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## **Cartels, Fines, and Due Process**

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### I. INTRODUCTION

The level of fines imposed by the Commission with respect to cartel infringements has increased considerably over the past decade.<sup>2</sup> In recent years, the Commission has imposed a number of record fines for cartel infringements, including fines amounting to a total of EUR 1.384 billion on four companies in the *Car glass* cartel in 2008 and fines amounting to EUR 992 million imposed on four companies in the *Elevators* cartel in 2007. These fines are high, certainly. But I do not believe that they are too high. Some commentators from the legal and business communities argue that these fines are disproportionate. They question whether the current Commission procedures continue to be in compliance with principles of due process and whether criminal penalties for the individuals concerned would not be more appropriate than levying high fines on companies. I consider that the Commission's current enforcement system based on deterrent administrative fines has been a tremendous success. It has managed to put an end to the view, long prevalent in Europe, that antitrust infringements are trivial. Companies are finally taking antitrust violations in Europe seriously.

### II. DAMAGE CAUSED BY CARTELS

Antitrust infringements, in particular cartels, cause enormous damage to consumers, businesses, and national economies within the European Union. The fight against cartels is a key task for the Commission, which is entrusted with enforcing the EU competition rules, one of the pillars of the EU internal market.

The Commission recently carried out an internal study assessing the consumer harm caused by those cartels that were the subject of Commission decisions during the period 2005 to 2007. On the basis of a conservative assumption of a 10 percent overcharge, the harm caused by these cartels is estimated at around EUR 7.5 billion. This figure does not include the damage resulting from the cartels investigated by national competition authorities or indeed by those cartels that went undetected during that period.

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<sup>2</sup> Detailed statistics concerning the Commission's fines from 2004 to 2009 are available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>

The enormous economic harm caused by cartels explains why the Commission pursues a zero tolerance policy vis à vis this type of infringement. The revised Fining Guidelines adopted in 2006<sup>3</sup> also have to be viewed in this context. Fines have two objectives. First, fines serve to punish the perpetrators. Second, and perhaps even more importantly, fines have a deterrent effect by discouraging other companies from continuing or entering into anticompetitive practices. Sufficiently deterrent fines therefore constitute the lynchpin of a successful competition policy.<sup>4</sup>

### III. THE COMMISSION'S FINES ARE NOT DISPROPORTIONATE

The fines imposed by the Commission in some recent cases are certainly very significant sums in absolute terms. However, the Commission enforces competition rules in the largest integrated economic area in the world. The cases in which the Commission imposes high fines are normally infringements that affect the entire EEA (e.g., *Car glass*) or a significant part of the EEA (e.g., *Elevators*) and involve multi-billion euro markets. It should come as no surprise that fines imposed for antitrust infringements affecting 30 EEA Member States in a market with almost 500 million customers are significantly higher than fines imposed by national competition authorities within the EEA concerning only one Member State or fines imposed by authorities outside the EEA. Nonetheless, national competition authorities in Europe have imposed fines exceeding EUR 500 million even for infringements affecting national markets only.<sup>5</sup> The Commission's fines are therefore by no means excessive when considered in relation to the size of the markets concerned (and the need to ensure deterrence on such large markets) and the fines imposed by other authorities.

The Commission's fines have not become “too high.” On the contrary; for decades the Commission's fines have been “too low” and recent changes in fining methodology finally enable the Commission to levy appropriate and deterrent fines.

According to the method of setting fines described in the 2006 Guidelines, for each company concerned the Commission starts by establishing the yearly sales related to the infringement within the relevant market in the EEA. Depending on the gravity of the infringement, the Commission will take into account a percentage of between 0 and 30 percent of those sales—for cartels this will be set “at the higher end” of the range. The resulting amount is then multiplied by the number of years the company participated in the infringement. This amount, to which is added a so-called entry fee (a one-time lump

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<sup>3</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C 210/02.

<sup>4</sup> Even though sanctions are not harmonized under Regulation 1/2003 and several different types of sanctions exist at national level (including, e.g., criminal sanctions against individuals), all competition authorities within the ECN can impose corporate fines.

<sup>5</sup> For example the German NCA in 2003 imposed a fine of EUR 660 million for a cement cartel; the French NCA in 2005 imposed a fine of EUR 534 million for a cartel in the mobile phone market.

sum of between 15 and 25 percent of the relevant turnover<sup>6</sup>) constitutes the "basic amount" of the fine. The basic amount is then further adapted in light of aggravating and mitigating circumstances and, where applicable, possible reductions under the leniency notice and settlements notice.

