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Director Disqualification as a Complement to EU Antitrust Fines: Towards a More Balanced Sanctions Policy

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I. WHERE ARE WE COMING FROM?

There is an intense debate in competition law circles about the seemingly high level of fines levied by the European Commission on companies found guilty of EU competition law violations (notably compared with unduly modest sanctions imposed in other areas of law, such as insider trading, money laundering, misleading financial information, or environmental disasters). There is concern in many quarters not only that the Commission's policy of corporate punishment is an ineffective means of deterrence (after all, cartels keep forming despite increasingly high fines),[2] but that handicapping European companies—the primary victims of the current policy—with headline-grabbing fines is hardly in tune with the Europe 2020 Strategy, which is designed to boost, not weaken, European industry. Recent research[3] shows that on at least three occasions in the last 10 years, DG COMP has refused a request for inability-to-pay relief just weeks or months before the company requesting it was declared bankrupt. It seems that in all three cases the Commission ended up recovering none of the fines imposed.[4] True, these are extreme cases, but the dangers associated with a single-track punishment mechanism are becoming evident in light of the current economic malaise. It is time to reconsider the current policy, to follow the lead set by other ECN members,[5] and to search for a more sophisticated toolbox,[6]—designed to deter individuals, but not to put companies, jobs, and investment at risk.

This article tackles three issues.

- First, it reviews the indirect consequences of the fine and questions whether the turnover-based 2006 Fining Guidelines have ever been the subject of an economic impact assessment—a pre-condition for pursuing any European policy initiative today.
- Second, it sets out some ideas how an EU-wide system of director disqualification could be put in place as a complement to the current fining policy.

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[2] *See* Joseph Harrington, *Comment on Antitrust Sanctions*, 6(2) COMPETITION POL'Y INT'L 42 (Autumn, 2010).

[3] *See* Schonberg & Knox, *Poverty Trap*, GLOBAL COMPETITION REV. (November 15, 2010).

[4] *Id.*

[5] *See* OFT guidance document, *Director disqualification orders in competition cases*, *available at* http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft510.pdf.

[6] *See* European Parliament resolution of 9 March 2010 on the Report on Competition Policy 2008, ¶ 45, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0050+0+DOC+XML+V0//EN&language=EN.

- Third, it explains the mechanics of putting in place and running such a system.

This brief article does not purport to hold all of the solutions, but would hope to stimulate a debate on how best to upgrade the current system of deterrence.

II. WHY EUROPE NEEDS A SMARTER APPROACH

Douglas Ginsburg and Joshua Wright have noted that:

> We think it is questionable, indeed doubtful, whether a $100 million fine—or even a fine of over EUR 1 billion—when imposed upon a corporation because one of its executives fixed prices, serve the primary goal of an antitrust sanction… When fines are levied against a publically traded corporation, the ones burdened are consumers and possibly shareholders, two groups almost certainly unable to affect the conduct of the corporation.[7]

Like all good things, the single punishment tool of corporate fines can, if used in excess, produce negative consequences—in this case a potentially damaging effect on companies operating in a flagging European economy. As noted above, this is supported by evidence that three European bankruptcies in the last 10 years have followed Commission antitrust fines where inability to pay pleas have been rejected.

Supporters of high fines may cite the damage cartel activity causes to the economy (this has been the subject of varying conclusions in several different studies) and argue that the bankruptcy of a few companies found guilty of competition infringements is a price worth paying to ensure effective competition in the economy. However, such an argument ignores the fact that almost all of the people whose jobs are put at risk by the bankruptcy of a company are probably unconnected to the alleged infringement of the competition rules. Also, it is unclear whether the knock-on effects of the bankruptcy on workers, suppliers, the wider local economy, and competition on the relevant market are fully taken into account.[8]

One of the cornerstones of current Community policy is the Europe 2020 Strategy, which is designed to boost employment and enhance competitiveness and social inclusion (including 75 percent employment rate for men and women aged 20-64).[9] Competition policy clearly has its role to play in meeting these objectives. However, the Commission's policy on fines seems to be swimming against this tide, especially when one recalls that the 2006 fining policy was introduced with no meaningful debate and no obvious economic impact assessment—something that would not be allowed to happen today.

