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Why would cartel participants still refuse to blow the whistle under the current EC leniency policy?

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1. INTRODUCTION

This article examines the level of transparency and predictability of the 2006 leniency policy, which is the latest policy implemented by the European Commission (the Commission) to relax the sanctions imposed on participants of cartels who come forward to disclose information about the cartels to the Commission. This policy increased leniency for whistle blower(s) in a cartel and happened parallel with the tendency to increase fines for those in a cartel who remained 'silent'.³

The Commission's first leniency programme dates back to 1996 with the reduction of fines (up to 75%) to cartel participants who disclosed the existence and details of their cartel activity.⁴ Without a guarantee of full immunity there was, in reality, little incentive to report the cartel to the Commission.

Therefore, the policy was modified. The initial modification took the form of the 2002 leniency notice⁵ in which full immunity became available to an applicant if certain conditions were met.⁶ The changes in the 2002 leniency notice resulted in 167 leniency applications between 2002 and the end of 2005.⁷ The 1996 leniency notice, which was effective for twice that time, resulted in only 80 applications. However, the modifications introduced by the 2002 leniency notice were still only partly effective.

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³Competition Commissioner Neelie Kroes stated: *'My message to companies is clear; the European Commission will not tolerate cartels. If you take part in cartels you will face very substantial fines...if you are already in a cartel, then blow the whistle to the Commission to gain immunity before someone else blows the whistle on you'*. (EU Focus 2007, 209, 4-5.) This strengthens the vision of previous Commissioner Mario Monti: M. Monti, *Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour?* Third Nordic Competition Policy Conference, September 11 and 12, 2000. There he stated that 'cartels are cancers on the open market economy'; J. S. Sandhu, 'The European Commission's leniency policy: a success?' (2007) 28(3) E.C.L.R. 148-157.

⁴European Commission, Commission Notice on the non-imposition or reduction of fines in cartel cases, (1996) O.J. C207/4 (1996 Leniency Notice).

⁵European Commission, Commission Notice on Immunity from fines and reduction of fines in cartel cases, (2002) O.J. C45/3 (2002 Leniency Notice). To place this in a context see also: R. Lane and J. McMahon, 'Current Developments, European Union Law' (2004) 53(2) I.C.L.Q. 465; J. Carle, 'The new leniency notice', (2002) 23(6) E.C.L.R. 265-272; X, 'New leniency policy adopted for cartel whistleblowers' (2002) EU Focus 95, 6-7; M. Jephcott, 'The European Commission's new leniency notice- whistling the right tune' (2002) 23(8) E.C.L.R. 378-385; C. R. A. Swaak and D. J. Arp, 'A tempting offer: immunity from fines for cartel conduct under the European Commission's new leniency notice' (2003) 24(1) E.C.L.R. 9-18.

⁶2002 Leniency Notice paragraphs 8-13.

⁷See Commission Memorandum, Competition: Commission proposes changes to the Leniency Notice- frequently asked questions, paragraph 1.

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/357&format=HTML&aged=0&language=EN&guiLanguage=fr> (Accessed March 27, 2008).

The current leniency policy came into force in 2006 and was intended to improve efficacy, transparency, and predictability of leniency application, as well as to address concerns that leniency applicants were unfairly disadvantaged in subsequent civil damages actions.⁸ This leniency policy was also the result of a pressing need to introduce more incentives for cartel members to come forward.⁹

Under the current system, an applicant making a leniency application will apply to seek full immunity from sanctions. If full immunity is not available, the applicant can apply for a reduction of any fine levelled against it.¹⁰ The 2006 EC leniency policy is in line with the European Competition Network's (ECN¹¹) Model Leniency Programme.¹²

This article aims to investigate how effective the current EC leniency policy really is by investigating some of the problems that have been attributed to the current leniency policy. The article will also endeavour to determine whether the underlying aims of certainty and predictability have been reached in relation to the current leniency policy and identify any areas, which should be improved to make the leniency policy more effective.

2. PROBLEMS UNDER THE CURRENT LENIENCY POLICY

(A) THE MARKER SYSTEM, ITS PITFALLS AND ALTERNATIVE SOLUTIONS

The marker system is one of the main innovations of the 2006 leniency policy. The system, originated in the US, and was followed soon after in Ireland, South Korea, Canada, Germany, the UK and Australia.¹³ It gives a leniency applicant the opportunity to save a place in the queue for all the applicants.¹⁴ Within a reasonable period of time the applicant has to perfect the marker by proffering the necessary information to the Commission.¹⁵ The purpose of the marker system is to encourage a race between cartel members to report cartels to the Commission and to provide the best information and most useful evidence on the cartel available to them.¹⁶ This system should add transparency, certainty and predictability to the leniency process as the leniency applicant is aware of where he stands

⁸European Commission, Commission Notice on immunity from fines and reduction of fines in cartel cases, (2006) O.J. C298/17.

⁹J. Hinloopen, 'An Economic Analysis of Leniency Programs in Antitrust Law' (2003) 4 De Economist 151.

¹⁰2006 Leniency Notice, paragraph 20.

¹¹The ECN consists of the European Commission and the competition authorities of the 25 Member States. It was established during the modernisation reform of the EC antitrust rules as a forum for discussion and cooperation of Member States.

¹²Competition: Commission and other ECN members co-operate in use of leniency to fight cross border cartels <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1288&format=HTML&aged=0&language=EN&guiLanguage=fr>, (visited May 20, 2008). The ECN launched a Model Leniency Programme with a view to improve the handling of parallel leniency applications in the ECN. The Model Programme is an effort towards a one-stop leniency shop and offers a set of rules on which all ECN programmes can align.

¹³C. Witterick C. and J. Gudofsky, 'Leniency programmes and cross-border co-operation in cartel enforcement: challenges and steps towards convergence' <http://competition.practicallaw.com/8-205-6152>, (visited May 14, 2008).

¹⁴2006 Leniency Notice, paragraphs 14 and 15.

¹⁵See 2006 Leniency Notice, paragraphs 8, 9 and 11.

¹⁶Competition: Commission proposes changes to the Leniency Notice <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/357&format=HTML&aged=0&language=EN&guiLanguage=en>, (visited May 14, 2008).

with respect to the other applicants and the Commission will inform the applicant whether he was the first party to seek leniency.¹⁷

However, by using the words 'the Commission may grant a marker ... the applicant should...justify its request for a marker'¹⁸, the Commission has retained significant discretion as to whether or not to grant a marker to the applicant. The Commission has already stated that markers may only be granted if 'a new management, after having taken over a company realises that the acquired company was involved in a cartel and decides to apply for immunity'.¹⁹ It seems that the management seeking leniency and involved in a cartel can only make a formal full immunity application, and cannot apply for a marker. This means that different cartel members²⁰ would be subject to different leniency practices. Such a policy would appear unfair, considering that the obtaining of a marker is less time consuming than making a full application for immunity.

It is unclear why a leniency applicant should justify its request for a marker.²¹ The disclosure of a cartel and detailed information allowing the Commission to find an infringement of Article 81 should, on its own, constitute sufficient reasoning for this.²² It could, however, be argued that 'justification' is necessary to prevent competing companies from abusing the leniency policy. Indeed, there could be market advantage for a whistleblower when he receives immunity and maintains some advantages of the cartel, while his direct competitors (former cartel partners) find themselves severely punished. A policy that rewards a whistleblower with such considerable market advantage without further justification could incentivise companies to create a cartel, and subsequently notify it to the Commission.

Further, the applicant is required to perfect the marker by providing necessary information within a given time frame. The time frame is set by the Commission on a case by case basis.²³ Some authors agree with this flexible approach as is followed in the US and the UK leniency practice,²⁴ however, it would have been beneficial if the Commission had stipulated a standard time frame, with the possibility for extensions to this under certain circumstances. This would serve to increase predictability and clarity of the marker. There are many jurisdictions that require a marker to be perfected within a specific time period, for example, Canada (30 days), Australia (28 days), South Korea (seven days) and Germany (eight weeks).²⁵

For the reasons elaborated above, it seems the current marker system is unlikely to reach the optimum level of efficiency, due to a lack of a clear and coherent policy. Even though the introduction of the marker system is laudatory, the Commission must further improve its efficiency.

¹⁷J.S. Sandhu, 'The European Commission's leniency policy: a success', (2007) 28 (3) E.C.L.R., 148-157.

¹⁸2006 Leniency Notice, paragraph 15.

¹⁹Commission Memorandum, Competition: Commission proposes changes to the Leniency Notice- frequently asked questions (September 2006) Memo/06/357.

²⁰I.e. those with and those without a new management.

²¹*Above* n 15.

²²*Ibid.*

²³Paragraph 15 of the 2006 EC Leniency Notice.

²⁴Comments of the ABA Section of Antitrust Law and Section of International Law.

²⁵http://ec.europa.eu/comm/competition/cartels/legislation/files_leniency_consultation/aba.pdf, (visited May 20, 2008).

²⁵*Above* n 11.

As the current marker system seems to be far from perfect, it could easily be undermined by (newer) initiatives such as direct settlements. The Commission has recently announced the introduction of a settlement procedure for cartels²⁶ that will allow it to settle cases using a simplified procedure.²⁷ Direct settlements can be defined as formal instruments of discussion by which counsel of a firm suspected of breaching the EC competition rules and the EC are able to reach an agreement resolving charges against the firm for a violation of Article 81.²⁸ Direct settlements are an alternative, which accelerate the prosecution process, reward co-operation and deal with the Commission's backlog of cases.²⁹ After the Statement of Objections, the companies can be invited by the Commission to enter into a direct settlement. This is comparable to plea bargaining (a negotiated direct settlement) in the US.³⁰ In a direct settlement procedure, a party can only agree not to contest the Statement of Objections and accept a fine with rebate.³¹ The use of settlement procedures in cartel cases is already occurring at EU Member State level.³² Under the new settlement procedure, the Commission neither negotiates nor bargains the use of evidence or the appropriate sanction, but can reward the parties' cooperation to attain procedural economies. Such cooperation is different from the voluntary production of evidence to trigger or advance the Commission's investigation, which is already covered by the leniency policy.³³

While the legal community has broadly welcomed the introduction of settlement procedures into the European cartel enforcement, the Commission should be mindful that its introduction does not detract from any other elements of its cartel enforcement regime.³⁴ An effective cartel settlement system requires sufficient benefits and incentives for both the government and the cartel participant, or else neither will commit to settlement.³⁵ The mere possibility of reduced sanctions will usually not be sufficient to induce a company to settle;

²⁶See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of the Council Regulation (EC) No 1/2003 in cartel cases, [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008XC0702\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008XC0702(01):EN:NOT) (Settlement Notice), and Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008R0622:EN:NOT> (visited July 15, 2008).

²⁷X, (2008) 'Settlement Procedure for cartels introduced' EU Focus, 237/238, 6-8.

²⁸F Souty, 'Direct Settlements' (2008) 2(14) C.L.I. 7. In the US, 90 per cent of its cartel cases are resolved through criminal plea bargaining. For the advantages of plea agreements see M. Hansen and others (2008), 'Breaking New Ground: Direct Settlement of EC Cartel Cases' The 2008 Antitrust Review of the Americas, 63.

²⁹*Ibid*

³⁰J. Koponen and J. Imgrund, 'Not quite settled, The Commission proposes a settlement procedure for cartel cases' (2007) 12(3) C.L.I. 6.

³¹See *above* n 24.

³²For instance, the UK's Office of Fair Trading (OFT) used such procedures in the Independent Schools case (OFT Decision No CA98/05/2006). The Dutch Competition Authority (the NMa) has adopted a similar settlement approach to the OFT in relation to cartel behaviour in the construction sector. Under French competition law, the French Competition Council can grant fine reductions in relation to anti-competitive behaviour where a company does not contest the alleged infringements and offers commitments to modify its behaviour in the future. See *Ibid*. See also P. Riedel and S. Horwitz 'Competition settlements Towards an OFT policy' (2007) 9 (10) C.L.I. 6.

³³Antitrust: Commission introduces settlement procedure for cartels (30/06/2008) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1056&format=HTML&aged=0&language=EN&guiLanguage=en> (visited July 17, 2008).

³⁴See Neelie Kroes, "The First Hundred Days" <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/205>, (visited July 5, 2008).

³⁵Ann O'Brien, Senior Counsel to the Deputy Assistant Attorney General For Criminal Enforcement, Antitrust Division, U.S. Department of Justice, Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions, 13th Annual EU Competition Law and Policy Workshop (June 6, 2008) <http://www.usdoj.gov/atr/public/speeches/235598.htm> - N_23_ (visited July 1, 2008).

the rewards must be transparent, predictable and certain. To maximise the goals of transparency, enforcers must not only provide explicitly stated standards and policies, but also clear explanations of prosecutorial discretion in applying those standards and policies.³⁶

Under the EC settlement procedure, if parties, after seeing the evidence in the Commission file choose to acknowledge their involvement in the cartel and their liability for it, the Commission can reduce the fine imposed on them by 10%.³⁷ Many commentators regard the 10% settlement reduction offered by the Commission as insufficient to induce companies to settle.³⁸ However, this figure could be expected because of the Commission's crucial concern that its leniency programme offering higher possible reductions remains attractive. Another critical issue to the success of the Commission's settlement procedure will be the Commission's transparency in discussing the fine that a cartel participant can be expected to pay. Though the 2006 Fining Guidelines are in place, they are relatively new and they have not been applied in many cases. Therefore, the more transparency the Commission can provide as to how it will apply the Fining Guidelines, the more likely parties will be likely to settle.³⁹

In dealing with direct settlements the Commission retains a broad discretion while deciding on whether or not to settle a case, with which parties to settle and whether or not to open or terminate the procedure.⁴⁰ It is also clear that investigated parties will not have any rights to settle and that the procedure involves 'discussions' as opposed to 'negotiations'; the Commission thus again retains complete discretion in this regard.⁴¹ This is where the European direct settlement system differs from the successful US plea bargaining process, where a negotiated settlement procedure is followed. The settlement procedure seems to be tilted in favour of the Commission. While the Commission has the right to change its mind at any time throughout the proceedings, even after a defendant's formal settlement submission, defendants have limited room for manoeuvre. Further, absent a significant discrepancy between the formal submission and the statement of objections, defendants do not have the ability to withdraw a settlement request.⁴²

³⁶*Ibid.*

³⁷*Above* n 25.

