Applying the Rules: Agency Processes for Enhancing Cooperation with the Private Sector

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Public consultation of the European Commission on the functioning of the Counsel Regulation 1/2003 –
Urgently required amendments

A. Introduction

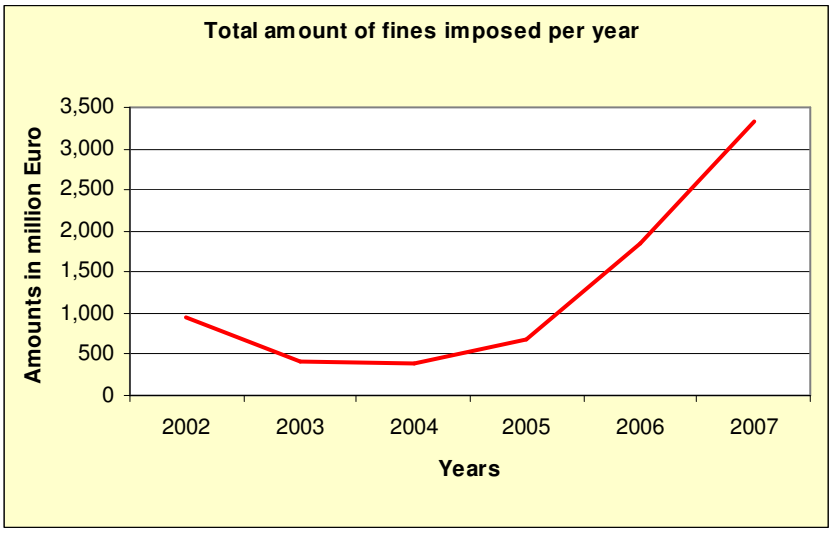
The fines which have been imposed by the European Commission ("**Commission**") for competition law infringements based on Art. 23 (2) 2 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the Implementation of the Rules and Competition laid down in Art. 81 and 82 of the Treaty[1] („**Reg. 1/2003**") have reached a historic level.

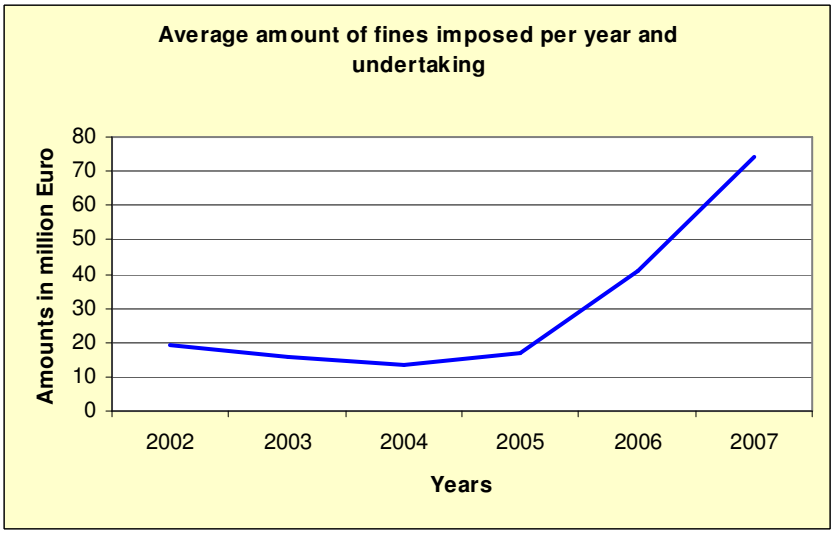
Statistics on the Commission's fining practice clearly display that – beginning in the year 2006 – the fines imposed have ultimately exceeded any reasonable level. While before 2006 the aggregate fines imposed over a whole year remained below EUR 1 billion and the average fine per undertaking did not exceed EUR 20 million, two years later in 2007, the respective amounts had already increased threefold and more. Just in the *elevators and escalators* case, the Commission imposed a total fine amounting to approximately

[1] OJ of 4 January 2003, L 1/1.

EUR 992 million, only scarcely failing to meet the EUR 1 billion threshold. *ThyssenKrupp* alone was imposed the remarkable fine of EUR 479 million.