As a last step, the Commission applies the two safeguards built into the system to ensure that fines do not become too high. First, it examines whether the amount of the fine exceeds the maximum legal threshold of 10 percent of the company's total turnover, the purpose of which is to avoid fines which companies are unable to pay.<sup>7</sup> Second, upon request, the Commission will specifically evaluate the company's ability to pay the fine in particular in view of its financial situation.<sup>8</sup>

The 2006 Guidelines enable the Commission to levy fines which are more proportionate to the harm caused by the infringement, by closely linking the amount of the fine to the company's turnover linked to the infringement. Perhaps even more importantly, for the first time, duration is fully taken into account (100 percent increase per year) thereby ending the unsatisfactory situation under the 1998 Fining Guidelines which only provided for a 10 percent increase per year; in other words, infringements became proportionally "cheaper" the longer they lasted.

The Commission's revised fining methodology is to a large extent also supported by economic thinking which has increasingly dealt with the question of optimally deterrent fines in recent years. Cartels lead to higher prices in the relevant market, but the extent of this overcharge is very difficult to determine in individual cases. Estimates range from 10 to 50 percent of the turnover in the relevant market (which is very roughly reflected in the 0 to 30 percent range under the 2006 Guidelines). The overcharge is multiplied by the number of years of the infringement (which corresponds to the 100 percent increase for duration under the 2006 Guidelines). In order to achieve "optimal" deterrence fines should take into account the likelihood of detection which, in the absence of reliable data, is estimated to range from around 10 to 20 percent. In other words, the overcharge accumulated during the duration of the cartel would have to be multiplied by a factor of between 5 and 10. This detection increase is, however, not foreseen under the 2006 Guidelines. Measured against these optimal fine standards, fines calculated under the 2006 Guidelines are far from being disproportionate.

Finally, it must be emphasized that in the vast majority of cases fines calculated under the 2006 Guidelines continue to remain well below the 10 percent turnover cap.

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<sup>6</sup> The entry fee is imposed irrespective of the duration of the cartel and serves to increase deterrence.

<sup>7</sup> See, e.g., Joined Cases C-189/02 *Dansk Rørindustri A/S and others v Commission*, [2005] ECR I-5425, ¶ 281: "That [10%] limit is therefore one which is uniformly applicable to all undertakings and arrived at according to the size of each of them and seeks to ensure that the fines are not excessive or disproportionate."

<sup>8</sup> See point 35 of the 2006 Guidelines. The current economic crisis has led to an increase of requests for inability to pay. The Commission is carefully examining each of these requests on a case-by-case basis.

The 10 percent threshold has been reached to date in only three out of thirteen decisions imposing fines under the 2006 Guidelines. In those three cases the cap was reached for only some of the companies concerned. In many cases the Commission's fines do not even represent one percent of the company's turnover.

#### **IV. THE COMMISSION'S ADMINISTRATIVE ENFORCEMENT SYSTEM IS IN FULL COMPLIANCE WITH APPLICABLE STANDARDS OF DUE PROCESS**

I believe that the above demonstrates that the Commission's fines are not too high, by any standard. Nevertheless, some commentators argue that the fines imposed by the Commission are now so high that they must be considered criminal in nature. Consequently, the standards of due process applied by the Commission (e.g., hearings, fundamental rights) are insufficient because they do not meet standards under criminal law and that the Commission's dual role as investigator and adjudicator violates Article 6(1) of the ECHR.

The Commission's fines are no more criminal now than in 1969 when it imposed its first fine of ECU 500,000 in *Quinine*.<sup>9</sup> The text forming the legal basis for the Commission's fines, currently set out in Article 23(2) of Regulation 1/2003, has remained unchanged for over 40 years. While it is clear that changes in the Commission's fining policy, inflation, and the expansion from 6 to 27 EU Member States have significantly increased the level of fines in absolute terms over time, fines in the overwhelming majority of cases continue today to remain well below the maximum 10 percent threshold, much as they did 40 years ago. The fact that the fines imposed by the Commission are not criminal is also explicitly enshrined in Article 23(5) of Regulation 1/2003 and has been confirmed in various judgments by the Community Courts.<sup>10</sup> In these circumstances, it is not clear why our system of administrative fines should suddenly have changed from being civil in nature to being criminal in nature.

The Community courts have repeatedly stated that the Commission is not a tribunal within the meaning of Article 6(1) ECHR and hence its double role as prosecutor and judge does not violate the right to a fair trial, in particular in view of the effective judicial control exercised by the Community Courts.<sup>11</sup> As an administrative authority, the Commission imposes fines without violating the ECHR, just like any other administrative authority (e.g., tax authorities, municipal authorities etc.). It is worth emphasizing that the enforcement of competition rules is entrusted to administrative authorities, rather than to courts, not only at the EU level but also at the national level in most countries within the European Union.

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<sup>9</sup> OJ 1969 L 192/5.

<sup>10</sup> See most recently Case T-54/03 *Lafarge v Commission*, ¶ 38 (not yet published); also see, e.g., Case C-204/00 *Aalborg Portland A/S and others v Commission* [2004] ECR I-123, ¶ 200.