³⁸See for example, Freshfields Bruckhaus Deringer's comments on the European Commission's Draft Proposals for Settlement Proceedings in Cartel Cases, http://ec.europa.eu/comm/competition/cartels/legislation/cartels_settlements/freshfields.pdf (visited July 5, 2008), 2008; P.Edlind and R.Gerrits, "European Commission Adopts Cartel Procedure" http://www.martindale.com/members/Article_Body.aspx?id=458718 (visited July 12, 2008). See also *Above* n 170.

³⁹*Above* n 33.

⁴⁰*Above* n 28.

⁴¹*Ibid.*

⁴²P.Edlind and R.Gerrits, "European Commission Adopts Cartel Procedure" http://www.martindale.com/members/Article_Body.aspx?id=458718 (visited July 12, 2008).

It will take some time to determine the impact and efficacy of the settlement procedure in practice. According to some commentators, the new settlement procedure can potentially reduce the number and scope of appeals brought against Commission decisions. However, success will largely depend on whether the Commission uses its considerable discretion in a transparent and consistent fashion.⁴³ Further, it is doubtful that a fine reduction of 10% will be a sufficient incentive for offenders to admit their participation in a cartel. Besides this, Commission officials have already explained that the Commission would only pursue a settlement when all parties to an alleged infringement would take part in the settlement procedure. For these reasons, even under the direct settlement system, there seems to be a lack of certainty, predictability and incentives, which poses questions concerning its efficiency.

Another alternative instrument to leniency applications refers to commitment proceedings under Article 9 of the Regulation 1/2003.⁴⁴ Basically, when the Commission decides on the commitments for the company (to restore a situation on the market), there is no longer a basis for action by the Commission when the company fulfils these commitments with success.⁴⁵ However, this instrument is also not very satisfactory in addressing competition concerns as it undermines too much the deterrent effect of the competition policy and greatly affects third parties.⁴⁶

Looking at the current scenario of anti-cartel enforcement in a holistic manner, for the many mid-sized companies in the EU with limited resources such rapid and numerous developments⁴⁷ can leave room for misunderstanding according to a senior competition law solicitor in London. These companies can easily get confused between leniency and settlement for instance. Although the Commission issues regular press releases and updates materials on its official website, this concern is still relevant.

(B) IMMUNITY AND REDUCTION OF FINES

I. IMMUNITY

The purpose of the immunity threshold is to articulate explicitly in the leniency policy the type of information and evidence the immunity applicants are required to submit.⁴⁸

⁴³J. Koponen, Partner Competition Group Linklaters, 'European Commission Adopts Settlement Procedure for Cartel Cases' June 30, 2008.

<http://www.linklaters.com/newsanddeals/newsdetail.asp?newsid=3601&navigationid=205> (visited July 1, 2008).

⁴⁴See; Case COMP/38.381 *The Beers Commission decision*, February 22, 2006; Case COMP/38.173 *FA Premier League Commission decision*, March 22, 2006; Case COMP/38.348 *Repsol SPP Commission decision*, April 12, 2006; Case COMP/38.681 *Cannes Extension Agreement Commission decision*, October 4, 2006.

⁴⁵E. Wind, 'Remedies and sanctions in Article 82 of the EC treaty' (2005) 26(12) E.C.L.R. 659-668.

⁴⁶For more information, see above n 26. See also the fundamental right problems arising in Case T-170/06, *CFI Alrosa Company Ltd*, July 11, 2007.

⁴⁷For instance, Direct Settlement, above n 24, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of the Regulation No 1/2003

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:NOT), (visited May 20, 2008) and White Paper on Damages actions for breach of the EC antitrust rules, http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf (visited July 1, 2008).

⁴⁸Competition: Commission proposes changes to the Leniency Notice. <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/357&format=HTML&aged=0&language=EN&guiLanguage=en>, (visited May 14, 2008).

IMMUNITY FOR ENABLING 'TARGETED INSPECTION'

On the face of it, the 2006 Leniency Policy has taken a clear position on the standard of evidence.⁴⁹ Paragraph 8 of the policy states that an undertaking seeking immunity is required to submit information and evidence that will enable the Commission to carry out a targeted investigation or enable the Commission to find an infringement of Article 81. However, the Commission has clearly raised the threshold for immunity from the earlier 2002 policy, which stated that an undertaking seeking immunity is required to submit evidence that may enable the Commission to carry out an investigation.⁵⁰ Further, the term 'targeted inspection' in the present policy should have been clearly defined and falls short of the aim of predictability and increases the Commission's discretion. Paragraph 9 lists the information that the undertaking must provide to carry out a targeted inspection. This stands in sharp contrast to the similar provision under paragraph 6 of the ECN's Model Leniency Programme⁵¹, which states that the undertaking should be in a position to provide the listed information. The list of information outlined in order to carry out a targeted inspection at the time of making the application under paragraph 9 of the 2006 EC leniency policy is also extremely extensive. On the other hand, the ECN's Model Leniency Programme requires a shorter and less detailed list. Some commentators are in fact of the opinion that the list of information is in some respects unclear and also goes significantly beyond the minimum amount of information which the Commission would require to launch a productive inspection.⁵² The new policy could, therefore, actually deter potential applicants from joining the race to seek immunity which the leniency programmes are designed to promote all over the world.

IMMUNITY FOR ENABLING INFRINGEMENT OF ARTICLE 81

The new wording of Point 8(b) significantly raises the evidentiary bar from under the 2002 Policy. There is an additional requirement to provide 'contemporaneous, incriminating evidence of the alleged cartel'. This additional requirement could have the effect of deterring undertakings that have participated in a cartel but lack contemporaneous evidence, from making the application.⁵³

In summary, the purposes of the Commission are not met. Moreover, the Commission by reserving a large amount of discretion and introducing new undefined concepts, has fallen short of the overall aim of transparency and predictability under the new policy. As the threshold for immunity is very high,⁵⁴ it could be likened to a form of 'Russian Roulette' as the conditions are difficult to achieve.

⁴⁹N. Zingales 'European and American Leniency Programmes: Two Models Towards Convergence?' (April 3, 2008). Available at file://localhost/SSRN/ <http://ssrn.com:abstract=1101803>.

⁵⁰Freshfields Bruckhaus Deringer Response to the European Commission's Draft Leniency Notice http://ec.europa.eu/comm/competition/cartels/legislation/files_leniency_consultation/fbd.pdf, (visited May 16, 2008).

⁵¹Europa, ECN Model Leniency Programme http://ec.europa.eu/comm/competition/ecn/model_leniency_en.pdf, (visited May 14, 2008).

⁵²Baker and McKenzie Response to the European Commission's Draft Leniency Notice http://ec.europa.eu/comm/competition/cartels/legislation/files_leniency_consultation/bakermckenzie.pdf, (visited May 14, 2008).

⁵³Linklaters Response to the European Commission's Draft Leniency Notice published on 29 September 2006 http://ec.europa.eu/comm/competition/cartels/legislation/files_leniency_consultation/linklaters.pdf, (visited May 14, 2008).

⁵⁴See the conditions mentioned in 2006 Leniency Notice, paragraphs 8-13.

II. REDUCTION OF FINE

If immunity is not granted, the applicant can still apply for a fine reduction. For this, he must provide 'the Commission with evidence of the alleged infringement, which represents significant added value with respect to the evidence already in the Commission's possession'.⁵⁵ However, the Commission will not determine whether the applicant's evidence provided 'significant added value' until issuing the final prohibition decision⁵⁶ and will only then determine in which of the three bands for reduction of a fine the applicant falls.⁵⁷

There is a lack of certainty in this process and the outcome is not predictable. This is because questions like; 'what is 'significant added value'?' and 'will the applicant reach the threshold for immunity?' have not been clearly explained. It could even result in certain companies providing as much information as possible to the Commission but finding themselves in a much worse position than if they had not approached the Commission.⁵⁸ Accordingly, some companies may decide not to approach the Commission in the first place.

Further, the Commission has maintained the reduction bands of the 2002 Leniency Policy.⁵⁹ It is important to bear in mind, the radical increase in fines since the 2006 Commission's new Fining Guidelines⁶⁰ became effective. Council Regulation 1/2003⁶¹ provides that companies may be fined up to 10% of their total annual turnover. The revised Guidelines provide that fines may be based on up to 30% of the company's annual sales to which the infringement relates, multiplied by the number of years of participation in the infringement.⁶² The dramatic increase in fine levels may appear attractive to an immunity applicant, however it results in a more severe treatment for reduction of fine applicants. They stand to suffer because even if they are granted a reduction in the fine, they do not receive as much reduction as before as the proportionate level of fines has been increased by the new fining policy. This could, thus, have a detrimental impact on applicants seeking a reduction of fines.

Nevertheless, one could find it necessary that cartel members cannot predict the fine and focus less on creating incentives to approach the Commission but focus more on avoiding firms being able to incorporate the amount of fines into their business plan.⁶³

Under the 2002 policy, a requirement of full and continuous co-operation only existed in respect of applicants for immunity of fines. This duty has now been extended to the reduction of fine applicants under the 2006 policy. The reason put forward by the Commission is that this requirement is an essential feature of the Leniency Notice.⁶⁴ However, while the immunity applicant is aware early in the proceedings that he has conditional immunity, an applicant for reduction of fines needs to satisfy the cumbersome

⁵⁵See, for instance, *above* n 15.

⁵⁶2006 Leniency Notice, paragraphs 26 and 30.

⁵⁷2006 Leniency Notice, paragraph 29.

⁵⁸For instance, due to a later applicant who leapfrogged ahead of the earlier applicant or in case a company admitted being involved in a cartel but is not granted leniency.

⁵⁹See paragraph 26 of 2006 EC leniency policy and paragraph 23 of 2002 EC leniency policy.

⁶⁰Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of the Regulation No 1/2003, [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:NOT), visited May 20, 2008). (2006 Fining Guidelines).

⁶¹Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in the Articles 81 and 82 of the Treaty, OJ L1, 04.01.2003.

⁶²Europa, Commission revises Guidelines for setting fines in antitrust cases <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/857&format=HTML&aged=0&language=EN&guiLanguage=en>, (visited May 20, 2008).

⁶³R. Rothwell, 'News-Company + Commercial: Lawyers on their guard as EC unveils tough guidelines to punish cartels. (2006) 6(1) L.S.Gaz 103/276.

⁶⁴Competition Commission proposes changes to the Leniency Notice <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/357&format=HTML&aged=0&language=EN&guiLanguage=en>, (visited May 14, 2008).

conditions of continuous co-operation without receiving any indication as to whether he will receive a reduction in fines until the statement of objections is notified.⁶⁵

As is manifest from the above, the burden on the applicant for reduction has been increased compared to the past, which can act as a disincentive.

(C) INFORMATION UNCOVERED.

An admission for leniency is very easily known to others, as the admission is often made public. Even more specific information concerning the applicant can too easily be disclosed.

Under the leniency policy, corporate statements (oral or otherwise) can be used as evidence by the Commission.⁶⁶ Such a statement is binding and cannot be challenged by the applicant.⁶⁷ The Commission uses such self-incriminating statements in the prohibition decision and statement of objections. The latter are regularly included in private damages claims⁶⁸ or discovery requests in procedures⁶⁹ in the US. Some vital considerations for potential EU leniency applicants are whether these corporate leniency statements may be included in private damage claims or be discoverable in the US civil proceedings that are subject to extensive document discovery requirements under the Federal Rules of Civil Procedure.⁷⁰ These concerns arise even with the EC. The Commission has acknowledged the disincentive created for leniency applicants when the undertaking's corporate statements are used against it in civil proceedings.⁷¹

In the past; the Commission has regarded the issue of discovery seriously and has adopted a two-fold step. Firstly, it sought to intervene in the US civil litigation to oppose discovery of the EU leniency applications.⁷² For instance, the Commission filed *amicus curiae* briefs in the US civil litigation relating to the Vitamins⁷³ and Methionine⁷⁴ case to contest the discoverability of corporate leniency statements. Secondly, after extensive discussions with the US Department of Justice (DOJ), the Commission began to allow oral immunity in leniency applications.⁷⁵

⁶⁵ *Above* n 48.

⁶⁶ 2006 Leniency Notice, paragraph 31.

⁶⁷ 2006 Leniency Notice, paragraph 32.

⁶⁸ The ECJ stated that private damages claims should be available: Case C-453/99 *Courage Ltd v Crehan*; A.P. Komninos, 'New prospects for private enforcement of EC competition law: *Courage v Crehan* and the Community right to damages' (2002) 39 CML Rev. 469.

⁶⁹ J. Joshua, 'Competition law enforcement, Criminalisation, cartels, leniency and class actions: a look in the future' (2004) 22(3) C.L.I., 3-7.

⁷⁰ N. Levy and Donoghue, 'The EU Leniency Programme Comes of Age' (2004) 27 (1) W.Comp.75-79; K. Nordlander 'Discovering discovery - US discovery of EC leniency statements' (2004) 25(10) E.C.L.R. 646-659. See also *Intel Corp v Advanced Micro Devices, Inc*, 542 U.S. 241 (2004).