This up-way trend is emphasized by the following charts:





Considering this development of the fines, Reg. 1/2003 does not meet with the requirements arising from overriding legal principles and standards. The currently imposed fines constitute serious interferences with the assets of the concerned undertakings; such interferences are only acceptable if there is a legal basis that is sufficiently "clear and unambiguous" and if the applied procedure also meets with applicable legal standards.

B. Conceptual deficiencies in European Community competition law

The concept of deterrence on which the imposition of fines by the Commission is based shows significant conceptual deficiencies:

First, when assessing the responsibility of undertakings, the Commission does not consider which internal efforts are taken in order to avoid violations of competition (compliance efforts). Currently a compliance organisation is built on several pillars. These entail a comprehensive communication of clear rules of conduct, including education and trainings, professional compliance divisions auditing and sanctioning employees which do not comply. In large group of companies with thousands of employees such efforts are the decisive and only instrument to avoid violations of law. Therefore, fines for competition law infringements which follow the purpose of deterrence must aim to sanction the non-existence or deficiencies of compliance efforts. This is ignored by the fining practice of the Commission today.

Second, a further important deficiency is constituted by the fact that parent companies are held liable for violations of their subsidiaries on a regular basis. Such liability is determined without proper examination whether the parent company was aware of the prohibited practices, and independent of whether the parent company undertook all possible compliance efforts in order to prevent the subsidiary from violating the law. This "strict" liability of the parent company is not a suitable means of deterrence.

Third, the deterrence concept of European competition law lacks sanctions against the responsible individuals. To the extent that employees of an undertaking participate in agreements although the undertaking undertook all efforts to prevent infringements of competition law, efficient deterrence can only be achieved through direct sanctions against the responsible employees and managers. New studies show that sanctions against individuals for violations of competition law are more efficient than sanctions against undertakings. Several national competition laws, especially in the United Kingdom and The Netherlands, provide for sanctions against employees of undertakings already today.

The concept of a cumulated and at the same time differentiated responsibility of companies and responsible employees is successfully applied in U.S. competition law. Each year, dozens of individuals which infringed competition law are either fined or even brought to jail. In correlation hereto, fines against undertakings in the U.S. are substantially lower than in the European Union. The aggregate of all fines against undertakings in the U.S. amounted to USD 615 million in 2007, which is only a small part of the fines which have been imposed in the European Union in the same time period. Furthermore, U.S. competition law allows to consider compliance programs as a mitigating factor. Also, the

principles under which parent companies can be held liable are much more developed. These deficiencies require the following amendments to the European Community competition law:

1. Clear and unambiguous provisions on the setting of the fines should be introduced into Reg. 1/2003. Art. 23 (2) Reg. 1/2003 does not constitute such clear and unambiguous legal basis allowing to impose fines in the current dimension.

2. The concept of fines must be re-considered:

   - A fine may only be imposed on an undertaking if the infringement of competition law can be clearly established by negligent or intentional behaviour of one or more individuals. Further, the Commission should be obliged to determine whether the actions of these individuals can be attributed to the undertaking concerned, because these individuals are the statutory representatives of the undertaking, or because the acting individuals were not sufficiently supervised by the statutory representatives of the undertaking.

   - Compliance efforts, like compliance programmes of undertakings, should be considered by the European Commission, either as a reason to deny responsibility of an undertaking for infringements of competition law, or as a mitigating factor in the setting of fines. In the long-term, this is the only way to motivate the undertakings to improve their compliance activities. - Sanctions against the acting individuals increase deterrence effects and simultaneously support compliance efforts of the undertakings (The EC Treaty would allow the introduction of such sanctions.[2]

3. The principles under which parent companies are made liable for infringements of subsidiaries must be codified. The "attributions" that were made by the Commission and the Community courts to date are not lawful without an explicit legal basis. Ultimately, the principle that every legal subject can only be held liable for its own conduct should prevail.

4. It should be ensured that the defence rights of the undertakings involved in proceedings before the Commission and the Community courts are as strictly observed as it would be guaranteed in criminal proceedings. In connection herewith, corrections of the leniency system as currently applied are necessary in order to avoid a collision with the *nemo tenetur* and *in dubio pro reo* principles. It should

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[2] See Wouter PF Wils, Efficiency and Justice in European Antitrust Enforcement, p. 197 et seq.

further be ensured that the contributions of an undertaking which is cooperating with the Commission under the Leniency Notice are carefully scrutinized as to the correctness by the Community courts.