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[7] *See* Ginsburg & Wright, *Antitrust Sanctions* 6(2) COMPETITION POL'Y INT'L 22 (Autumn, 2010).

[8] A very interesting study by Oxford Economics published earlier this year –*An analysis of the follow-on effects of cartel fines on investment and employment* attempts to quantify this. The study can be found at: http://www.oef.com/OE_Cons_Descns.asp. The study draws some stark conclusions. Let us take the example of a German manufacturing company that is fined EUR 150 million for a cartel infringement (a modest fine by today's standards) but stays in business. In a "mid-range" estimate of the direct impact of this fine on such a company (see below), 177 jobs in the fined company would be foregone as a result of such a fine. Add in indirect impact (loss of jobs in suppliers and other trading partners) and the job loss tally rises by another 151. Finally, the effects of the fine "rippling out" into the wider economy would cost a further 157 jobs. The total job losses in the entire economy is therefore 485. Almost 500 jobs will be lost as a result of an EU antitrust fine levied on a typical European company, probably none of which will include the actual individual perpetrators of the infringement.

[9] *See* http://ec.europa.eu/europe2020/index_en.htm

Fines levied on undertakings risk causing harm to a wide array of players in the economy who had nothing to do with the cartel infringement, including other undertakings in the supply chain. Moreover, the individual perpetrators of the cartel—the senior managers and/or the directors who operated the cartel—may avoid sanctions altogether.

The EU could benefit from a system that enhances deterrence by targeting punishment against the individuals perpetrating antitrust infringements, which would have the effect of making other individuals think twice before engaging in such conduct.

Targeting individuals could take the form of personal fines, director disqualification (or other disbarment), or criminal sanctions. There are at least two problems with criminal antitrust sanctions: First, there is still debate as to whether criminal sanctions are appropriate for antitrust infringements. No matter where one stands on this issue, it is hard to see how an EU system of criminal antitrust sanctions could be put in place when the Commission itself has no criminal law competence under the TFEU and most Member States do not view antitrust infringements as criminal offenses. Second, even if a criminal enforcement system could be put in place, it would require significant resources to enforce, given the burden of proof typically required in criminal law enforcement.

Turning to personal fines, companies could indemnify their employees, which would undermine their deterrent effect. [10]

Director disqualification, on the other hand, is a significant personal punishment that could be implemented across the EU, as will be shown. It could be operated as a civil law punishment, making its operation easier than a criminal sanction. Furthermore, companies will find it difficult to "indemnify" directors against the financial cost and social stigma of being disqualified from directorship, as opposed to personal fines. It is true that director disqualification would not catch non-directors involved in cartels, nor could it reach outside the EU jurisdiction. However, a system of director disqualification would raise compliance levels in European companies from the top down. Focusing the minds of directors—sending, as Peter Kalbfleisch puts it,[11] "chills down the spines of individuals that gave instructions to cartels"—would, in turn, ensure directors keep a close eye on their senior managers.

Some may argue that punishing individuals as well as the companies for which they work amounts to punishing the same conduct twice ("double jeopardy"). First, the Commission would fine the company for the infringement; then the individual directors of the company would be disqualified based on the same infringement. There are, however, various arguments against the "double jeopardy" theory:

1) The subject of punishment is not the same: the Commission fines undertakings, i.e. the company involved in the infringement. Director disqualification would, on the other hand, punish an individual director of that company, a separate person.

2) It could be argued that the offense is not the same: a company is fined for involvement in an infringement of the EC competition rules. A director would be disqualified on the

[10] In this respect, *see* Peter Kalbfleisch, *Antitrust Oversight: More an Art than a Craft*, 6(2) COMPETITION POL'Y INT'L 57 (Autumn, 2010).

[11] *Id.* at 63.

basis that they are found no longer fit to perform their duties following their company having been involved in a competition law infringement.

3) The principle of "follow-on" director disqualification on the back of a Commission fining decision against the company of which the individual is a director already exists in both Sweden and the United Kingdom.