⁷¹ D. Little, 'The European Commission's Revised Leniency Notice for Cartel Cases' (2007) 10 TCLR 136-144.

⁷² M. Reynolds and D. Anderson, 'Immunity and leniency in EU cartel cases: current issues' (2006) 27 (2) E.C.L.R. 82-90.

⁷³ In *Re Vitamins Antitrust Litigation*, Misc. No. 99-197 (TFH). Brief of the Commission of *Amicus Curiae* stated that '...disclosure would do harm to the fundamental strengths of the leniency programme- confidentiality would be destroyed, leniency applications would be deterred, and candour with the Commission (Cartel Unit) would be chilled.'

⁷⁴ In *Re Methionine Antitrust Litigation*, Master File No. C-199-3491-CRB (N.D.Cal. filed 12/08/99).

⁷⁵ *Above* n 70.

The Commission has attempted to include in the 2006 leniency policy the essential elements of the procedure to protect corporate statements.⁷⁶ The process works in a way that oral statements will be recorded and verbatim written transcripts will be made of each statement.⁷⁷ The applicants who make oral statements will not retain or receive from the Commission any copies of these statements. Nevertheless, the moment the oral statement has been submitted, it will become a Commission document. This is designed so that the applicant retains no document on its statement that could be required by a third country court to be produced.⁷⁸ These steps diminish the risk that oral statements or other information provided by the company and contained in the Commission's file will be used in civil litigation, especially in the US.⁷⁹

However, the wording of the 2006 leniency policy on mechanical or electronic copying of any information appears insufficient to exclude a person from recording the information contained in a corporate statement by means of dictation equipment or handwriting the information. It has also been argued that the Commission should have been more precise, specifying clearly that information obtained from access to the file can only be used in the administrative proceedings or any judicial appeal from those administrative proceedings.⁸⁰ Some authors are of the opinion that the Commission should follow the practice of the US DOJ and use the applications as 'road maps' for further evidence gathering as opposed to relying on them as primary evidence. The Commission could use its information-gathering powers to confirm the essential elements of the corporate statement without having to formally rely on the transcript as part of the Commission's file.⁸¹

One must realise that the US discovery requests for corporate statements can be addressed to the Commission or to the defendant and are granted more frequently.⁸² Discovery requests should actually only be addressed to the defendant (and not the Commission) and only for the 'documents' under his control or in his possession.

⁷⁶Competition: Commission proposes changes to the Leniency Notice <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/357&format=HTML&aged=0&language=EN&guiLanguage=en>, (visited May 14, 2008).

⁷⁷S. Suurnakki and M. Centella, 'Commission adopts revised Leniency Notice to reward companies that report hard core cartels' (Spring 2007) Competition Policy Newsletter 7-15.

⁷⁸*Ibid.*

⁷⁹*Above* n 15.

⁸⁰Freshfields Bruckhaus Deringer Response to the European Commission's Draft Leniency Notice http://ec.europa.eu/comm/competition/cartels/legislation/files_leniency_consultation/fbd.pdf, (visited May 16, 2008). See also M. Bloom 'Despite Its Great Success, the EC Leniency Programme Faces Great Challenges' in Ehlermann C. and Atanaisu I. (ed), *European Competition Law Annual 2006: Enforcement of Prohibition of cartels*, Hart, Oxford, 2007.

⁸¹Berwin Leighton Paisner Response to the European Commission's Draft Leniency Notice http://ec.europa.eu/comm/competition/cartels/legislation/files_leniency_consultation/blp.pdf, (visited May 20, 2008).

⁸²See, for instance, *Re Vitamins Antitrust Litigation*, Misc. No. 99-197 (D.D.C. 17 Sept. 2002) and K. Nordlander, 'Discovering discovery-US discovery of EC leniency statements' (2004) 25(10) E.C.L.R. 646-659.

The consequences for a defendant if the 'duty' to disclose is not fulfilled can include a fine or dismissal or even appear in the US Court assuming that he lost that particular point of issue ('adverse findings').⁸³ This means that not discovering can harm the defendant. If the Commission (who actually does not have the duty to discover) refuses to discover the documents in its possession directly to the US litigant(s), the current leniency programme does not protect the defendant and does not allow him to automatically obtain a copy of the certified documents he handed over to the Commission in order to discover. It seems that under the current leniency policy, whether discovery takes place or not, the defendant can experience a range of negative consequences. On top of that, the US courts do not hold back to order discovery. Even in case of an EC non-disclosure rule of the information concerning leniency applications, the US courts might still be able to order discovery.⁸⁴

Following from the above, it seems that the leniency policy is still open to abuse by foreign complainants who seek to obtain the US discovery.⁸⁵

Not only from overseas, but also even within the EC, discovery implications arise as other cartel authorities (NCAs) could easily obtain such information. Although provisions in the Co-operation Notice create some 'legitimate expectations' upon which parties should be able to rely vis-à-vis the Commission, they might not be binding in relation to NCAs.⁸⁶ The one nuance in the Notice itself states that the information will only be made available to those NCAs that are committed to respect the principles of the ECN Notice.

Furthermore, the question arises whether whistleblowers should also fear information unveiled to private damages claims. The Commission regards private action damages for loss suffered from infringements of the EC antitrust law, as an integral part of the enforcement of competition law in the EC.⁸⁷ One could read in the Article 10 of the EC Treaty the duty for the Commission to co-operate with the national courts of the Member States. However, the Commission's Cooperation Notice states that the Commission would not unveil information voluntarily transmitted by a leniency applicant to the national court without his/her consent.⁸⁸

It can be inferred from the issues discussed in this part that sometimes, a leniency applicant, even after receiving immunity from the Commission, is in a worse position than other cartel members who challenged the investigation by the Commission.⁸⁹ The Commission itself has stated that a leniency applicant, as a result of his co-operation, should not be in a worse position than those members of a cartel that did not co-operate.⁹⁰

⁸³See, for instance, *Ins. Co. of Ireland v Compagnie des Bauxites de guinea*, 456 U.S. 694 (1982); *Societe Internationale v Rogers*, 357 U.S. 197 (1958); § 442 (2) (c) of the Third Restatement of Foreign Relations Law of the United States (1986).

⁸⁴See, Ziegler, 'What to do When the American Subpoena Arrives' (1991) 10(5), I.F.L.Rev. 27-29.

⁸⁵See for instance: *Intel Corp v Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). This case involved an EC investigation and it was ruled that the US courts could order discovery under Section 1782 even if the matter was not discoverable in the foreign court.

⁸⁶A. Burnside and H. Crossley, 'Cooperation in competition: a new era?' (2005) 30(2) E.L.Rev. 234-260.

⁸⁷J. Phaessant, 'Private damages actions, damages claims' (2006) 2(6) C.L.I. 5.

⁸⁸Commission Notice on cooperation within the Network of Competition Authorities, (2004) O.J. C101/43, paragraph 40.

⁸⁹Above n 15.

⁹⁰European Commission Green Paper, *Damages actions for breach of the EC antitrust rules* and Commission Staff Working Paper, Annex to the Green Paper (December 19, 2005) COM (2005) 672 final.

Only a few unclear steps have been adopted to protect leniency applicants from these pitfalls.⁹¹ These include, *inter alia*, the following:

Firstly, it was already mentioned that under the 2006 leniency policy, some protection measures were incorporated and resulted in certain information not being unveiled to parties under certain conditions.⁹²

Secondly, under the ECN notice, 'basic information' in a leniency procedure in an ECN Member State may not be circulated amongst the ECN members. This rule actually leads to the problem of 'forum shopping'. Companies can choose to blow the whistle within the jurisdiction where the sanction is probably the lightest. This is a result of Member States being free to choose their own national sanctions and demonstrates that in order for the 'borders' of the current leniency to be broadened, a more integrated approach is necessary.

It is also interesting to mention that under the Modernisation Regulation, which came into effect on May 1, 2004, the Commission has relinquished its role as primary enforcement mechanism for competition law, with respect to the Articles 81 and 82 EC.⁹³ According to former competition commissioner Mario Monti, this is the most important legislative initiative in Europe in the competition field since the adoption of the Merger Regulation in 1989.⁹⁴ The key implication of modernisation is that the Commission intends to focus upon serious infringements such as cartels. Modernisation ensures that when national authorities within the EU apply national competition law to cases that may affect trade between Member States, they also need to apply EC law, and national law may not lead to a different outcome from the EC law in Article 81 cases. However, it is significant to note that while the same substantive law will be applied in this way in all Member States, the procedures and sanctions remain national.⁹⁵ The Commission's enforcement powers have been remarkably increased, such as provisions, which allow it to carry out unannounced inspections in private homes⁹⁶ as well as company headquarters; it may seal premises and offices to ensure evidence is not destroyed and ask for oral explanations.⁹⁷

⁹¹See, for instance, European Commission, Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and the Council Regulation 139/2004, (2005) O.J. C325/7; Commission Staff Working Paper, Annex to the Green Paper, paragraph 233-236; 2006 Leniency Notice, paragraph 33-34.

⁹²See, Articles 33-35 of the 2006 Leniency Notice. There is some form of improvement over the years. See, for instance, October 21, 1997, revised version of the European Commission's notice on access to the file, Official Journal of the EU (C259/8).

⁹³D. Gerber and P. Cassinis (2006) 'The 'modernization' of European Community competition law: achieving consistency in enforcement: Part 1' 27(1) E.C.L.R. 10-18.

⁹⁴See M. Monti, European competition for the 21st century, in Annual Proceedings on the twenty-seventh Annual Fordham Corporate Law Institute on International Antitrust Law and Policy on October 19 and 20, 2000 (2001) as cited in M. Bloom, 'The Great Reformer: Mario Monti's Legacy in Article 81 and Cartel Policy', (2005) 1 Competition Policy International 55-78. For a detailed Commission's perspective of the Regulation see S. Blake and D. Schnichels 'Leniency Following Modernisation: Safeguarding Europe's Leniency Programmes' (2004) 2 Competition Policy Newsletter 7-12.

⁹⁵M. Bloom, 'The Great Reformer: Mario Monti's Legacy in Article 81 and Cartel Policy' (2005) 1 Competition Policy International 55-78.

⁹⁶For instance in *Graphite Electrodes* (2002) O.J. L100/1 home faxes were used to contact competitors in order to avoid the Commission's powers of investigation. In *SAS/Maersk* [2001] O.J. L265/15, documents relating to a market-sharing agreement were kept at home. Under the Modernisation Regulation such evidence will be within the realms of the Commission's powers of inspection.

⁹⁷The Commission's powers of inspections have been laid out in Articles 20 and 21 of the Modernisation Regulation. See also G. Monti, *EC Competition Law*, Cambridge, New York, (2007); C. Kerse and N. Kahn *EC Antitrust Procedure*, Sweet and Maxwell, London, (2005).

There is the clear possibility that information might disappear overnight or that documents can be kept at home and these changes thus provide useful powers to conduct cartel investigations.⁹⁸ These radical changes have impacted the Commission's leniency policy and have also been described as a contributing factor to the growth in cartel decisions.⁹⁹ However, the Modernisation Regulation did not introduce a 'one-stop shop' for leniency applicants. One possible reason can be that some Member States do not (yet) have a leniency policy and they are sometimes viewed with distaste.¹⁰⁰ Another reason that can be advanced is that it may have been considered virtually impossible to make such a system function to the required standards of reliability and certainty. Multiple leniency 'entry points' would in all likelihood be necessary because the Commission would be unable to handle all incoming cases.¹⁰¹

Ultimately, when protection measures fail, it might be helpful to refer to the principle of International Comity¹⁰², given that the Commission clearly stated that

'access to the file is only granted to the addressees of a statement of objections on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue'¹⁰³

This is similar to a judgment, which must be respected by other courts.¹⁰⁴ However, this principle is insufficient as it refers to a balancing test on a case-by-case basis and cannot provide the necessary certainty for the parties that the information will not now nor in the future, be disclosed to any US litigants or NCAs.

(D) PUNISHMENT AND LENIENCY

The leniency policy tends to be increasingly lenient towards whistle blowers and co-exists with the zero-tolerance policy in cartel matters. The latter tends to increase cartel fines for those who did not blow the whistle correctly, not at all or not in time. The Commission has for instance, imposed increasing levels of fines on cartel members including record level of fines in serious cartels, see for instance, the following cases: Cartonboard, Polypropylene, Graphite Electrodes and Vitamins.¹⁰⁵ Both policies share the aim of deterrence.

⁹⁸R. Clarke and E. Morgan, 'Horizontal Agreements and Restrictive Practices Policy in the UK and EU', in R. Clarke and E. Morgan (ed) *New Developments in UK and EU Competition Policy*, Edward Elgar Publishing Limited, UK (2006).

⁹⁹G. Olivier, 'The fight against secret horizontal agreement in the EC Competition Policy', in Annual Proceedings on the Thirtieth Annual Fordham Corporate Law Institute on International Antitrust & Policy on October 23 and 24, 2003 (2004) as cited in M. Bloom, (2005) 'The Great Reformer: Mario Monti's Legacy in Article 81 and Cartel Policy', 1 *Competition Policy International* 55-78.

¹⁰⁰A. Jones and B. Sufrin, *EC Competition Law*, 3rd edition, Oxford, United States (2008).

¹⁰¹F. Arbault and E. Sakkars 'Cartels' in Nikpay A. and Faull J., (ed) *The EC Law of Competition*, Oxford, Great Britain (2007).