5. The current commingling of the competences of the Commission as administrative, prosecution and fining body infringes the principle of the separation of powers. Additionally, the current deficiency with regard to the judicial review should be remedied by establishing a system in which the Commission merely acts as an prosecuting authority, while the Court of First Instance ("**CFI**") or specific judicial panels attached to it decide on the case and determine the fine based on its own finings with unlimited ability to take evidence.

C. Amendments to Reg. 1/2003

The conceptual deficiencies of the substantial and procedural provisions of European competition law necessitate the requirements for amendments for Reg. 1/2003 as set forth below. In order to satisfy all issues listed under B. above, further reforms beyond the amendments proposed for Reg. 1/2003 will be required. Due to the fact that the public consultation of the Commission concerns Reg. 1/2003 only, these issues can not be dealt with in the following.

1. Introduction of detailed principles on the setting of fines into Art. 23 (2) Reg. 1/2003

In its current version, Art. 23 para. 2 Reg. 1/2003 provides that the Commission may impose fines on undertakings and associations of undertakings amounting to a maximum of 10% of its total turnover in the preceding business year in order to sanction undertakings for the infringement of Art. 81 and 82 EC Treaty. Reg. 1/2003 remains silent with respect to the principles that have to be applied in setting the amounts of the fines. Beyond the already mentioned maximum of 10% of the total turnover Art. 23 para 2 Reg. 1/2003 only provides that the Commission has to consider the gravity and the duration of the infringement when setting the fine. The Community legislator has not provided for further parameters and left it to the

administrative body – the Commission – to regulate the setting of the fines by issuing administrative norms – especially the Fining Guidelines[3].

This kind of regulation infringes the principle of a "clear and unambiguous legal basis" that can be derived from the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union as well as further legal sources and applies in the Community law. For example, the European Court of Justice ("**ECJ**") held that "a penalty even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis"[4]. To date, the Community courts refused to acknowledge the infringement by referring to the existence of the maximum amount and the two criteria of the gravity and the duration[5]. However, the Community courts have so far ignored that the determination of a maximum amount that gives a discretionary margin of possibly several billion euros, as well as the criteria of the duration and gravity of the infringement are not sufficient enough to meet the requirements for a "clear and unambiguous" provision. The criteria of gravity and duration are especially not sufficiently determined as well. Case law of the Community courts has not developed a list of criteria which have to be taken into consideration regarding the gravity of the case. The principles for setting the fines are laid down in the Fining Guidelines by the Commission, not in Reg. 1/2003. It can be left open whether the Fining Guidelines of the Commission are sufficiently clear and unambiguous. Even if they were, which is to be doubted, they may not remedy the lacking clarity of Art. 23 (2) Reg. 1/2003. The infringement of this legal principle may only be remedied if the scope of discretion of the Commission in setting the fines is legally restricted and the Community legislator itself issues sufficiently clear and unambiguous principles.

2. Determination of individual misconduct and responsibility of the undertaking

Pursuant to Art. 23 (2) Reg. 1/2003, an undertaking is liable for an infringement of Art. 81 EC if an individual acted for the undertaking and if the undertaking acted intentionally or negligently.

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3 Guidelines on the method of setting fines imposed pursuant to art. 23 para. 2 lit. a of Reg. 1/2003, OJ of 1st September 2006, C 210/2.

4 ECJ of 25 September 1984 - Case 117/83 - *Könnecke v Balm*, ECR 1984, 3291, para. 11; likewise in that sense: ECJ of 13 March 1990 - Case C-30/89 - *Commission v France*, ECR 1990, I-709, para. 23.

5 CFI of 5 April 2006 - Case T-279/02 - *Degussa v Commission*, ECR 2006, II-897, para. 66; ECJ of 22 May 2008 - Case C-266/06 P - *Evonik Degussa v Commission*, para. 36 et seq.

