



# Why good companies misbehave and (occasionally) break competition rules

15 March 2017



# What is a cartel?

FROM THE DIRECTOR OF OCEAN'S 11, 12 AND 13

**MATT DAMON**



**BASED  
ON A  
TATTLE-TALE**

THE FILM 'THE INFORMANT' IS BASED ON THE BESTSELLING MEMOIR BY MATTHEW SETTER, A FORMER DRUG DEALER WHO TURNED INFORMANT FOR THE FBI. THE FILM IS A COMEDY-DRAMA THAT EXPLORES THE DARK WORLD OF DRUG TRAFFICKING AND THE CONSEQUENCES OF BETRAYAL. THE FILM IS A MUST-SEE FOR ANYONE INTERESTED IN CRIME, DRUGS, AND THE HUMAN CONDITION.

**SEPTEMBER**

Go to [www.youtube.com](http://www.youtube.com) and search for lysine cartel



## Why do companies break the law?

- The general perception, as seen in movies, newspapers and with enforcers, is that companies gang up against the free market deliberately, consciously and with malicious intent. Moreover, that this is more or less general practice across industries



## Impact on compliance

- Most companies adopt a compliance approach centered on avoiding careless conversations, comments or participation in (secret) meetings with no legitimate or clear purpose



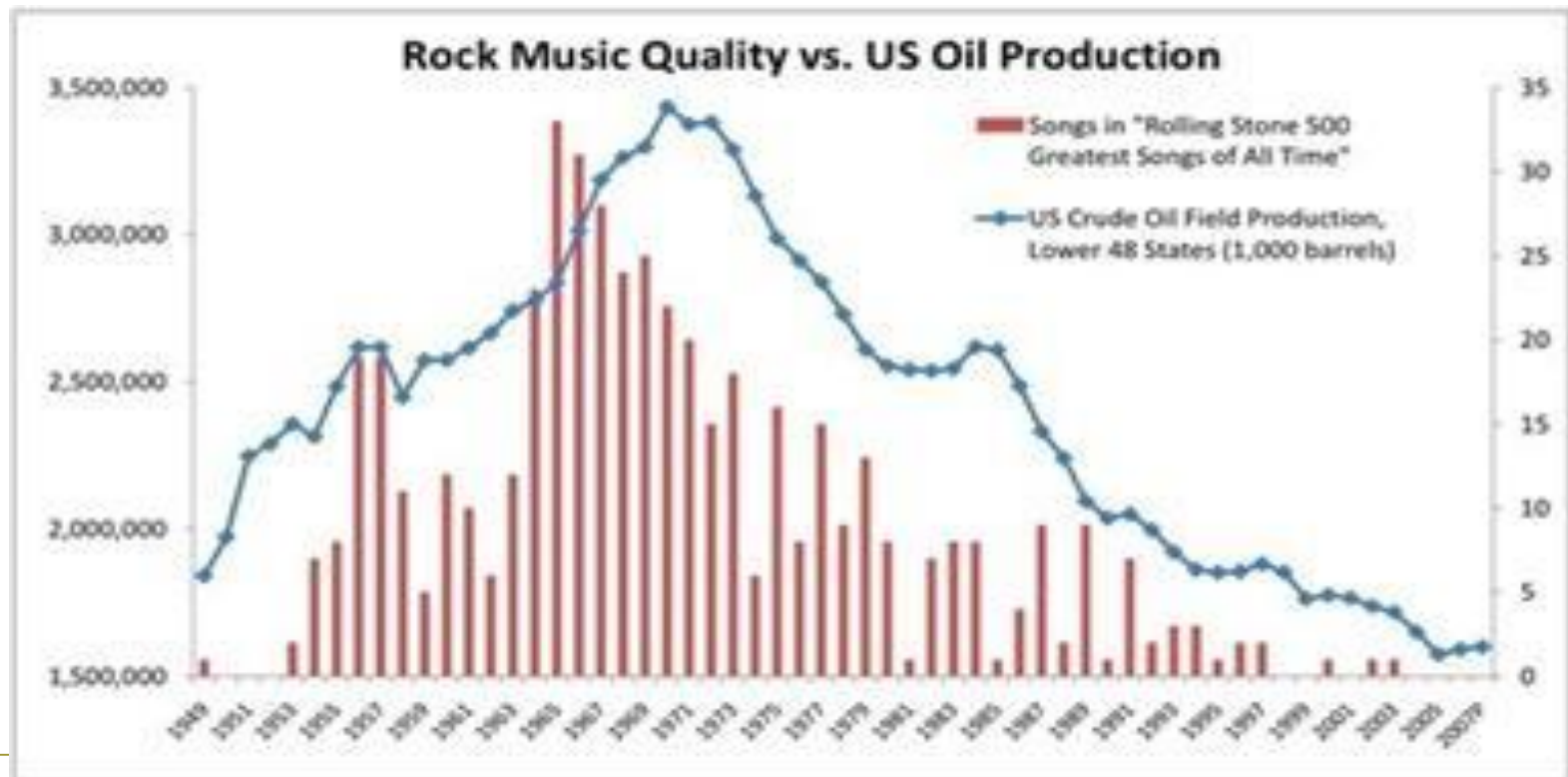
## Impact on compliance

- This is why you might have heard lawyers recommend a strong and clear reaction if confronted with any such attempts, e.g. suspicious invitations or suggestions under a meeting, in order to avoid misunderstandings



## Impact on compliance

- A prudent approach. A meeting followed by parallel behavior does look suspicious...