¹⁰²For applications, see; *Re Emory v Grenough*, 3 U.S. (3Dall.) 369, 370 (1797); *Hartford Fire Ins. Co v California*, 509 U.S. 764, 817 (1993); *Société Nationale Industrielle Aérospatiale v United States District Court*, 482 U.S. 522, 544 (1987).

¹⁰³Commission Notice on immunity of fines and reduction of fines in cartel cases (2006) OJ. C298/17, paragraph 34.

¹⁰⁴In this restrictive sense, see also; Brief of the Commission of *Amici Curiae* the European Communities, page 13, *Re Vitamins Antitrust Litigation*, F. Supp. 2d (D.D.C. 2002).

¹⁰⁵For example in *Vitamins* [2003] OJ L6/1 the approximate total fine was 855.23 million.

According to a study¹⁰⁶, only 13% of cartels are detected and investigations are very expensive. There seems to be a deterrence gap.

A minority of the EC Member States have introduced a criminal cartel offence to close this gap in deterrence.¹⁰⁷ Member States were free to do so as Article 5 of the Regulation 1/2003¹⁰⁸ allows them to impose ‘any other penalty provided for in the national law’.

Introducing criminal sanctions or any other sanction is not the right answer, as it merely contributes to intimidating parties who apply for leniency. This could be why most EC Member States nowadays tend to abandon criminal sanctions and focus more on leniency policies and administrative fines instead.¹⁰⁹

Indeed, the deterrence gap introduced the need to apply a stronger leniency policy. With this knowledge, it has been ruled that ‘a very serious infringement...application of the Leniency Notice serves the important policy aim that it is of even more importance to encourage whistleblowers than to punish participants in a cartel.’¹¹⁰ However, this statement would suggest a need to choose between punishment and leniency.¹¹¹

When chosen for punishment, the fine must be set correctly and therefore, outweigh the illegal profits enjoyed from the cartel membership.¹¹² The Commission’s discretion still leaves a great lack of transparency and certainty in the Commission’s fining system.¹¹³ However, discretion is necessary to set a sufficiently high level of fines. Some authors state that, even if companies would have to pay up to ten times the ‘illegal cartel profits’ in fines and damages (as is the case in the US), there would still be under-deterrence for cartels.¹¹⁴ Even with higher fines, the effective level of deterrence seems very difficult to reach.¹¹⁵

In 2006, the EC announced new guidelines for setting antitrust fines.¹¹⁶ The new guidelines are expected to further systemise the EC’s significant increase in the level of fines over the last decade. These guidelines do not change the legal maximum amount that the EC can assess under the Article 23(2). Fines will now be based on a percentage of the yearly sales in the relevant sector for each company participating in the infringement. The Commission may impose a fine representing up to 30% of such sales. For members of hard-core cartels, the guidelines further introduce an ‘entrance fee’ just for joining the cartel, which is independent of the duration of the infringement and thus, of any illegal gains it may have resulted in. In addition, repeat offenders risk a doubling of the fine, as do ringleaders and undertakings that refuse to cooperate or obstruct the Commission’s investigations.¹¹⁷ In order to fully reflect the duration of the infringement, this amount will

¹⁰⁶P. Bryant and E. Eckard, ‘Price Fixing: The Probability of Getting Caught’ (1991) 73 *The Review of Economics and Statistics*, 531. See also: DTI, *A world Class Competition Regime* Cm. 5233 (2001) (The Stationery Office, London), paragraph. 7.7.

¹⁰⁷OECD, *Cartels: Sanctions Against Individuals*, DAF/COMP (2004) 39.

¹⁰⁸*Above* n 59.

¹⁰⁹*Above* n 70.

¹¹⁰A. McDougall and A. Verzariu, ‘Vitamins litigation: unavailability of exemplary damages, restitutionary damages and account of profits in private competition law claims’ (2008) 29(3) *E.C.L.R.* 181-184; Case *Devenish Nutrition Ltd v Sanofi-Aventis SA* (2007) EWHC 2394 (Ch).

¹¹¹Also in this sense (but than chosen for deterrence), see; W.P.J. Wils, ‘EC Competition Fines: To Deter or not to Deter’ (1995) 15 *Yearbook of European Law* 23.

¹¹²R. Posner, *Economic Analysis of Law* (Aspen, 1998), 421; S. Hammond, ‘An Inside Look at a cartel at Work: Common Characteristics of an International Cartel’, speech delivered to ABA Section of Anti-trust Law (Washington DC, April 6, 2000); S. Gale, ‘The leniency regime and the fight against cartels by the Directorate General for Competition’ (2004) 25(11) *Comp. Law*. 324-330.

¹¹³I. Van Bael, ‘Fining a la Carte: The Lottery of EC Competition Law (1995) *E.C.L.R.* 237; M. Furse, ‘Article 15(2) of Regulation 17: Fines and the Commission’s Discretion’ (1995) *E.C.L.R.* 110; Spink, ‘Enforcing EC Competition Law: Fixing the Quantum of Fines’ (1999) *J.B.L.* 219.

¹¹⁴J. Connor, ‘Optimal Deterrence and Private International Cartels’ (2005) unpublished paper. (This is partly because of plea-bargains and out-of-court settlements)

¹¹⁵For examples, see; J. Rayner, ‘Practice Area: EC Competition: Trading blows’ (2006) *L.S.Gaz.* 103/33 16-18.

¹¹⁶*Above* n 58.

be multiplied by the number of years of participation in the infringement.¹¹⁸ This, thus, represents a significant toughening in relation to long lasting infringements.

The level of fines that is large enough to discourage prospective cartel members from engaging in a cartel has been a controversial aspect in the EU. Some commentators have argued that the fines are too low and after the new guidelines the reaction is that they are too high.¹¹⁹ Other authors have argued that the legal maximum fine specified in Article 23(2) of the Regulation 1/2003 seriously constrain the Commission in reaching its objective and applying its new fining method effectively.¹²⁰ Moreover, fines are the main tools in the EC's enforcement of the EC competition law, unlike the US where the Antitrust Division has long emphasised that the most effective way to deter and punish cartel activity is to hold individuals accountable by seeking jail sentences.¹²¹ In the case of the Commission therefore, its central component of enforcement effort, its leniency policy is itself reliant upon sanctions being substantial enough to induce an infringing firm into revealing a cartel to the Commission in return for immunity.¹²²

The EC also recognises the concern that some fines may lead to insolvency.¹²³ One of the downsides of it is that since the US investigations of international cartels normally precede those of the EC, by the time an international firm faces punishment from the EC, it is in a better position to argue a danger of bankruptcy by making reference to fines and settlements for private damages already incurred in the US. It is also possible that Community judges will be unwilling to accept further increases in fines.¹²⁴ The Community courts have always acknowledged the setting power of the Commission within the framework of the Regulation 1/2003, but they have also added that the fines should be imposed respecting the principle of proportional justice.¹²⁵

¹¹⁷L.Bos and M. Schinkel, 'On the scope for the European Commission's 2006 fining guidelines under the legal maximum fine', 2 (4) *Journal of Competition Law and Economics* 673-682.

¹¹⁸Competition: Commission revises Guidelines for setting fines in antitrust cases (June 28, 2006) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/857&format=HTML&aged=0&language=EN&uiLanguage=en> (visited June 2, 2008).

¹¹⁹M. Motta 'On cartel deterrence and fines in the European Union' (2008) 29 (4) *E.C.L.R.* 209-220. See also Buccirosi, Paolo and Spagnolo, Giancarlo, 'Optimal Fines in the Era of Whistleblowers - Should Price Fixers Still Go to Prison?' (December 12, 2005). Lear Research Paper No. 05-01 Available at SSRN: <http://ssrn.com/abstract=871726>.

¹²⁰*Above* n 115.

¹²¹S. Hammond (2008) Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program, <http://www.usdoj.gov/atr/public/speeches/232716.htm>, (visited July 1, 2008).

¹²²S. Stephan, 'The bankruptcy wildcard in cartel cases' (2006) *J.B.L.* 511-536.

¹²³'Financial constraints consideration'. See *Ibid.* The Commission's treatment of SGL Carbon AG demonstrates the application of a 'financial constraints' consideration. SGL was fined for its involvement in three different cartels: *Graphite Electrodes* [2002] O.J. L100, *Specialty Graphites Case C-37/667*, COM (2002) 5083 final, and *Carbon & Graphite* [2004] O.J. L125/45. In both the Specialty Graphites cartel and the Carbon & Graphite cartel decisions, the Commission granted a 33 per cent discount. In Carbon and Graphite cartel decision, the Commission stated that 'for the reason that SGL is both undergoing serious financial constraints and has relatively recently been subject to two significant fines by the Commission for participation in cartel activities'.

¹²⁴*Above* n 117.

¹²⁵*Ibid.*

Thus, it seems that even with the discretionary powers, the Commission cannot introduce the 'correct' level of deterrence through punishment. The problem could be overcome by increasing the level of detection. Many authors agree that the required level of punishment and the level of detection are in direct correlation.¹²⁶ It can be argued that there is actually no choice between severe punishment and lenient leniency policy but that the one needs the other to be effective. Therefore, leniency and punishment should go hand in hand and be integrated as one policy. Only the 'correct' punishment in combination with the 'right' probability of detection (through investigations¹²⁷) leads to a sufficient level of deterrence.¹²⁸ Such conclusion also finds support in the OECD's report noting 'the 'carrot and stick' approach to cartel investigation. This approach requires that the 'stick'- the possible sanction is sufficiently severe to give effect to the 'carrot'-the opportunity to avoid the sanction- by cooperating.¹²⁹ The Leniency policy is the carrot and the fining policy the stick.

Unfortunately, the Commission has chosen to separate each component into separate policies.¹³⁰ Fines are increased¹³¹ up to a certain maximum in a separate policy next to the increase of detection¹³². The result is two incoherent systems. The leniency policy could thus start to live its own life and become more inconsistent with the 'zero tolerance policy'. This has happened not only at the EC level but also at various national levels. For instance, under some leniency policies a whistle blower can now not only obtain immunity but also receive a reward for having blown the whistle after participating in a cartel.¹³³

(E) LACK OF HARMONISATION

EC leniency rules come into play as soon as the cartel may have a (negative) influence, (directly or indirectly, actually or potentially) on interstate trade.¹³⁴ Even when the Commission has competence, Member States remain free to choose whether or not to adopt different national leniency programmes. This results in a lack of harmonisation and multi-stop leniency procedures.

¹²⁶See, for instance, W. Wils, *The Optimal Enforcement of EC Anti-Trust Law. Essays in Law and Economics* (Kluwer Law International, 2002), page. 39; P. Buccirosi and G. Spagnolo, 'Optimal Fines in the Era of Whistleblowers, Should Price Fixers Still Go to Prison' (2005) Lear Research Paper 05-01, p. 26; CH. 7 of the White Paper that preceded the Enterprise Act 2002 in the UK.

¹²⁷These are very costly and time consuming; ICN Cartel Working Group, *Anti-Cartel Enforcement Manual* (Bonn, 2005), page 4.

¹²⁸*Above* n 124 Ch. 8; W. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 U.Chi.L.Rev. 652; A. Polinsky and S. Shavell, 'The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy' (1998) 167 *Stanford Law and Economics Working Paper*; G. Becker, 'Crime and Punishment: An Economic Approach' (1968) 16 *J.Pol.Econ.* 169.

¹²⁹OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes 2002* <http://www.oecd.org/dataoecd/41/44/1841891.pdf>, (visited May 30, 2008).

¹³⁰The 2006 Leniency Notice and the 2006 Guidelines on fines seem to evolve both in opposite directions, ie greater leniency versus harsher punishment.

¹³¹See 2006 Fining Guidelines, *Above* n 58. (In brief, they result in higher fines, harsher treatment for recidivists and there is greater weight of the duration of the conduct on the fine.)

¹³²*Above* n 6.

¹³³For instance, see Times Online, 'OFT offers whistle blowers £100,000 reward' (Feb. 29, 2008) <http://business.timesonline.co.uk/tol/business/industry_sectors/industrials/article3458691.ece> (visited March 28, 2008).

¹³⁴See, in this respect also; *Procureur de Roi v Benoit and Gustave Dassonville*, ECJ Case 8/74, July 11, 1974; E.C.R. 00837 (concerning free movement of goods).

At least 20 different leniency programmes are in use across the EC.¹³⁵ The fundamental differences¹³⁶ between these leniency regimes (or other cartel rules in Member States without a leniency programme) and the EC leniency system influence the efficacy of the EC leniency programme in a negative way. Additionally, obtaining leniency from the Commission does not automatically result in immunity when the Commission refers the case to the NCAs.¹³⁷ In a commendable development, the ECN members have adopted a model leniency programme, which encourages national competition authorities to adopt leniency programmes with certain key features that ECN members believe should be common to all leniency programmes.¹³⁸ While the programme does not harmonise leniency policies and procedure in the EU, it does introduce a model for a new procedure for a uniform summary leniency application system in cartel cases relating to more than three Member States. However, the model leniency programme is not legally binding.

The ECN members are expected to assess the state of convergence with the Model Programme this year.¹³⁹ Besides this, the fact that some Member States have chosen to criminalise cartel offences discourages whistle blowers from coming forward, as they fear criminal prosecution.¹⁴⁰ The Member States of the EC are free to apply such criminal sanctions, a freedom which is expressly laid down in the Regulation 1/2003 under paragraph 8. The result is that cartel participants will not apply (for leniency) to the Commission or will be forced to apply to several¹⁴¹ authorities (as an application for leniency to a certain cartel authority is only limited to the leniency from that authority)¹⁴².