III. PERSONAL SANCTIONS ARE NOT AN OPTION UNDER CURRENT EU LAW

The Commission's hands appear to be tied when it comes to means of punishing antitrust infringements. Regulation 1/2003 only provides for fines to be imposed on "undertakings and associations of undertakings."[12] It adds that these fines cannot be of a criminal nature.[13]

Revising Regulation 1/2003 to grant the Commission the power to impose director disqualification would be both legislatively complex[14] and controversial, given that even EU Member States that consider director disqualification a civil sanction (notably Sweden and the United Kingdom) still require a court to pronounce the sanction, rather than an administrative body.

One way to enable individual punishment within Regulation 1/2003 as it stands might be to levy individual fines on directors of companies found guilty of anticompetitive behavior. However—apart from the indemnification issue discussed in section II—for an employee to be deemed an undertaking (undertakings being the only entities potentially subject to fines under Regulation 1/2003, article 23(2)), it is necessary to establish independence and freedom from the employer's control. This is a difficult test to satisfy[15] and means the chances of an individual

[12] Regulation 1/2003, Article 23(2).

[13] Regulation 1/2003, Article 23(5). These provisions appear to constrain the statement earlier in the Regulation (Article 7(1)) that "…[the Commission] may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end." Emphasis added

[14] A revision of Regulation 1/2003 could be taken on one of two legal bases:

- Article 103(2) (a) TFEU (implementation of competition policy). Article 103 TFEU states that regulations or directives taken under it shall be designed in particular to provide for fines and penalty payments for non-compliance with Articles 101 and 102. However, the wording does not exclude the possibility that the Commission could use Article 103 TFEU to introduce regulations or directives for other ends, such as to obtain the power to disqualify directors for breaches of Articles 101 and 102.
- Article 352 TFEU (ex Article 308 EC) allows for the EU to be given the powers it lacks (such as director disqualification) to achieve any of the objectives set out in the Treaty.

Under Article 103(2) (a), the Commission would be seeking a power not specifically listed in the Treaty, a possibility the wording of the Treaty appears to leave open, although the Commission would have to work hard to justify such a legislative initiative. The legislative process would be consultation (Article 103(1)) and the Commission could propose either a regulation or a directive.

However, the second route is less straightforward. Article 352 TFEU requires unanimity in the Council, after having obtained the consent of the European Parliament. There is also a subsidiarity check: a minimum of one-third of the national parliaments can ask the Commission to review its proposal if it does not respect the principle of subsidiarity (Article 7 Protocol 2). This is, therefore, a more complicated legislative process than consultation under Article 103 TFEU.

[15] Under EU law, an undertaking is defined as an independent economic entity (Höfner & Elser Case C-41/90 Höfner and Elser v Macrotron GmbH [1991] ECR I-1979, [1993] 4 CMLR 306). Having an *economic* activity means proposing goods or services for profit (or for which profit could potentially be made). An *independent* entity encompasses two elements: assuming own financial risk and being free of an employer's control. It is therefore

being fined under Regulation 1/2003 as it stands are slim. If the Commission is able to impose fines only on undertakings, and squeezing individual sanctions into Regulation 1/2003 is difficult, an answer to the problem may lie in the European Competition Network ("ECN"). Could we not envisage the Commission empowering Member States' Competition Authorities to pursue directors of companies found guilty of competition infringements?

As will be shown below, such a system could be explored, allowing National Competition Authorities ("NCAs") a greater role in European competition enforcement, and potentially enabling more effective enforcement through the use of a range of sanctions.

IV. SETTING UP AN EU-WIDE SYSTEM OF DIRECTOR DISQUALIFICATION FOR ANTITRUST INFRINGEMENTS

Regulation 1/2003 provides for NCAs to apply Articles 101 and 102 TFEU in individual cases, and indeed they are obliged to do so where dealing with a case that may affect trade between Member States.[16] NCAs may take decisions imposing "any … penalty provided for in their national law."[17] NCAs could impose director disqualification for an infringement of Article 101 TFEU where the national law of their Member State provides for such a remedy.