As regards intentional and negligent conduct, the CFI held that an undertaking acts intentionally or negligently where it cannot be unaware of the anti-competitive nature of its conduct.[6] Thus, the ECJ refers to the undertaking (and not to the individual acting for it) when establishing whether the infringement was committed intentionally or negligently. The nature of this criterion is demonstrated in the *Volkswagen* judgment in which the ECJ held that it is not necessary for the Commission to identify the persons whose acts reveal the intentional or negligent nature of the infringement. In this case, the Commission and the CFI derived the intentional nature of the infringement from statements made by persons, at least some of whom were not parties directly involved, without having established whether those persons had themselves also committed any infringements. The ECJ argued that an identification is not necessary because the fines are not of a criminal nature and that such a requirement would impinge seriously on the effectiveness of Community competition law.[7]

This approach of the Commission and the Community courts regarding the intentional and negligent conduct of undertakings is not acceptable in several respects; it clearly violates the principles of adequacy and reasonableness. First, the Commission and the Community courts need to clearly distinguish between intention and negligence since an infringement is more serious in the event of intent than in the event of negligence. Negligent conduct must have different consequences than intentional conduct, i.e. it has to be sanctioned with lower fines. In the decision practice of the Commission and the courts, the standards for negligence and intent are neither clearly defined nor assessed in detail. In addition, the standards regarding the responsibility of an undertaking for actions of its employees are poorly defined. Intention and negligence are of a subjective nature since they refer to what a person does and what the person is aware of. The responsibility of an undertaking on the other hand can only be established by attributing to it the intention or negligence of individuals acting for the undertaking.[8] As a consequence, the individuals whose

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6 CFI of 6 October 1994 - Case T-83/91 - *Tetra Pak v Commission*, ECR 1994, II-755, para. 238 et seq.; ECJ of 8 November 1983 - Case 96/82 - *IAZ v Commission*, ECR 1983, 3369, para. 45.

7 ECJ of 18 September 2003 - Case C-338/00 P - *Volkswagen v Commission*, ECR 2003, I-9189, para. 94 et seq.

8 Cf. Engelsing/Schneider, in: Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht (Kartellrecht), Band 1 Europäisches Wettbewerbsrecht [Munich Commentary on the European and German Competition Law (Antitrust Law), Vol. 1 European Competition Law], 2007, Art. 23 Reg. 1/2003, para. 27; Dannecker/Biermann, in: Immenga/Mestmäcker Wettbewerbsrecht EG / Teil 2 [Competition Law / Part 2], 4th ed., 2007 preliminary remarks to Reg. 23 et seq. Reg. 1/2003 para. 60.

intention or negligence shall be attributed to an undertaking must be identified. In addition, the action of such persons and the subjective background of such action needs to be scrutinised. Furthermore, an undertaking must not be held liable for the breach of each employee. Only intentional or negligent actions of persons who are entitled to represent the undertaking under the respective corporate law, i.e. members of the management, should be attributable to the undertaking. An undertaking shall not be held liable if its management undertook compliance efforts which meet best practise standards.

3. Introduction of a legal basis for the liability of parent companies

The current system of the liability of parent companies for infringements committed by their subsidiaries shows serious deficiencies.

The Commission regularly attributes a liability of the parent companies for the conduct of their subsidiaries. However, there is no legal basis for this practice by the Community legislator but only the practice of the Commission and the Community courts.

The profound legal consequences, such as the co-liability of the parent company, require – especially considering the effect of the joint and several liability of the parent company – that this issue be regulated by the Community legislator. Ultimately, the attribution of liability is only admissible if the dominating entity itself has negligently participated in the infringement, which, unless the dominating entity directly participated in the infringement, is possible only to the extent the dominating entity had such influence. Therefore, it should be ensured that fines may only be imposed on the acting entity by introducing a respective provision into Reg. 1/2003.

4. Consideration of compliance efforts of an undertaking

To date, the Commission does not take into consideration compliance efforts when setting the fines and does not classify compliance efforts as mitigating circumstances.[9] The Commission does not only refuse such efforts but also discriminates companies which maintain compliance efforts through its leniency policy. Undertakings that maintain a compliance programme suffer from significant disadvantages in leniency cases. In order to function, compliance programmes of undertakings need to provide for sanctions against their employees should they participate in cartels or infringe antitrust laws in general. The employees face

[9] Commission of 31 May 2006 – case F/38.645 - *Methacrylates,* para. 386.

dismissals, damage claims or other sanctions by their employer. Therefore, it is much more difficult to convince employees which have participated in cartels to cooperate with the undertakings and to disclose details. Thus, the undertakings with a compliance programme have a strong disadvantage compared to undertakings without a compliance programme. Consequently, this policy does not encourage undertakings to initiate and apply compliance programmes and to commit to the avoidance of competition law infringements.