However, in the UK¹⁴³, which has in place a criminal statute, the possibility for an overlap seems to be remote. The OFT has expressly mentioned that with regard to 'no-action' letters¹⁴⁴ where an undertaking has been granted 100 per cent leniency by the

¹³⁵Even outside the EC, leniency programmes rise: K. de Araujo, P. Pugliese and A. Castillo, 'European Union and Brazil: leniency in cartel cases- achievements and shortcomings' (2003) 24(9) E.C.L.R. 463-474.

¹³⁶For instance, whether leniency is available for vertical agreements or not.

¹³⁷See Regulation 1/2003, articles 11 and 12 and Commission Notice on co-operation within the Network of Competition Authorities, (2004) O.J. C101/43, paragraphs 39-42.

¹³⁸*Above* n 15.

¹³⁹Europa, The European Competition Network launches a Model Leniency Programme <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/356&format=HTML&aged=0&language=EN&guiLanguage=en>, (visited May 30, 2008).

¹⁴⁰A. MacCulloch, 'The cartel offence and the criminalisation of United Kingdom competition law' (2003) J.B.L. 616-627.

¹⁴¹See, for instance, *above* n 68.

¹⁴²D. Henry, 'Leniency programmes: an anaemic carrot for cartels in France; Germany and the UK?' (2005) 26(1) E.C.L.R. 13-23.

¹⁴³The Enterprise Act 2002 introduces the cartel offence, a criminal offence for individuals who dishonestly engage in cartel agreements. Section 188 of the Enterprise Act is an offence of dishonesty relating to hard-core cartels. For a commentary of the UK's cartel offence see, J. Joshua, 'The UK's new cartel offence and its implications for EC competition law: a tangled web' (2003) 28 (5) E.L.Rev. 620-641; B. Rodger 'The Competition Act and the Enterprise Act Reforms: Sanctions and Deterrence in UK Competition Law' in G. Dannecker and O. Jansen (eds) *Competition Law Sanctioning in the European Union* Kluwer, The Hague (2004).

¹⁴⁴Under Section 190 (4) of the Enterprise Act 2002, immunity from prosecution is available for individuals in the form of 'no-action' letters. A no-action letter will prevent a prosecution being brought against an individual in England and Wales or Northern Ireland for the cartel offence except in circumstances specified in the letter. See OFT guidance 'The Cartel Offence, Guidance on the issue of no-action letters for individuals'.

Commission, the UK will normally be prepared to issue no-action letters to those named employees, directors, ex-employees or ex-directors on whose behalf an approach is made.¹⁴⁵

Moreover, potential conflicts between the Commission's programme and other Member State criminal statutes are also remote as in general, criminal enforcement has not been at the forefront of Member State enforcement.

There is, however, a strong view gaining ground for treating cartels as serious crimes and cartel members as criminals.¹⁴⁶ The recent sentencing, on June 11, 2008, of 3 former executives to significant terms of imprisonment for their part in a global cartel to fix the price of marine hoses is expected to send a powerful message around the UK business community that the courts will not tolerate serious anti-competitive behaviour such as bid-rigging, customer sharing and price fixing.¹⁴⁷

An overview of the initiatives taken to deal (in part) with the above-mentioned pitfalls;

(1) As discussed earlier, following Regulation 1/2003, NCAs of Member States have since May 1, 2004, powers to apply competition rules within their territory.¹⁴⁸

(2) ECN members have agreed on a Model Leniency Programme.

However, this is not legally binding and does not harmonise leniency policies and procedures in the EC.¹⁴⁹ If the unpredictability between the EC Member States and the Commission ensues, it will kill leniency policies.¹⁵⁰ In that context, the ECN Notice states that some information (albeit only the 'basic' information) relating to a leniency application, and circulating amongst ECN members, may not be used by another ECN member to initiate its own proceedings.¹⁵¹

¹⁴⁵*Ibid.*, paragraph 3.6 as cited in Reynolds.

¹⁴⁶For instance see T. Barnett 'Seven steps to better Cartel enforcement'; M. Bloom 'Despite Its Great Success, the EC Leniency Programme Faces Great Challenges'; W. Wils 'Is Criminalization of EU Competition Law the Answer?'; to be found in C. Ehlermann and I. Atanaisu (ed) *European Competition Law Annual 2006 : Enforcement of Prohibition of cartels*, Hart, Oxford (2007).

Many countries are now following the US practice of punishing executives responsible for cartel behaviour with criminal sanctions, including prison time. Today, among other jurisdictions, Canada, Japan, Israel, Ireland, Korea and Australia have adopted, or are in the process of adopting, laws that provide for such criminal sanctions. See D.Vann and E. Litwin, 'Recent developments in international cartel enforcement

http://www.gettingthedealthrough.com/narrative_chapter.php?id=36§or_id=9, (visited July 1, 2008).

¹⁴⁷Office of Fair Trading (2008) Three imprisoned in first OFT criminal prosecution for bid rigging

<http://www.offt.gov.uk/news/press/2008/72-08> (visited July 15, 2008). See also Pinsent Masons LLP, United Kingdom: First UK Prison Sentences For Criminal Price-Fixing Will Encourage Greater Competition Law Compliance http://www.mondaq.com/article.asp?articleid=62488&email_access=on&login=true (visited July 15, 2008).

¹⁴⁸This is due to the Council Regulation 1/2003. See S. Blake and D. Schnichels, 'Leniency following modernisation: safeguarding Europe's leniency programmes' (2004) 25(12) E.C.L.R. 765-770.

¹⁴⁹It only introduces a model for procedure for a uniform leniency application system in cartels concerning more than three Member States: European Competition Network, Model Leniency Programme; see also Commission Memorandum Competition: the European Competition Network launches a Model Leniency Programme—frequently asked questions (September 2006) Memo/06/356; X, 'EC competition law—Cooperation within the European Competition Network' (2003) 9 (11) C.L.I. 11-15.

¹⁵⁰A. Nourry and M. Jephcott, 'The interaction of EC and national leniency systems, Closing the gap between the two regimes is critical' (2005) 10(7) C.L.I. 4.

¹⁵¹*Above* n 84.

(3) One could read in the Article 10 of the EC Treaty the duty for NCAs to reduce their fines correspondingly with the European Commission.¹⁵²

(4) It can be stated that the Article 10 of the EC Treaty includes the obligation for the EC Member States to avoid double fines in order to not jeopardise the objectives of the Treaty and the leniency policy.¹⁵³

However, the principle of *non bis in idem*, i.e. the principle that a person cannot be sanctioned more than once for the same unlawful conduct to protect one and the same interest¹⁵⁴, has not shown to protect a whistle blower against other authorities or private damages claims after being granted immunity or being fined by the Commission. First of all, this principle will not be applicable towards other authorities; this is because this principle does not apply between sovereigns.¹⁵⁵ Secondly, the principle refers to facts and the Commission and the NCAs focus more on the effects in a particular territory instead of facts. There is also no *non bis in idem* with private damages claims as these seek only recovery for the loss and do not refer to the legal interest of punishment.

(F) GAPS

The following examples illustrate that the 2006 Leniency Notice offers no solution to a number of issues:

It is, for instance, stated that only the first whistleblower can obtain immunity. But who is the 'first' when several cartel participants approach the Commission together by all signing the same paper with the attached proof, in which they admit their participation in a cartel? To illustrate by way of example, when a cartel consists of five participants and four of them apply for leniency, it is clearly inconsistent with the competition goals if the Commission were to help create a smaller oligopoly by granting immunity to those four and would thus pose a large market disadvantage for the remaining participant.

Secondly, it is sometimes difficult to draw the distinction between a leniency applicant and someone complying with an obligation to provide information under the Regulation 1/2003. For instance, cases where the Commission's request for information is responded by providing the information. Some see this form of co-operation not as leniency or they draw a distinction between 'request for documents' and 'request for answers'.¹⁵⁶ Another approach would focus on the company's co-operation with the Commission, as increasing the speed of the procedure and the detection levels are the main goals of any leniency policy. Others take into account whether the Commission's request for information would go beyond the Commission's investigatory powers or whether it demonstrates a spirit of co-operation and facilitates to establish an infringement.¹⁵⁷ In any event, in the case where providing information to the Commission after being requested to do so, would not be seen as an application for leniency, this could include a provision to the effect that the participant that provided this information, unlike his competitors who were equally members of the cartel, can no longer be the first one to blow the whistle.

¹⁵²See, J. T. Lang, 'The implications of the Commission's leniency policy for national competition authorities' (2003) 28(3) E.L.Rev. 430-435

¹⁵³See, for instance, *Ibid.*

¹⁵⁴*Archer Daniels Midland Co v Commission of the European Communities* (2006) 5 C.M.L.R. 28.

¹⁵⁵See, for instance, Case T-59/02 *Archer Daniels Midland v Commission*, judgment of September 27, 2006; Case C-397/03 P *Archer Daniels Midland v Commission*, judgment of May 18, 2006; Case C-308/04 P *SGL Carbon v Commission*, judgment of June 29, 2006.

¹⁵⁶C. Perrin, 'The graphite electrodes cartel, Advocate General Geelhoed's opinion on a company's duty to provide information to the Commission' (2006) 4(13) C.L.I. 5.

¹⁵⁷*Ibid.*

Thirdly, no form of ‘amnesty plus’ standard, (however successful in the US), is incorporated in the current EC Leniency policy.¹⁵⁸ Such a standard provides incentives for a company found engaging in one market to admit its involvement in a second unrelated market, as the application of this standard rewards the co-operation to unveil a cartel in both markets with granting immunity in one market and a reduction of fines in the other market.¹⁵⁹ EC leniency applicants would have to apply to the Commission for leniency twice, but in terms of legal certainty¹⁶⁰ it is not clear whether the Commission would find it ‘justified’ to grant substantial leniency to the same applicant twice.

3. CONCLUSION

It seems that many concerns, which were present after the 2002 Leniency Notice, have not or not sufficiently been resolved by the 2006 Leniency Notice.¹⁶¹ This article has given several reasons as to why the current leniency policy might well have failed to reach its aims and is therefore not as lenient as one would have hoped.

The first problem referred to gaps in the leniency policy. Another problem centred on inconsistencies resulting from the separation between the leniency policy and the zero tolerance policy in cartel matters. Also, uncertainties in relation to NCAs, civil damages claims and the US discovery procedures seemed to be problematic. Last but not the least, there is a lack of EC leniency harmonisation.

This has resulted in uncertainty, unpredictability, and the rise of alternative methods to leniency. This article has demonstrated why applicants will still think twice before they blow the leniency whistle.

¹⁵⁸The OECD advised to incorporate the ‘amnesty plus’ standard: OECD Committee on Competition Law and Policy (2001) *Report on Leniency Programmes to Fight Hard-Core Cartels*, DAFNE/CLP 13 at 31.

¹⁵⁹D. McElwee, ‘Should the European Commission adopt “amnesty plus” in its fight against hard-core cartels?’, (2004) 25(9) E.C.L.R. 558-565.

¹⁶⁰See, in this context; G.R. Spratling, *Transparency in Enforcement Maximises Cooperation from Antitrust Offenders* (1999) <www.usdoj.gov/atr/public/speeches/3952.htm> (visited 27 March 2008).

¹⁶¹See, for instance, J. P. Azevedo, ‘Crime and punishment in the fight against cartels: the gathering storm’, (2003) 24(8) E.C.L.R. 400-407.

New Theory for the Vertical Regulation in Korea

YO SOP CHOI*

Various elements are comprehensive factors in the determination of anti- and pro-competitiveness of vertical restraints. This article attempts to examine the Korean case as an example of a developing country regarding competition law on vertical restraints and to trace and forecast the development of the Korean competition law and policy

1. INTRODUCTION

The Republic of Korea (hereafter, Korea) has shown a rapid economic growth for the past sixty years since the Korean War. In particular, Korea has established a reputation of achieving a high rate of economic growth through a policy of coordinating large business group activity with that of government, which has been recognised as export-led policy. These large Korean business groups, so-called Chaebols,¹ have a unique corporate structure only existing in Korea and have played an important role in the business environment for the purpose of contributing to national economic growth. The Korean government's coordination with Chaebols and its support for the export-led policy during the 1960s and 1970s allowed Chaebols' total monopolies.²

As the concern about market concentration increased during the 1970s, the government has developed its competition law since 1980 to prevent further market dominance.³

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¹Chaebol is a form of Korean large business groups or conglomerates. The Korean word means a business group or a trust. Chaebol refers to the several large and family-owned business groups that used to be supported by the Korean government. Chaebols cooperated with the government in the field of economic planning and R&D. However, after the Monopoly Regulation and Fair Trade Act legislation in 1980, the government has tried to encourage competition amongst Chaebols to avoid monopolies.

²See Ha-joon Chang, *The Political Economy of Industrial Policy*, St. Martin's Press, New York, 1994, 92; Myungsoo Hong, *Chae-Bol-Ui-Kyong-Jae-Ryok-Jib-Jung-Kyu-Jae [Regulations on Economic Concentration of Chaebol]*, Kyounghin Publishing, Seoul, 2006, 20-65. Since the early 1960s, Korea has demonstrated a very remarkable economic growth and an economic structure change. Between 1965 and 1986, Korea's annual per capita GNP growth showed 6.7% that was significantly high compared with that of 2.9% of the developing world as a whole. During the time of rapid economic growth, the government's intervention in the market influenced the allocation of resources amongst industrial activities such as through taxes and subsidies, credit rationing, various sorts of licensing, and the creation of public enterprises. The fundamental policy for this is to strategise export-led policy. See also Larry E Westphal, 'Industrial Policy in an Export Propelled Economy: Lessons From South Korea's Experience' (2001) 4 *The Journal of Economic Perspectives*, page 41.