There are several ways in which the Commission could direct Member States to enact director disqualification for competition law breaches. The aim in this section is not to entangle the reader in detail, but to show that there are potential legislative routes to achieve this EU-wide system. We focus on the most promising in our view, and touch briefly on the other possibilities.

A. Director Disqualification Under EU Company Law—The Most Promising Means of Implementing Director Disqualification

The Commission has in the past spoken out in favor of legislating for director disqualification at EU level in the context of Community company law.[18] The Commission has passed a number of directives in the domain of company law, using Article 50 TFEU (formerly Article 44), which is concerned with the right of establishment, and empowers the EU legislature to adopt directives to coordinate "to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms (…) with a view to making such safeguards equivalent throughout the Union."

Article 50 TFEU offers the simplest route to achieving such harmonization because it uses the ordinary legislative process (formerly "co-decision").[19] It could be argued that director

unlikely that an employee could ever be considered an "undertaking" for the purpose of levying EU competition fines.

[16] Regulation 1/2003 Article 3(1).

[17] Regulation 1/2003 Article 5.

[18] Communication from the Commission to the Council and the European Parliament: *Modernising company law and enhancing corporate governance in the European Union – a plan to move forward*. COM (2003) 284 page 16: "The High Level Group made several other recommendations designed to enhance directors' responsibilities [including]… imposition of directors' disqualification across the EU as a sanction for misleading financial and non-financial statements and other forms of misconduct by directors. The Commission supports these ideas, whose implementation requires further analysis, and therefore intends to present the relevant proposal for a Directive in the medium term."

[19] However, if director disqualification is a penal sanction, it is open to question whether Article 50 TFEU would suffice or whether the application of Article 83(2) would be necessary to legislate.

disqualification for director misconduct (including competition law breaches) is a measure intended to protect the interests of members of the European Union.

A new directive could require Member States to disqualify directors for misconduct in managing their companies. Member States would then be required to ensure that director disqualification was provided for under their domestic law for the offenses set out in the directive. This is an enforcement model that is well established in domains such as EU environmental law, where directives require Member States to implement effective penalties for breaches of EU environmental requirements.[20]

In the domain of competition law, Member States could follow the U.K. and Swedish models whereby power is given to the NCA to ask a court to disqualify a director on the basis of evidence of an infringement (a Commission decision that the director's company breached EU competition law, for example).[21]

B. A Brief Description of Three Alternative Routes to Achieve EU-Wide Director Disqualification

If director disqualification were considered to be a criminal sanction, then Article 83(2) TFEU offers a route to implement this sanction throughout the Union. Under Article 83(2) TFEU, the EU can take minimal measures of harmonization of criminal sanctions when the field has been "subject to harmonisation measures," if it is "essential to ensure effective implementation of a Union policy."[22] Competition law could be viewed as harmonized, since Articles 101 and 102 TFEU have direct effect in Member States' legal systems.[23] Harmonization of criminal measures is to be achieved by a directive, which is addressed to and implemented by the Member States.

Apart from the question of whether director disqualification is correctly categorized as a criminal sanction (a number of Member States having director disqualification treat it as a civil sanction), the legislative process would be complicated.[24]

Article 114 TFEU (ex-Article 95 EC) is another alternative legislative route. This Treaty provision has been used to harmonize national law affecting the functioning of the internal market. For example, international accounting standards have been implemented on this legal basis (Regulation 1606/2002/EC). However, the predominant purpose of the regulation is decisive when choosing the right legal basis under the TFEU where several legal bases are available (as in this case). Arguments would need to be made as to why Article 114 TFEU should be preferred over Article 50 TFEU (and over any other Treaty provision).

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[20] *See, for example*, Directive 2006/21/EC of 15 March 2006 on the management of waste from extractive industries, Article 19: "The Member States shall lay down rules on penalties for infringement of the provisions of national law adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive."

[21] OFT guidance document "Director disqualification orders in competition cases," ¶ 4.6. Also, 2010 Swedish guidelines, point 2 (in English): http://www.konkurrensverket.se/upload/Filer/ENG/Competition/KKVFS_2010-1_english.pdf

[22] Article 83(2) of the Treaty on the Functioning of the European Union (TFEU).