Thus, provisions regarding the consideration of compliance efforts should be introduced into Reg. 1/2003. In the event of infringements despite the existence of compliance efforts which meet best practise standards, a negligent infringement by the undertaking should be excluded. Where the compliance efforts are deemed to be insufficient, the existence of them should be classified as a mitigating factor. This result is in accordance with the practice in the United States of America (U.S. Sentencing Guidelines) and recommendations of the OECD that support preventive measures by rewarding compliance programmes in antitrust proceedings.

5. Introduction of a legal basis for the leniency system

The leniency system which is currently applied by the Commission raises material legal concerns and should, therefore, be thoroughly amended.

The legal provisions for the application of the leniency system are laid down in the Commission's Leniency Notice[10]. The Lenience Notice constitutes - like the above mentioned Fining Guidelines – mere administrative provisions. The Community legislator has not provided for this instrument in any of its legal acts. Considering the fact that the leniency system is very important for the determination amount of the fine to be imposed – there is a margin between a fine of several million Euros, a significant reduction of such fine and the full immunity from a fine – the legal principles that require a "clear and unambiguous" legal basis apply in this context. Therefore, the community legislator itself has to provide for such a "clear and unambiguous" legal basis for the leniency system by introducing it into Reg. 1/2003.

6. Proposal for amendment of Art. 23 Reg. 1/2003

In consideration of the above identified need for amendments, Art. 23 Reg. 1/2003 could be amended as follows:

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10 Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ of 8 December 2006, C 298/17.

(…) The Commission may by decision impose fines on undertakings and associations of undertakings between EUR 1,000 and EUR [xxx] million where, intentionally or negligently, Article 81 or 82 of the Treaty are infringed.

(…) *Undertaking in the meaning of this provision shall be the legal subject to which the infringement may be attributed. An attribution to a legal person shall occur only subject to the condition that one or several members of the legal representative body negligently or intentionally have participated in the infringement or have omitted supervisory measures. The negligent participation in the infringement by omission of supervisory measures requires that not all necessary measures for avoiding competition law infringements (compliance) have been taken. A compliance measure meets the required scope only where it provides for adequate means of training, supervision, and sanctions of the employees.*

(…) Where the infringement is very serious the Commission may impose fines of up to EUR [xxx] million. A very serious infringement shall be deemed to occur where the undertaking or the association of undertakings

1. *has participated for more than [xxx] years actively and continuously in horizontal restrictions;*

2. *has been the ringleader of the cartel;*

3. *has forced or instigated others to participate in the infringement;*

4. *[xxx].*

(…) Where the infringement is less serious the Commission may impose fines that shall not exceed EUR 1 million. A less serious infringement shall be deemed to occur where the undertaking or the association of undertakings has participated in the infringement involuntarily or for a short period only or where the infringement has occurred despite compliance efforts. Where the illegality of the conduct has not been identifiable for the undertaking or the association of undertakings due to the lack of settled case law or a clear practice of the Commission the Commission shall refrain from imposing a fine.

(…) In setting the amount of the fine, the Commission shall weigh the advantageous factors against the disadvantageous factors in the decision for each undertaking or association of undertakings. In particular, the Commission shall have regard of the following criteria:

1. *the nature of the infringement as a horizontal or vertical competition law infringement;*

2. *the size of the part of the Common Market affected by the infringement geographic- and product-wise;*

3. *the actual effects of the infringement on the Common Market;*

4. *the intensity of the participation of the undertaking or the association of undertakings;*

5. *the benefits gained by the infringement and the damage suffered by the consumers;*

6. *the duration of the infringement and the cessation of the infringement prior to the intervention of the Commission;*

7. *the turnover and market share of the undertaking or the association of undertakings;*

8. *the level of the guilt;*

9. *[xxx].*

(…) In no case, the fine for each of the undertakings participating in the infringement shall exceed 10% of its total turnover in the preceding business year or shall not be unreasonable for other reasons.

(…) Where the undertaking or the association of undertakings submits evidence fostering the detection and sanctioning of an infringement, the Commission shall grant full immunity or reduce the fine. The details shall be governed by a Commission regulation.

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