³See Ohseung Kwon, *Kyong-Jae-Bub [Economic Law]*, (5th ed.), Bubmunsa, Seoul, 2005, pages 93-105; Hak-Kuk Cho, 'Gong-Jung-Go-Rae-Ui-Bal-Jeon-Bang-Hyang [Blue Print for Korean Competition Law Development]' in Ohseung Kwon (ed), *Ja-Yoo-Kyung-Jaeng-Kwa-Gong-Jung-Go-Rae [Free Competition and Fair Trade]*, Bubmunsa, Seoul, 2002, page 55-6. In the 1990s, the average Concentration Ratio (CR) 3 of the business sectors that had market size over 112 million Korean Won was 72.6%, and the average Herfindahl-Herschman Index (HHI) of the same sectors was 3,260. The concern about economic concentration was brought especially in the industries such as oil refinery (CR3: 85.7%), automobile (94%), iron and steel (85.8%), and broadcasting and wireless communication (72.2%).

Through the Financial Crisis in 1997, the Korea Fair Trade Commission (KFTC) has revised its competition policy to a level stricter than that set out in the first legislation and has focused on preventing the anti-competitive abusive conduct of Chaebols.⁴ Along with the regulation on abuse of dominance, the KFTC has tried to develop the regulation of vertical restraints. However, this remains one of the difficult subjects of its competition policy.

Although economic analysis is essential to assess the effects of vertical restraints,⁵ a consensus view of the effects of such restraints in the Korean market has not yet emerged. Some critics argue that a mere legal reasoning or defective economic theory leads to several results that are detrimental to both competition and public policy.⁶

The improvement of competition policy on vertical restraints also raises other concerns such as the opening of the market to foreign competitors. This is because vertical arrangements in the domestic market are the gateway of international trade. Concerned about international trade, the KFTC is considering how the application of competition law can encourage domestic enterprises to compete vigorously with other foreign competitors. At the same time, it should ensure fair benefits for consumers and small and medium-sized enterprises (SMEs) from fair and free competition, as well as the encouragement of efficiency and innovation.

The globalization through international trade requires domestic competition law not to improperly weaken the potential for competitiveness of domestic enterprises.⁷ Therefore, the KFTC should be concerned about its competition policy regarding international trade and economic growth. It is not difficult to imagine that the economy of a developing country such as Korea can be drastically influenced by international trade. Where a country heavily relies on efficient and effective international trade in order to achieve the goal of economic growth, a sound vertical regulation should be one of the most important parts in competition legislation. It flows from this that the relevant Korean authority for the application and development of competition policy should be taking into account the economic principles and evidence applicable to vertical restraints.

The KFTC has demonstrated willingness to proceed with regulatory reform with regard to vertical restraints. However, its legal provisions do not give clear guidance to competition lawyers and enterprises regarding efficiency-improvements. Unlike other competition regimes, the KFTC has not set an appropriate economic justification in order to achieve efficiency as a goal of competition law. The KFTC has also shown a lack of capacity in assessing the pro- and anti-competitive effects of vertical restraints. In particular, the *Anti-Chaebol* competition policy has not always had beneficial effects. Despite the necessity of the large enterprises' contribution to efficiency-improvement and economic development through vertical practices, the KFTC has not fully considered the problems in its regulation on vertical restraints. Its occasionally flawed decisions have resulted in harm to competition as well as to the economy. The KFTC should therefore examine closely whether it needs to balance efficiency and pro-competitive effects of vertical restraints, anticipating vigorous competition after market opening to foreign competitors – the so-called globalised competition.⁸

⁴There has been the criticism against the national Chaebol policy that the Financial Crisis was mainly brought by the Chaebols' excessive investment and market dominance.

⁵Vertical restraints are related to the supply of goods or services between enterprises that operate at different stages of a production and distribution. Whilst the main aim of anti-competitive horizontal agreements is a collusive strategy, the concern arising from vertical is an exclusive or foreclosing one. For the further discussion, see Michael D. Whinston, Lectures on Antitrust Economics, The MIT Press, London, 2006, page 133.

⁶See Oliver Williamson, 'Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach', (1979) 127 University of Pennsylvania Law Review, page 953.

⁷See C.J. Green and D.E. Rosenthal (eds), Competition Regulation in the Pacific Rim, Oceana Publications, New York, 1996, Foreword. For further discussion about complementarities between international trade and competition law, see also Kevin C. Kennedy, Competition Law and The World Trade Organisation: The Limits of Multilateralism, Sweet & Maxwell, London, 2001, page 2-5.

⁸See Dong Won Suh 'Enforcement Direction of Competition Law' (2005) 4 Journal of Korean Law, page 29. The author argues the Korean economy has become exposed to international competition with acceleration of globalisation.

To achieve economic growth and solve the general problems in the KFTC's policy, this article aims at introducing a new model of regulatory reform of the Korean competition law and policy on vertical restraints. It first scrutinises whether the current Korean vertical regulation can satisfy the various tasks that should be achieved. Then it explains the failure of the KFTC's implementation of competition law to achieve the purposes of the law, especially to obtain economic growth through increased efficiency. Finally, it suggests an amendment to the Monopoly Regulation and Fair Trade Act (MRFTA),⁹ the Unfair Business Practice (UBP) Guidelines,¹⁰ and Resale Price Maintenance (RPM) Guidelines¹¹ by creating new guidelines on vertical restraints. This proposed amendment would result in the achievement of the various aims of economic and competition policy. This suggests that the KFTC needs to experiment with competition laws that are practised in other competition regimes which already have a long history of examining their competition theories and practices. The KFTC can be more effective by modifying its regulation through adopting legal techniques and models from other countries. This method of a comparative analysis is beneficial since different competition regimes around the world can offer a larger variety of solutions than could be made in a system within one country.¹²

2. KOREAN COMPETITION LAW AND POLICY ON VERTICAL RESTRAINTS

(A) THE VARIOUS PURPOSES OF THE KOREAN COMPETITION LAW

Article 1 of the MRFTA states the purposes of the Korean competition law. Its ultimate aim is to promote fair and free competition, which mainly focuses on restricting market dominance. By achieving this, competition law can attain the goals of (i) encouraging creative enterprises' activities, (ii) protecting consumers, and (iii) balancing development of national economy. Moreover, Article 119(2) of the Constitution of Korea¹³ ensures the implementation of the MRFTA, articulating that the state may regulate and coordinate economic affairs to maintain the balanced growth and stability of the national economy.¹⁴

Because the large enterprises' market dominance had been created by the national economic policy and influenced the domestic market significantly, the KFTC has developed the law to prevent further market dominance at any cost –although its legal provisions may harm the national economy. This can, therefore, bring some arguments that the current Korean vertical regulation is inconsistent with the aims of total welfare achievement (features (i) and (ii) of the competition law stated above). Shortly after discussing this, this article will consider the aim (iii) of a balanced economic growth and stable national economy.

Firstly, the existing Korean competition law of vertical restraints does not encourage enterprising activities in the market because it does not provide a sufficient degree of tolerance of vertical arrangements that may improve inter-brand competition and efficiency. The regulation strictly curbs efficient vertical arrangements in the market if enterprises have some degree of market power.¹⁵ It can be reasonable to apply competition law strictly where the market is evaluated as highly dominated by monopolists. However, along with this concern, the law also aims at encouraging enterprises' (including large ones) activities overall. The current law is, nevertheless, so strict on vertical restraints that it does not properly implement efficiency-led ideas which may encourage enterprising activities where

⁹Monopoly Regulation and Fair Trade Act (amended by law No. 9554, Mar. 25, 2009).

¹⁰Guidelines for review unfair business practice (KFTC established rule No. 26 of the KFTC amended on Mar. 11, 2005).

¹¹Guidelines for review resale price maintenance (KFTC established rule No. 34 enacted on Aug. 30, 2006).

¹²See K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, (3rd ed.) Oxford University Press, Oxford, 1998, page 3.

¹³Constitution of Republic of Korea (amended Oct. 29, 1987).

¹⁴Article 1 of the MRFTA further implies that the Korean competition law should prevent abuse of market dominance and excessive economic power of large enterprises and regulate improper concerted acts and unfair business practices. This is to guarantee a proper distribution of wealth, to thwart the market domination and the abuse of economic power, and to democratise the economy through the harmony amongst economic entities. Article 119(1) of the Constitution also declares constitutional provision to ensure the free and fair market. It states, 'the economic order of the Republic of Korea is based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs'.

¹⁵The KFTC provides some efficiency-led measures such as the UBP Guidelines, which will be discussed below. However, it does not give a sufficient degree of efficiency consideration compared with other competition regimes.

the enterprise has some degree of market power. If competition law is very strict on business activities based on the size of enterprise, despite its efficient activities such as vertical arrangements (for example, which may reduce transaction costs), the enterprising activities will be discouraged.¹⁶ This problem can flow from the absence of a sufficient and effective presumption of market dominance based on a market share threshold test that can inform the balancing of pro- and anti-competitiveness by vertical restraints.

Secondly, the current strict rule on vertical restraints does not protect consumers' benefits—as required for the protection and development of consumer welfare. Exclusionary restraints may harm consumers where an enterprise has a significant market power.¹⁷ However, the consumer welfare implications of most forms of business conduct of vertical restraints are beyond the knowledge of almost all lawyers and economists.¹⁸ Vertical restraints, by decreasing intra-brand competition, provide consumers with valuable promotional information and services,¹⁹ which increase inter-brand competition, enhance sales, and thereby increase consumer welfare. In the absence of vertical restraints, distributors will be unwilling to pay the cost of pre-sale services because other distributors can take a free-riding on the service investment. Economic approach theorists argue that the benefits to consumers from free-riders²⁰ with lower prices would be only on a short run basis.²¹ In other words, although consumers may get benefits from free-riding distributors for their low price for a short run, it can harm more on the whole market and result in loss of consumer welfare in the long run. Even though the current guidelines of the KFTC illustrate some efficiency justification,²² the criteria for exemption are not very clear. In particular, the KFTC's decision in *DPK International*,²³ a territorial restriction case, showed its lack of capacity in understanding this justification.²⁴

¹⁶Regarding transaction cost arguments, see R.H. Coase, 'The Nature of the Firm' (1937) 4 *Economica*, page 403. It is rational to assume transaction consideration to determine the size of the enterprise, the cost of marketing and competition law litigation. For example, an enterprise will not take a risk of high cost litigation although its practice is efficient.

¹⁷See V. Korah and D. O'Sullivan, *Distribution Agreements under the EC Competition Rules*, Hart Publishing, Oxford, 2002, page 2.

¹⁸See FH Easterbrook, 'Vertical Arrangements and the Rule of Reason' (1984) 53 *Antitrust Law Journal*, page 153.

¹⁹See L.G. Telser, 'Why Should Manufacturers Want Fair Trade?' (1960) 3 *Journal of Law and Economics*, pages 86-90. For argument about the infra-marginal consumer against the pre-sale service theory, see also William S. Comanor, 'Vertical Price Fixing – Vertical Market Restrictions, and the New Antitrust Policy' (1985) 98 *Harvard Law Review*, pages 991-2.

²⁰Free-rider or free-riding problem incurs where no economic entity is willing to contribute towards the cost of something when he or she expects that someone else will bear the cost in order to get benefits.

²¹See Richard A. Posner, *Antitrust Law*, (2nd ed.) The University of Chicago Press, Chicago, 2001, pages 171-6. However, some scholars disagree with this assertion. Because of imperfections in the market for consumer goods, there is no guarantee that restraints, by providing point-of-sale information and services, will necessarily increase consumer welfare. Competition in consumer good industries is by nature imperfect. See also Alden F Abbott 'Paradox Regained: Towards a "New Economic Approach" to Vertical Restraints Policy' (1980) 48 *The George Washington Law Review* 568-9.

²²E.g., sec. III.1.A.(4) of the UBP Guidelines.

²³The KFTC Decision 2000-163, 15 Nov. 2000.

²⁴*DPK International Co.*, the Domino Pizza franchisor, was found responsible of violating the law for its territorial restriction arrangement. Although DPK's vertical restraint could improve efficiency by improving inter-brand competition, the KFTC heavily relied on its inhibiting intra-brand competition. Moreover, DPK's market share was approximately 10% that was significantly lower than its competitor, Pizza Hut's 50%. For more discussion, see Sung-Un Yoon 'Franchise-Wa-Kyoung-Jaeng-Jae-Han [Franchise and Restriction on Competition]' in Ohseung Kwon (ed), *Ja-Yoo-Kyoung-Jaeng-Kwa-Kong-Jung-Ko-Rae [Free Competition and Fair Trade]*, Bubmuna, Seoul, 2002, pages 500-14.

Competition policy cannot be properly viewed in isolation. It should be considered as part of governmental micro- and macroeconomic policies in general, including industrial and international trade policies.²⁵ In examining competition policy in the terms of overall government policies, competition policy-makers should not assess market power only but also the consequences of regulation on pro-competitive business practices such as vertical restraints.²⁶

The Korean competition law has not been considered as the means of promoting the development of national economy. The KFTC's policy has sought to balance the power of the *Chaebols* by fostering the emergence and support of SMEs. The KFTC has not sufficiently considered the improvement of international competition and economic growth through vertical restraints. The Korean competition authority is more concerned with vertical foreclosure and entry barriers than it is with efficiency. However, the aim of balanced economic growth cannot be achieved by a prohibition of large enterprises and the protection of SMEs but rather by a balanced approach to trade-offs between pro- and anti-competitiveness. Therefore, the KFTC should establish a fair trade order without impeding the growth of enterprises.²⁷ The KFTC should ask the right questions to elicit valuable guidance for harmonising the purposes of the Korean competition law.

