief that in the past, antitrust laws have been used for political and commercial purposes to benefit U.S. companies at home and abroad at the expense of European competitors.

While criminal sanctions are planned in the U.K.,<sup>24</sup> the current position is that antitrust infringement is not yet (and indeed may never become) a criminal matter in the U.K. Moreover, antitrust infringement is never likely to be a criminal matter in the E.U. given

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<sup>22</sup> See generally <http://www.dti.gov.uk/cp> (last visited on Feb. 8, 2002).

<sup>23</sup> International Competition Policy Advisory Committee Final Report (Feb. 2000), Annex 1-C, available at <http://www.usdoj.gov/atr/icpac/icpac.htm> (last visited Feb. 8, 2002).

<sup>24</sup> See generally *Productivity*, supra note 6.

the constitutional problems the Commission would face in trying to establish general jurisdiction over criminal matters. The MLAT mechanism has little real transparency or accountability and this seems objectionable on first principles given the nature of the powers being exercised.

Finally, on the issue of confidentiality, the Office of Fair Trading has stated that under MLAT mechanisms, it will not exchange information obtained under the U.K. leniency (amnesty) program. This is, however, merely current working practice, which has no formal legal status.

## VI. Global Defense Strategy

When advising a modern international business on contentious antitrust issues, defense counsel must consider a number of different antitrust authorities in Australia, Canada, New Zealand, and Latin America, in addition to the E.U. and the U.S. authorities.

Clearly, defense counsel need to be aware of the possibility for multi-jurisdictional procedural and human rights challenges and to be aware of the differences in substantive law. Not all price-fixing cases under Article 81 are of the classic smoke-filled room variety involving *Archer Daniel Midland* stereotypes. A number of cases involve complex issues surrounding the sharing of cost-based information, as well as some arguably pro-competitive benchmarking exercises. Article 81 is of wider ambit than Section 1 of the Sherman Act and can catch conduct, which involves a lesser degree of culpability than its U.S. counterpart.

While the U.K. has plans to introduce criminal sanctions for hardcore cartel activity, these plans may yet fall foul of E.U. law. The Court of Justice has emphasized that Article 81 is not the same as the Sherman Act in that there are no *per se* violations in theory within Article 81.

Significantly, the European Commission, as an administrative body, frequently requests competitors to collude together regarding standards, testing and environmental matters. When compared to the Department of Justice, the Commission clearly has a much broader administrative role in antitrust matters (for example through the granting of exemptions under Article 81(3) and the promulgation of Notices and Guidelines on, for example, the block exemptions to Article 81).

Defense counsel also must appreciate the differences in the approach of the respective enforcement agencies. There is a clear trend in the U.S. towards the prosecution of foreign corporate and

individual defendants. There is undoubtedly a political component to that strategy. In one parallel investigation case, the Department of Justice characterized a major U.S. corporation as being in a vertical relationship with those suspected of involvement in a price-fixing cartel. Alternatively, it would have been impossible under E.U. law for that U.S. corporation to be characterized as being in anything other than a straightforward horizontal relationship.

In contrast, the European Commission has concentrated its efforts on persistent European corporate offenders and certain specific sectors, particularly chemicals, automotive, glass, and steel.

The forthcoming changes in the systems in the U.K. and the E.U. will give rise to certain anomalies. The larger pan-European cartels will fall within the jurisdiction of the European Commission, where there will be only corporate financial penalties and no criminal sanctions for guilty individuals. If, however, an individual is implicated in smaller, purely U.K.-based cartels (with logically a lesser effect on commerce), under the proposed criminal regime, that individual will be facing the possibility of a 3 to 5 year prison sentence.

On a procedural level, U.S.-style joint defense agreements are unlikely to develop in the E.U. Some of the information exchange obligations in typical U.S. agreements involve significant constraints upon a defendant's freedom of action and concerns will remain regarding the compatibility of such agreements with wider professional obligations.

Perhaps the most significant procedural issue for defense counsel going forward will be the ramifications posed by the various amnesty and leniency programs. The system in the U.S. works well because of the ability to formally plea bargain. This procedure is presently impossible on constitutional grounds in the U.K. The current proposals for criminalization will potentially cause significant damage to the U.K. leniency policy in that no guarantee of immunity from prosecution can be given. This disrupts the essential prisoner's dilemma matrix behind all effective amnesty/leniency programs.

The E.U. leniency program is currently under review.<sup>25</sup> The present procedure is extremely unsatisfactory in that it is inherently subjective (requiring the production of "decisive evidence" of cartel involvement), no immunity can be granted up front, and significant uncertainty as to the scope and extent of any eventual immunity from

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<sup>25</sup> Commission Notice on the non-imposition for reduction of fines in cartel cases, 1996 O.J. (C 207) 4; Draft Commission notice on immunity from fines and reduction of fines in cartel cases, 2001 O.J. (C 205) 18.

finer remains throughout the process. It is also currently the case that only a maximum 75% reduction in fine can be given once an investigation has begun and this is unattractive when compared with the U.K. and U.S. regimes. Given the size of the Commission fines, even the possibility of having to pay 25% of the fine is likely to discourage companies from taking the initiative and approaching the Commission. The decision to seek leniency is a process fraught with difficulty due to conflict of interest problems between individuals and the company, as well as within the Board where the incentives of, for example, venture capitalist representatives, may differ from those of other Directors.

One major issue for defense counsel will be the question of which authorities to approach for leniency and when. The existence of class actions, contingency fees, and the court's power to award treble damages does not make the U.S. a particularly attractive proposition when dealing with a pre-investigation application for leniency. That stated, once an investigation is under way, the certainty inherent in the U.S. amnesty program would have clear procedural benefits over both the E.U. and (prospectively) the U.K. regimes. The final decision on leniency will also require to factor in the application of differing rules on limitation, *locus standi*, and quantum of damages, which operate in the various civil jurisdictions affected by the infringing conduct. There is yet to be a single reported decision in the U.K. of a successful private action for damages for breach of Article 81 or Article 82. One should not assume, however, that the absence of a treble damages remedy in, for instance the U.K., means that the level of recovery is unlikely to justify the risks and costs of private enforcement. In the U.K., the courts can award pre-judgment interest on actual damages, but it cannot be assumed that the U.K. courts will follow the *Illinois Brick*<sup>26</sup> rule, which denies *locus standi* to indirect purchasers, and perhaps most importantly, exemplary or punitive damages may well be available in serious cartel cases, such as the Vitamins case.

Finally, it will need to be borne in mind that one effect of criminalization of hardcore cartel activity in the U.K. will be that individuals will then be capable of being extradited to the U.S. (and other countries with criminal regimes) under normal U.K. extradition arrangements.<sup>27</sup>

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<sup>26</sup> *Ill. Brick v. State of Ill.*, 431 U.S. 720, 735 (1977).

<sup>27</sup> 18 U.S.C.A. § 3181 (West 2000).

**Appendix A****EUROPEAN COMMISSION PRICE FIXING FINES IN 2001**

<b>Case</b>	<b>Amount fined (€ million)</b>
Carbonless paper	313.7 million
German banks	100.8 million
Zinc phosphate	11.95 million
Citric acid	135.22 million
Luxembourg brewers	448,000
Belgian brewers	91 million
Vitamins	855.22 million
Daimler Chrysler	71.825 million
Sodium Gluconate	57.53 million
Graphite electrodes	218.8 million
SAS/Maersk Air and Sun-Air; SAS and Maersk Air	39.375 million; 13.125 million
Volkswagen	30.96 million
<b>Total</b>	<b>1,940 million</b>