## However, reality differs

- The “management cartel” established and operated by senior management (that others could accidentally join) is rare and predominantly observable in books, presentations and films



## However, reality differs

- Out of 1111 Danish cases decided (and published) by the Danish Competition and Consumer Authority (1998-2014), 159 could be labeled as cartels (an agreement between competitors restricting competition)
- However, 65 cases were closed by exceptions, commitments or informal adjustments, reducing the number of “serious” cartels to 94





## However, reality differs

- Further, in 46 of these cases, the parties could provide a reasonable explanation mitigating (but not legitimizing) their actions:
  - a) The association of veterinarians had restricted customer shopping following the sickness or death of a colleague (2014)
  - b) The Danish Association of Undertakers had adopted a ban on TV advertisements (2010)
  - c) An association of retailers had adopted a 13 point agenda to reduce the sale of enriched candy (2007)
- Hence, there is an infringement, but not an evil conspiracy against the free market



## However, reality differs

- What remains are 48 hardcore cartels (of which 36 predate 2000), where no mitigating or clear indications that the parties were pursuing legitimate (or somewhat legitimate) interests could be found



## Hence, no one intended the infringement

- Rather than focusing on the intended cartels, it is the unintended cartels nobody intended to establish that should worry compliance officers



# Many ways to Golgatha

- Many ways to end up in a cartel infringement:
  - a) Restrictive contractual clauses
  - b) Group associated companies
  - c) Careless comments
  - d) Trade organization



## Many ways to Golgatha

- Many ways to end up in a cartel infringement:
  - a) Restrictive contractual clauses infringing competition law. Best addressed by legal department or external attorney review of contracts prior to conclusion



## Many ways to Golgatha

- Many ways to end up in a cartel infringement:
  - a) Restrictive contractual clauses

Agreements that have as their <u>object</u> to restrict competition	Agreements that have as their <u>effect</u> to restrict competition
<p>Horizontal</p> <ul style="list-style-type: none"> <li>• To fix prices</li> <li>• To exchange current or future price information</li> <li>• To divide markets</li> <li>• To limit output</li> <li>• To limit sales</li> <li>• For collective exclusive dealing</li> <li>• Pay for delays</li> </ul> <p>Vertical</p> <ul style="list-style-type: none"> <li>• To fix minimum resale prices</li> <li>• To impose export bans</li> <li>• (certain other agreements)</li> </ul>	<p>No clear principles but a requirement for a counterfactual analysis</p>



# Many ways to Golgatha

- Many ways to end up in a cartel infringement:
  - When conducting the counterfactual analysis consider how the market would have developed without the agreement



# Many ways to Golgatha

- Many ways to end up in a cartel infringement:
  - a) Restrictive contractual clauses

Agreements that have as their <i>obj</i>	Agreements that have as restrict
Hori • • • • • • Vert • • • (certain other agreements)	requirement sis  



# Many ways to Golgatha

- Many ways to end up in a cartel infringement:
  - b) Group associated companies (subsidiaries) enter into a cartel (intentionally or unintentionally). Look for plus factors, e.g. exchange of employees, sudden increase of profitability or a (bad) incentive scheme



## Many ways to Golgatha

- Many ways to end up in a cartel infringement:
  - c) Careless comments that could be misunderstood and indicate unwanted interests and opinions



# "Veterinary cartel"

## Summary of meeting between veterinarians held on 6 May 2008

Byggestruktur Dyrehospital - Referat af møde for dyrlæger  
Åbnet: den 6. maj 2008

Discussionemner:

Arbejdsresultater pr. år

"Shoppingpriser"

- Det skal ikke være værd at køre efter disse ydelser
- Sættes som laveste takst
- Er ydelserne ens?
- Ekstra ydelser skal takseres ekstra
- Opdeling honorar/medicin/materialer

Medicinske vs. zoonotiske patienter, hvorfor og når vi bruger på et ind-  
bæddet?

- ✓ Medicinske værneregler, bl.a. anvendelse af klinikpakninger
- ✓ Prisdiskrimination generelt, lønforhøjninger og inflation
- ✓ Lønsoplysning, lønsoplysning starter vagter fra kl. 17.00 og eftermiddag pr. 1. juli

Afslutning:

Priser pr. 1. juli 2008: kr. 198,-

Kastration og sterilisation følger point med hidtilige satser:

Kat:	
Kastration	4,32
Sterilisation	6,5
Hund:	
Kastration	7,37
Sterilisation	14,78

Priserne for kat er forsat inkl. omærkning men evt. registrering

Reguleringer (welfare) med virkning indtil 1. juli 2009.

Referent: Helle Jørgensen

### "Shoppingpriser"

- Det skal ikke være værd at køre efter disse ydelser
- Sættes som laveste takst
- Er ydelserne ens?
- Ekstra ydelser skal takseres ekstra
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# Many ways to Golgatha

- Many ways to end up in a cartel infringement:
  - d) Trade organization
    - Trade organizations were involved in 38 out of 94 observed cartels (40%) and 8 out of 48 “malicious intent cartels” (16%)
    - Don’t panic. Just exercise some caution so that you do not share sensitive and internal information



# Questions

- Feel free to contact me later at [cbe@jur.ku.dk](mailto:cbe@jur.ku.dk)