(B) ARGUMENT FOR STATUTORY REFORM

If the law is not appropriate to obtain the objectives of competition policy, it should be amended. This section contains a short summary and an evaluation of the framework of the Korean competition law on vertical restraints, and further considers two main issues: (i) the unclear standard of scrutiny, grounded mainly in the wrongful presumption of market dominance and (ii) the improper legal provisions to implement the law for balancing pro- and anti-competitive effects.

In overall, the legislation of the MRFTA has been somehow motivated by microeconomic considerations of efficient resource allocation and effective competition.²⁸ In addition, macroeconomic concerns such as international competition and economic growth have been adopted.²⁹ Accordingly, a general concept of the total welfare was laid down by the MRFTA as the criterion by which the KFTC was to assess the effects of exercise of market dominance. A result of this is that the vertical regulation under Articles 3-2, 19, 23, and 29 of the MRFTA has not fully developed in its implementation of the law.

²⁵See J. Vickers and D. Hay 'The Economics of Market Dominance' in D. Hay and J. Vickers (eds), *The Economics of Market Dominance*, Basil Blackwell, Oxford, 1987, page 2.

²⁶*Ibid.*, 3-4. The KFTC hardly considers that the exercise of vertical restraints with some market share may be used for pro-competitive purposes. The only solution for this is to find the best inference of economics and a comparative competition law study for examining whether vertical practices with some degree of market power can be neutral for promoting welfare and economic growth.

²⁷See Young-Dae Lee 'How Many Magic Rings: Economic Review of Korean Antitrust Law' (2003) 9 *Journal of Korean Competition Law*, page 260.

²⁸Kwon, *above* note 3, pages 82-9.

²⁹The administrative policy of competition with macroeconomics has its long history. For example, even the statutes concerning price stability were legislated in the 1970s, e.g., the Price Stabilisation and Fair Trade Act (Law No. 2798, Dec. 31 1975). These statutes were, however, withdrawn shortly after legislation for the externality outcomes. This macroeconomic concern can be also observed in the M&A control. Under the efficiency defence of merger stated in sec. VIII. 1 of the M&A Review Guidelines (KFTC Guidelines No. 2007-12, 20 Dec. 2007), the KFTC offers exemption benefits on the mergers that may contribute to the national economy such as (i) job creation, (ii) development of regional economy, (iii) development in supply chain, (iv) stability of national supply (energy), and (v) elimination of pollution. For further discussion regarding the correlation between competition law and economic growth, see also Dina I. Waked 'Competition Law in the Developing World: The Why and How of Adoption and Its Implications for International Competition Law' (2008) 1 *Global Antitrust Law Review*, pages 73-7.

I. ARTICLES 3-2, 19, 23, AND 29 OF THE MRFTA

The first step in measuring the pro- and anti-competitiveness of a business practice which falls within the jurisdiction of a competition authority is assessing market power. If the enterprise does not have a significant market power, its vertical restraint may give pro-competitive benefits. However, the probability of its anti-competitiveness increases where the market power of the enterprise is significant.

Article 3-2 of the MRFTA prohibits abusive conduct of an enterprise holding a market dominant position.³⁰ Article 23 of the MRFTA also prohibits unfair business practices, regardless of whether these are unilateral or collusive.³¹ Article 3-2 of the MRFTA, somewhat confusingly, overlaps with Article 23 of the MRFTA regarding vertical restraints such as refusal to deal, exclusive dealing, territorial restriction, and tie-ins.³² Article 23 of the MRFTA prohibits anti-competitive and unfair business practices in general, irrespective of market share, hence preventing the further strengthening of a dominant position. Article 3-2 of the Act, on the other hand, prevents abusive conduct of a market dominant enterprise which is exclusionary in intent. Therefore, some scholars argue that there is a clear difference between these two provisions based on the fact that Article 23 of the Act is based on an *ex ante* approach but Article 3-2 of the Act is regarded as *ex post* provision.³³

In particular, because of the different amount of fines which may be imposed for breaches of the two provisions, market dominant enterprises would have the incentive to take scrutiny under Article 23 of the Act rather than the scope of Article 3-2 of the Act. Traditionally, where an enterprise infringes both provisions, Article 3-2 of the Act foremost activates because Article 3-2 bears the privileged name of 'special provision'. Although the KFTC is supposed to apply one of two provisions to one case, it still opens a possibility of applying both provisions to one case. For instance, the KFTC found that *Microsoft Corp* had infringed both of Articles 3-2 and 23 of the MRFTA based on the fact that its tying practices extended to different products.³⁴ Therefore, this unclear-cut implementation can be used as a discriminatory and unfair measure against large enterprises.³⁵

³⁰Article 5 of the Enforcement Decree of MRFTA (amended by Presidential Decree No 21148, Dec. 3, 2008) also illustrates the types of and criteria for abusive activities: (i) fixing, maintenance, or alternation of price, (ii) controlling output, (iii) hampering of business activities, (iv) hindering of market entry, and (v) exclusive dealing.

³¹This provision prevents most of the vertical restraints.

³²See Jungwon Song, *Ca-Rit-Tel-Mit-Bul-Gong-Jung-Go-Rae-Haeng-Wui-Kyu-Jae [Regulations on Cartels and Unfair Business Practices]*, Parkyoungsa, Seoul, 2005, 486. The MRFTA has a similar statutory structure to the Japanese antimonopoly law (AML). Article 3-2 of the Act has its model from Article 3 of the AML in its prohibition of abuse of market dominance. However, some scholars argue that the form of Article 3-2 of the MRFTA was borrowed from the provision of Article 22 of the German competition act, *Gesetz gegen Wettbewerbschänkungen (GWB)*. Others also explain that Article 23 of the Act is the influence of Section 5 of the US Federal Trade Commission Act. See also Y. Lee, above note 27, page 249.

³³*Ibid.*, Song, 485-6. In addition, the author argues that there is another distinction between Articles 3-2 and 23 of the MRFTA by the terms. Article 3-2 of the MRFTA is applicable only to enterprises with market dominance. Therefore, this provision is called, *Teuk-byol-kyu-jung* (special provision) for preventing market dominance. On the contrary, Article 23 of the MRFTA applies to all the enterprises including market dominant enterprises where they have businesses in the Korean market. Article 23 of the Act is, thus, named *Il-ban-kyu-jung* (general provision) which can be applicable to any enterprises. Hence, there is a possibility that an enterprise with a market power may infringe both of the Articles 3-2 and 23. In addition to this, there is another issue that can be created by the application of these two. The fine on the violation of Article 3-2 of the MRFTA is heavier than that of Article 23. The fine on the Article 3-2 violation is maximum 3% of the turnover which is more than that of Article 23 as its 2% of the turnover.

³⁴The KFTC Decision 2006-42, 24 Feb. 2006. The KFTC decided that *Microsoft* coerced consumers to purchase other products by abusing its dominant position in the Windows PC system market, and it restricted consumers' choice to have a better quality product. This conduct, therefore, violated Article 3-2 of the MRFTA. Moreover, the KFTC condemned *Microsoft* impeded competition by tying and resulted in driving out its rivals from the market by establishing entry barrier, which infringed Article 23. This case is very abnormal comparing with the EC case of *Microsoft* (COMP/C-3/37.792, 24 March 2004) because *Microsoft* infringed only Article 82 of the EC Treaty based on the fact that it abused its dominant position though tie-ins.

³⁵Because *Microsoft* dropped its appeal in 2008, it is difficult to observe the Korean courts' opinion about the KFTC's decision. *Microsoft* submitted a letter for the withdrawal of the legal suit, and the KFTC settled this case by agreeing to it. See KFTC, *Newsletter*, Issue 4, October 31, 2007, page 10, retrieved 11 March 2009. <http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=10>.

Article 19 of the MRFTA prohibits only horizontal agreements as a *per se* violation, and Article 23 of the MRFTA prevents anti-competitive and unfair business practices regardless of unilateral or collusive and also either horizontal or vertical. This provision may cause confusion to the economic entities with experience of competition law provisions outside Korea.³⁶

Vertical restraints involving price continue to be *per se* unlawful under Article 29 of the MRFTA although a rule of reason approach is followed for vertical non-price restraints under the Article 23 of the MRFTA. Economic analysis supports this step in respect of vertical non-price restraints on intra-brand competition and would justify a similar approach for vertical restraints involving price where the resale price maintenance (RPM) is maximum or recommended. However, it is unclear whether Article 29 of the MRFTA is necessary to be applied when other provisions can cover vertical price cases. The KFTC can prevent anti-competitive RPM by Article 19 of the MRFTA because this provision already prohibits price fixing.

II. PRESUMPTION OF MARKET DOMINANCE: UNCLEAR STATEMENTS CREATING UNCERTAINTY

The most troublesome question is the way to construe the most proper assessment of the relevant market and of market dominance. This question is essential to determine whether a business practice by way of a vertical restraint harms competition. To infringe Article 3-2 of the MRFTA therefore, an enterprise should be first presumed as a market dominant enterprise. The MRFTA states that an enterprise shall be presumed to be a market dominant enterprise where (i) the market share of one enterprise is 50% or more under Article 4(1), or (ii) the total market share of three or less than three enterprises is 75% under Article 4(2).

To illustrate an example regarding market share consideration under Article 4 of the MRFTA, presume there are five enterprises whose market shares in a certain relevant market are respectively, for instance, A: 45%; B: 25%; C: 16%; D: 9%; and E: 5%. In this case, Article 4(1) of the MRFTA cannot be applied since there is no enterprise with the market share over 50%. Therefore, only Article 4(2) of the MRFTA is applicable. Because the sum

³⁶In the United States, Section 1 of the Sherman Act prohibits anti-competitive agreements and Section 2 prevents monopolisation and attempts to monopolise. EC competition law also has the provisions of Articles 81 and 82 EC Treaty for anticompetitive agreements and abuse of dominant position, respectively. Nevertheless, the Korean competition law does not have this distinction.

of the A, B, and C's market shares is 76%, these enterprises are presumed as market dominant enterprises. Therefore, in this case, A, B, and C shall be regarded as market dominant enterprises. This presumption of market dominance under the law is not very practical, and Vertical restraints involving price continue to be *per se* unlawful under Article 29 of the MRFTA although a *rule of reason* approach is followed for vertical non-price restraints under the Article 23 of the MRFTA. Economic analysis supports this step in respect of vertical non-price restraints on intra-brand competition and would justify a similar approach for vertical restraints involving price where the resale price maintenance (RPM) is maximum or recommended.³⁷ However, it is unclear whether Article 29 of the MRFTA is necessary to be applied when other provisions can cover vertical price cases. The KFTC can prevent anti-competitive RPM by Article 19 of the MRFTA³⁸ because this provision already prohibits price fixing.

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³⁷Vickers and Hay, *above* note 25, page 7. See also Keith N Hylton, *Antitrust Law: Economic Theory and Common Law Evolution*, Cambridge University Press, Cambridge, 2003, pages 257-61.

³⁸Article 19 of the MRFTA prevents only horizontal price-fixing. However, if Article 19 prohibits any price restraints regardless of horizontal and vertical, it will be the major RPM provision. This issue will be further discussed below.

³⁹This presumption test can be made after market definition.

⁴⁰However, those whose market share is less than 10% shall be excluded under so-called *de minimis* rule. Addition to market share, according to the sec. III of the guidelines for review abuse of market dominant position (Notification No. 2002-6, amended on May 16, 2002), the KFTC considers following factors to decide market dominance: (i) entry barriers, (ii) rival enterprises' market power, (iii) possibility of collusion, (iv) substitutability of goods and services, (v) market foreclosure, (vi) financial strength, and (vii) other considerations such as possibility of changing trading partners.

⁴¹Because D and E's market shares are less than 10%, they will not be presumed as market dominant enterprises.

⁴²See also Sang-Yong Park and Ki-Sub Um, *Kyoung-Jae-Bub-Wol-Lon [Principles of Economic Law]*, (2nd ed.) Parkmunsa, Seoul, 2006, pages 72.

neither effectively prevents anti-competitive abusive conduct of market dominance nor improves efficiency by vertical restraints. For example, enterprises B and C can infringe Article 3-2 of the MRFTA despite their small market shares (25 and 16% respectively) which are not very influential in the market.⁴³

The guidelines for the review of abuse of market dominant position⁴⁴ provide various methods to examine market dominance along with the market share test. However, because the market share guidance is the most important factor, the supplementary factor criteria are not very helpful when the KFTC heavily relies on market share test. The KFTC has not established a clear statement of threshold for presumption of market dominance although the market share test is the foremost criterion for presumption in the test of market dominance.⁴⁵ This unclear market dominance test generates uncertainty in the implementation of the MRFTA. To estimate the margin from trade-offs between pro- and anti-competitive effects by vertical restraints, a market share threshold test is crucial for granting legal certainty.

3. THEORY OF VERTICAL REGULATION REFORM

(A) AMENDMENTS TO STATUTES

I. ARTICLES 3-2, 4, 23 AND 29 OF THE MRFTA

In vertical cases, the absence of market power may often be the determinative issue.⁴⁶ The simplest solution would be to presume the legality of all vertical restraints based on market power, and therefore, the market share threshold test is the centre of assessing market power.⁴⁷ The test of dominance based on a certain standard of market share would eliminate the ambiguity in litigation. The presumption of market dominance regarding market share is, therefore, very important in distinguishing Articles 3-2 and 23 of the MRFTA. The difference between unilateral and concerted actions is irrelevant based on the definition of a market dominant position in this distinction.⁴⁸ Because market dominance distinguishes the application of Articles 3-2 and 23 of the MRFTA, a presumption of market dominance would need to enquire into the real pro-competitive effect on the market. Although the KFTC is concerned about the market concentration problem, enterprises with less than a 50% market share should be presumed to have no significant market power.