<sup>11</sup> See, e.g. the recent judgment in Case T-54/03 *Lafarge v Commission*, ¶ 35 (not yet published); also see Joined Cases 209/78 *et al. Heintz van Landewyck and others v Commission*, [1980] ECR 3125, ¶ 81.

The protection of rights of defense in Commission investigations is not only a requirement under the case law of the Community Courts; it is also a high priority for the Commission. With the hearing officer, the Commission has created an independent—and rather unique—role overseeing the right to be heard and the fairness of the Commission's proceedings. Fundamental rights and principles such as the presumption of innocence, the protection against self-incrimination, *ne bis in idem*, or legal professional privilege, fully apply in the context of Commission proceedings.

Companies enjoy extensive rights to be heard as the Commission must communicate its preliminary view with respect to a possible competition infringement in the form of what is usually a very detailed statement of objections. The companies concerned may reply in writing as well as request an oral hearing which can last for several days. The Commission also operates a multi-layered system of internal checks and balances for its case investigations including cartels. Cases are investigated primarily by the case teams under the supervision of their direct management. However, cartel investigations, at least at key stages of the procedure, also involve the internal coordination unit, the policy directorate (to the extent that policy issues are at stake in a case), the chief economist team, the Hearing Officer, and the Legal Service as well as the Commissioner and the Commissioner's cabinet. A case has to pass several checkpoints both within and outside DG Competition before a decision is adopted. These ensure that, of the Commission's cases, "only the strong survive."

In the context of due process, the Community Courts play an important role. Upon appeal, they review the legality of the Commission's decisions. In addition, Article 31 of Regulation 1/2003 endows the Courts with unlimited jurisdiction regarding fines. The Court of First Instance tends to carry out a detailed scrutiny of the Commission's factual and legal assessments with hearings lasting several days in complex cases.<sup>12</sup> The Community Courts also have, on a number of occasions, exercised their powers to reduce and occasionally even annul the Commission's fines.

## V. IS CRIMINAL LAW THE ANSWER?

Companies sometimes argue that an enforcement system based on administrative fines punishes them unfairly, while letting off the hook those managers and employees that actually committed the infringement. The Commission, they argue, should introduce criminal sanctions for natural persons rather than fining companies.

There is little doubt that criminal sanctions generally have a significant deterrent effect on individuals. At the same time, deterrence resulting from criminal sanctions has its limits as a quick glance into any local newspaper will confirm. In addition, and leaving aside the disputed question of the existence of a legal basis and political feasibility, criminalization would require a complete overhaul of the Commission's

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<sup>12</sup> The ECJ is limited to the review of points of law.

investigative powers and procedures and not least the creation of a European criminal court.

From an enforcement policy perspective, it may therefore be questioned whether the added element of deterrence would justify the fundamental changes that would be required to our current administrative system. Criminalization might arguably even lead to under-enforcement, as a result of the added layers of complexity.<sup>13</sup> Moreover, criminal sanctions would, even if they were to be introduced at some future point in time, have a role only in addition to corporate fines for companies. Even in a criminalized cartel world, sufficiently deterrent corporate fines would still be needed in order to punish and deter companies (inter alia since companies benefit most from the illegal profits of the cartel) and to keep the corporate leniency program attractive for whistle-blowers.

Even today, companies themselves can introduce individual "sanctions" against their employees. Managers and employees who are instructed (e.g. in a compliance program) that they will be sacked and sued for damages in the event they participate in illegal anticompetitive behavior, will think very carefully about risking their job and their livelihood. Should compliance programs be rewarded with a reduction in fines? This is a difficult question. The Commission certainly welcomes compliance programs as a useful tool for companies, to help prevent and deter antitrust infringements. On the other hand, companies are obliged by law to comply with competition rules and compliance programs form part of standard corporate governance. The debate on this issue will continue.

## VI. CONCLUSION

Modern day cartels have nothing in common with the original chivalrous meaning of the term "cartel," namely the terms of agreement between belligerents for the exchange or ransom of prisoners.<sup>14</sup> During my seven years as Director General of DG Competition I have witnessed cartels that were orchestrated at top management levels, in aptly termed "elephant rounds"; cartels that involved cell phones registered in Switzerland to avoid detection; cartels relying on secretariats located outside the EEA to prevent inspections; cartels where participants referred to themselves as "mafia;" and many more. Modern day cartelists are not knights, they are robber barons and they deserve a punishment commensurate with the negative impact of cartels on the market. So fines are high—for good reason—but they are by no means disproportionate. Fines should not be expected to decrease any time soon.

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<sup>13</sup> Some countries (e.g., Austria) abandoned criminal sanctions for competition law infringements in the past as they were not enforced in practice.

<sup>14</sup> *DICTIONARY OF POLITICAL ECONOMY*, ed. Sir Robert Harry Inglis Palgrave, (London 1915).