[23] Regulation 1/2003, Article 5.

[24] Article 83(3) TFEU provides the ability for a single Member State to delay the passing of the directive by sending the draft directive to the European Council if it considers that it is harmful to its criminal justice system. The European Council is then required to find a consensus within four months and send the draft back to the Council.

Finally, it would be possible for the Commission to encourage NCAs to disqualify directors for competition law infringements. Such informal harmonization could take place through the ECN. Informal harmonization would give less certainty to the Commission because the discretion would lie with the Member State (a) to implement a director disqualification law, and (b) to impose director disqualification in individual cases. It could also result in two-tier enforcement in the EU where companies in certain Member States are exposed to more significant sanctions than those in other Member States. For these reasons, a directive would be preferable to informal harmonization efforts.

In conclusion, this section is by no means exhaustive, but simply shows that if the political will exists, a way can be found to implement director disqualification as an EU-wide punishment for competition law offenses.

V. ENSURING EFFECTIVE MOVEMENT OF EVIDENCE BETWEEN THE COMMISSION AND NCAS TO FACILITATE DIRECTOR DISQUALIFICATION CASES

A possible barrier to entrusting director disqualification to NCAs lies in the restrictions on exchange of evidence in Regulation 1/2003. However, two potential solutions lie in the powers given to national courts under Regulation 1/2003 to request information from the Commission, and in the Transparency Regulation (1049/2001). These are briefly explained below.

A. The Restriction on Transfer of Information Between the Commission and NCAs Under Regulation 1/2003, Article 12(3)

Regulation 1/2003, Article 12, grants NCAs and the Commission the "…power to provide one another with and use in evidence any matter of fact or of law, including confidential information,"[25] whether this is for the purpose of applying Articles 101 and 102 or national competition law to the subject matter for which it was collected. However, Article 12(3) includes an important restriction. Information exchanged can only be used to impose sanctions on natural persons (which director disqualification is) if:

- the law of the transmitting authority (the EU) foresees sanctions of a similar kind for such infringements (it does not)26; or
- in the absence of such provision, the information has been collected in such a way that it respects the same level of protection of the rights of defense of natural persons as provided for under the national rules of the receiving authority (it probably has not).

The information being exchanged would likely have either been provided by a leniency applicant or gathered during the course of a dawn raid. In either scenario, it is unlikely that the gathering of the information would have respected the same level of protection of the individuals' rights of defense as the national rules of the receiving authority, given the Commission's broad

[25] Regulation 1/2003, Article 12(1).

[26] It could be argued that "similar kind" means civil, as opposed to criminal, in which case civil director disqualification could be deemed a "similar kind" of sanction as a Commission fine. However, a personal sanction like director disqualification is more likely to be viewed as not being of a "similar kind" to an administrative Commission fine against an undertaking.

search and seizure powers under Regulation 1/2003.[27] It therefore could arguably not be used for the application of national competition law to private individuals.

However, two other legal routes exist for NCAs to obtain evidence from the Commission: the Transparency Regulation and national court cooperation.

B. The EU Transparency Regulation

The EU has very wide-reaching freedom of information rules, which are set out in the Transparency Regulation (1049/2001). The Regulation provides for access to Commission documents for any natural or legal person in the EU (including NCAs) subject to certain exceptions.[28] The exceptions cover elements such as privacy, commercial interests, court proceedings, or the purpose of inspections, investigations, or audits. However, even where exceptions such as these apply, they may be overridden by public interest in disclosure of the documents.[29]

Although redactions may be necessary to safeguard data protection rights, the exceptions to disclosure do not appear to apply to a situation where the Commission has already taken an infringement decision and an NCA wishes to have access to documents in order to bring a case to disqualify a director of a company found guilty of breaching competition law. This position appears to be supported by a recent decision of the European Ombudsman in the *ELB* case, concerning access to a Commission case file by a potential private damage claimant.[30] This decision is interesting for a number of reasons:

- First, the Ombudsman found that the Transparency Regulation applies to all documents in the Commission's possession.[31]
- Second, the Ombudsman found that the existence of privileged access rights under specific regulations (such as 1/2003) does not exclude the possibility to request access under the Transparency Regulation. He also specifically rejected a Commission argument that the Transparency Regulation should not be used to gather evidence for damages actions.[32] If this is the case, and we offer no view on the rights or wrongs of this approach, there is logically no reason why NCAs should be barred from accessing such documents for (follow-on) director disqualification actions.
- Third, the Ombudsman found a strong public interest in private damages actions since these increase the deterrent effect of EU competition law.[33] The same principle could apply to (follow-on) director disqualification actions, which are also aimed at increasing

[27] This interpretation is supported by the "Commission's Notice on Cooperation within the Network of Competition Authorities" (2004/C 101/03). Paragraph 28 (c) provides: "if … both legal systems do not provide for sanctions of a similar kind, the information can only be used if the same level of protection of the rights of the individual has been respected in the case at hand."

[28] Regulation 1049/2001 Article 2(1).

[29] Regulation 1049/2001 Article 4.

[30] Complaint 3699/2006/ELB.

[31] *Id.* ¶ 92.

[32] *Id.* ¶ 53.

[33] *Id.* ¶¶ 58, 97 and 100.

the deterrence of EU competition law (although the data protection and privacy issues would need to be carefully considered and, as noted, redactions may be necessary).[34]

- Fourth, the balancing of public interest over the potential exceptions in the Regulation must be carefully undertaken for each document to which access is requested, and the specific content of each document must be taken into account.[35] The burden on the Commission when refusing access is therefore onerous.

The EU Ombudsman has, therefore, confirmed that he sees significant public interest in private enforcement of EU competition law and in access to Commission documents that will facilitate this. Assuming this approach is correct, by extension, NCAs should be well placed to access Commission documents that assist them in bringing director disqualification actions under the terms of the Transparency Regulation. It would need to be explored if this could work in practice.

C. National Courts Also Have Powers to Review Commission Documents That May be Relevant to EU Competition Law Cases They are Hearing

Regulation 1/2003, Article 15, gives national courts of Member States the right to "… ask the Commission to transmit to them any information in its possession or its opinion on questions concerning the application of the Community competition rules" when the proceedings concern Articles 101 or 102 TFEU. This means that if an NCA took a director to a national court to apply for that director to be disqualified, the court itself could seek information relating to the case from the Commission.

The EU Ombudsman appears to be enthusiastic about this form of cooperation between the national courts and the Commission. He repeatedly refers to the process in the *ELB* decision.[36] In particular, the Ombudsman notes that courts may request access to documents that contain commercially-sensitive information without having to reveal their contents to the parties involved or to the public. The Article 15 route therefore appears a viable one for the national court to gather further evidence from the Commission.

VI. CONCLUSION

There is growing concern about the consequences of the European Commission's recent turnover-based fining policy. First, fines imposed on companies reverberate throughout the economy and may punish those unconnected to the infringement. Indeed, fines appear to have reached a level where the result can be that either that the company is put out of business, or their competitiveness in a global economy is diminished. Second, there may be under-deterrence, since the actual perpetrators of competition infringements are being overlooked.

This article offers some ideas on how an EU-wide system of director disqualification for antitrust infringements could be put in place and operated. Admittedly, this is far from straightforward and this article has merely sought to map out the issues and to stimulate a debate. However, subject to certain safeguards, disqualifying directors following a competition

[34] *See* Case C-28/08 P, European Commission v The Bavarian Lager Co. Ltd., not yet reported, judgment of the Court (Grand Chamber) of June 29, 2010.

[35] *Id.* ¶ 64. Ultimately, refusal to the documents was upheld by the Ombudsman on the ground of commercial interests, which was not overridden by public interest. *See* ¶ 115 of the Complaint decision.

[36] *Id.* ¶¶ 112 to 114, and also further remark at end of decision.

law infringement by their company would offer the Commission an alternative means of achieving deterrence, which would be one steps towards a more balanced, proportionate, and effective sanctions policy.