Most of the foreign competition regimes do not usually have a presumption of market dominance according to a market share threshold test determined by statute.⁴⁹ However, the

⁴³E.g., *Interpark G Market Corp.*, KFTC Decision 2007-555, 18 Dec. 2007.

⁴⁴KFTC Notification No. 2002-6 (amended on May 16, 2002).

⁴⁵The UBP Guidelines provide safety zone of 10% market share threshold as the block exemption measure for some vertical arrangements. However, this clause simply overlaps with the exemption of Article 4 of the MRFTA.

⁴⁶See E. Elhauge and D. Geradin, *Global Competition Law and Economics*, Hart Publishing, Oxford, 2007, page 451.

⁴⁷However, the enterprises' collective action in distribution should be condemned as *per se* violation under Article 19 of the Act.

⁴⁸This is because horizontal concerted action is the *per se* violation under Article 19 of the MRFTA.

⁴⁹Elhauge and Geradin, *above* note 46, page 236. The EC and US competition regimes do not have a particular regulation for this. However, Japanese competition authority imposes special remedies to under the existence of a monopolistic situation. Market dominance is defined to exist when an enterprise has a market share over 50% or two enterprises' is over 75% under Sections 2(5) and 3 of the Japanese AML. This market dominance presumption is similar to that of the MRFTA.

case law in the EC and US regimes indicates the concern of assessing market power and dominance. The US Supreme Court has designated that market shares above 66% indicate monopolistic position.⁵⁰ In the EC regime, the European Court of Justice (ECJ) also held in *Hoffman-La Roche*⁵¹ that a highly important factor for the presumption of market dominance is the existence of very large market shares.⁵² In *AKZO*, the ECJ referring to *Hoffman-La Roche* indicated that 50% of market share could be considered as very large, thus will create a presumption of market dominance. Moreover, according to the guidance issued by the Commission on the application of Article 82, the extension of the market share and the length of the of time that such market share has been held in market operates as an indicator of the existence of dominance, although other market considerations should be taken into consideration⁵⁴. This would be the case where an undertaking holds more than 50% market share.⁵⁵

As seen in the two regimes, less than 40% of market share would not indicate market dominance although the other factors can also be considered for the presumption of market dominance. Unlike the KFTC's, moreover, both competition regimes do not necessarily indicate the total market share of a certain number of enterprises, the so-called concentration ratio (CR) test to presume the enterprises' market dominance.⁵⁶ The approaches of these two regimes are successful in inducing creative business activities at a vertical level and may also give a legal certainty in vertical cases along with the development of case law by *the rule of reason* and *per se rules*.⁵⁷ The Korean competition system has not borrowed the idea of tolerance in vertical cases,⁵⁸ and the KFTC continues to condemn enterprises with some degree of market power where vertical restraints are imposed. Although the Korean market is more concentrated than other developed countries, the KFTC can still apply the similar market dominance presumption as long as the domestic market is open to international competition.

⁵⁰*Ibid*, page 245. See also Andrew I. Gavil 'Exclusionary Distribution Strategies By Dominant Firms: Striking A Better Balance' (2004) 72 Antitrust Law Journal, pages 11-2. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 76 S. Ct., 1264 (1956) at 379, observing that *du Pont* produced 75% of the cellophane sold in the US and that the enterprise may be presumed to have monopoly power; *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072 (1992) at 481, holding that a 80-95% market share is enough to survive summary judgment, and describing a prior case as holding that over two-thirds of a market is a monopoly; *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S. Ct. 632 (1911), over two-thirds of the market and over 80% of the field of comparable cigarettes constituted a substantial monopoly.

⁵¹Case 85/76, *Hoffman-La Roche & Co AG v Commission*, [1979] ECR 461, [1979] 3 CMLR 211.

⁵²Elhauge and Geradin, *above* note 46, page 246; Einer Elhauge 'Defining Better Monopolization Standards' (2003) 56 Stanford Law Review, page 259. In this case, ECJ stated that the existence of a dominant position may also derive from several factors. The enterprise had approximately from a 75 to 87% market share.

⁵³Case C-62/86, *AKZO Chemie BV v Commission*, [1991] ECR I-3359.

⁵⁴Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings COM (2008), paragraph 15.

⁵⁵From the Commission perspective, a firm holding a market share of 40% or below is not likely to have dominant position, yet possible under certain circumstances. See *Ibid*, paragraph 14.

⁵⁶See R. O'Donoghue and J. Padilla, *The Law and Economics of Article 82 EC*, Hart Publishing, Oxford, 2006, page 115; Femi Alese, *Federal Antitrust and EC Competition Law Analysis*, Ashgate, Hampshire, 2008, pages 187-203. Although the EC Commission does not take into account this CR test, it examines competitor's market power. In general, the EC Commission has considered market dominance where the market share difference between the dominant enterprise and its next largest competitor is to exceed 20%.

⁵⁷The Korean competition authority and the courts adopted *the rule of reason and per se rules* from the US regime only. The EC regime does not accept *the rule of reason*, e.g., Case T-528/93, *Métropole Télévision SA v. Commission* [1996] ECR II-649, [1996] 5 CMLR 386. The Court of First Instance (CFI) expressly rejected *the rule of reason*.

⁵⁸Some critics may argue that the safety zone in the UBP Guidelines indicates the idea of tolerance on vertical restraints. However, it merely offers a 10% market share threshold test that may be considered as only *de minimis* rule.

Article 4 of the MRFTA states that (i) 50% of market share of a single enterprise, or (ii) 75% of the total market share of three or less enterprises (CR3) will create a presumption of market dominance. The KFTC's approach may create a risk of condemning an enterprise whose practices do not harm competition in the market where the enterprise has less than 50% market share. Therefore, the KFTC should remove the presumptive provision of CR3 in the second limb of the test, although the rest of the presumption could be retained.

Whilst examining abuse of dominance at a horizontal level, the presumption of market dominance can still be positioned more strictly than the vertical one even if the KFTC sets a 50% market share presumption. It is reasonable for the KFTC to condemn an enterprise's practices where that enterprise maintains a market share of between 30% and 50% in horizontal or unilateral cases. The KFTC should also design new guidelines on abuse of market dominance, stating a special clause of tolerance for vertical cases. It should provide a legal measure stating that a market share of less than 50% in vertical cases may not create a presumption of abuse.

To sum up the suggested amendment, in order to establish the presumption of market dominance under the MRFTA, (i) an enterprise should have 50% of market share in the relevant market regardless of being a horizontal or vertical level and (ii) enterprises with less than 10% shall receive the benefits from *de minimis* exemption under Article 4 of the MRFTA. Additionally, under the guidelines on abuse of market dominance, the KFTC may prevent acts of an enterprise with a market share of between 30% and 50% only in horizontal cases. However, an enterprise whose market share does not fall within Article 4 of the MRFTA and of the guidelines may still violate Article 23 of the MRFTA. Then, an enterprise with a market share of less than 30% could receive an automatic exemption of both provisions where the practice is vertical except hard-core restrictions.⁵⁹

It is also necessary for the KFTC to consider its change of RPM policy.⁶⁰ The economic consequences of RPM are not undesirable in almost all circumstances because most are beneficial to consumers, distributors, and manufacturers alike.⁶¹ In particular, the MRFTA is almost the only competition legislation that maintains a statutory provision for RPM practices by authorisation. As an example in another regime, the US Congress once gave the competition authorities the power to authorise RPM within their state borders in 1937,⁶² responding to the US Supreme Court's *per se* judgment in *Dr. Miles*.⁶³ Forty years later, the

⁵⁹This block exemption regulation for the vertical practices with 30% market share and hard-core restrictions will be considered below.

⁶⁰For more discussion about the Korean RPM provisions, see Ho Young Lee, *Dok-Jum-Kyu-Jae-Ui-Ie-Ron-Kwa-Sil-Jae [Theory and Practice of Monopoly Regulation and Fair Trade Act]*, Hongmunsu, Seoul, 2006, pages 388-98.

⁶¹Easterbrook, above note 18, 156. See also Walter Adams 'Resale Price Maintenance: Fact and Fancy' (1955) 64 *The Yale Law Journal*, page 974.

⁶²The Miller-Tydings Act of 1937, 50 Stat. 693. See also Rudolph J.R. Peritz, *Competition Policy in America: History, Rhetoric, Law*, Oxford University Press, Oxford, 1996, pages 153-6.

⁶³*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S. Ct. 376 (1911).

regulation for authorisation was withdrawn.⁶⁴ The US courts, however, again recognised RPM including minimum RPM as one of the efficiency-enhancing practices like other types of vertical non-price restraints.⁶⁵ In the *Leegin* case,⁶⁶ the US Supreme Court abandoned the *per se* rule for minimum RPM and held that the *Dr. Miles* precedent should be overruled and judged by *the rule of reason*.

The KFTC added the RPM provision, although Article 19 of the Act already prohibited price fixing as a *per se* violation. Since RPM practices in some cases –except minimum RPM combined with market power– are pro-competitive, the KFTC should withdraw the current provision of Article 29 of the MRFTA.⁶⁷ The existing provision simply gives the KFTC an exemption power regarding a certain type of vertical price practice, especially in, for example, the publishing industry.⁶⁸ However, this regulatory provision does not give a further efficiency-enhancement and may impede pro-competitive practices, for instance, in franchise contracts that require an RPM practice to prevent free-riding.⁶⁹

In conclusion, the KFTC should provide more flexible guidelines for RPM practices, which allow enterprises to benefit from the operation of a *rule of reason*. Despite some *rule of reason* judgments of the courts on RPM,⁷⁰ the KFTC still continues measuring the RPM under a strict rule. Subsequent economic literature and other competition regimes' current approach to vertical price restraints (including minimum RPM) have focused the attention, in a more sophisticated manner, on the efficiency issue.⁷¹ If Article 19 of the MRFTA replaces the current Article 29 of the MRFTA, the RPM Guidelines should also be withdrawn.⁷²

II. ARTICLES 19 AND 23 OF THE MRFTA

To create a new Korean vertical regulation, the KFTC should provide a clear legal measure relating to vertical agreements. In particular, it needs to create a separate legal provision on vertical cases from that contained within Article 23 of the MRFTA. Other competition regimes have drawn clear distinctions between two legal provisions: (i) preventing unfair or anti-competitive agreements regardless of horizontal or vertical and (ii) preventing market dominance or monopolisation. This measure can give a clear picture to enterprises and

⁶⁴The *per se* rule was restored for all states by the Consumer Goods Pricing Act of 1975, 89 Stat. 801 after its withdrawal. See H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (3rd ed.) Thomson West, St. Paul, 2005, pages 55-6.

⁶⁵*Ibid*, pages 471-9. The author illustrates the historical development of RPM in the US.

⁶⁶*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. (2007).

⁶⁷See Ohseung Kwon, 'Retrospect and Prospect on Korean Antitrust Law' (2005) 4 Journal of Korean Law, page 16. The author argues Article 29 MRFTA should be withdrawn since Article 23 MRFTA rather than Article 19 covers RPM cases.

⁶⁸Article 43 of Enforcement Decree of Monopoly Regulation and Fair Trade Act (amended by presidential decree No. 21148, December 3, 2008).

⁶⁹The present Fair Franchise Transactions Act (amended by the law No. 8630, August 3, 2007) covers franchise cases. Under Article 12(1) of Franchise Act, vertical restraints such as refusal to deal, territorial restrictions and etc. are prohibited. This Act foremost applies where both of Article 23 of the MRFTA and Article 12 of the Franchise Act are applicable.

⁷⁰*Namyang Dairy Products Co., Ltd v. KFTC*, Supreme Court 99Du11141, 24 Dec. 2001; *Maeil Dairy Industry Ltd v. KFTC*, Supreme Court 2000Du1829, 31 May 2002. However, the judgments in these cases do not give a clear efficiency-justification but indicate the criteria of coerciveness in the RPM cases.

⁷¹G.A. Hay 'Vertical Restraints After Monsanto' (1985) 70 Cornell Law Review, page 422.

⁷²For further arguments, see Ho Young Lee, 'Su-Jik-Jeok-Go-Rae-Jae-Han-Ui-Kyu-Jae [Restrictions on Vertical Restraints in Korea]' in Ohseung Kwon (ed.), *Gong-Jung-Go-Rae-Wa-Bub-Chi [Fair Trade and Regulation]*, Bubmunsa, Seoul, 2004, pages 622-3.

competition lawyers. However, since Article 19 of the Act covers only horizontal cases,⁷³ it may create uncertainty to enterprises. Moreover, Article 19 of the MRFTA does not clearly state that it is only applicable to horizontal agreements despite the KFTC's implementation of the restriction merely to horizontal concerted acts.⁷⁴ Therefore, the KFTC can maintain Article 23 of the Act as a provision for preventing unfair and anti-competitive practices regardless of whether these are unilateral or concerted, and should apply Article 19 of the MRFTA to horizontal and vertical cases.⁷⁵

If the KFTC amends its implementation of the law to both horizontal and vertical actions, it should also revise Article 19(2) of the MRFTA. This provides exemptions where the business practices satisfy the criteria of industrial rationales, such as the promotion of research and development (R&D) or the enhancement of the SMEs' competitiveness with the authorisation of the KFTC.⁷⁶ The KFTC should amend this exemption provision from a method of notification to a system of block exemption. The KFTC, then, needs to provide new vertical guidelines to illustrate detailed criteria in offering block exemptions.

The KFTC could usefully adopt the method set out in Article 81(3) of the EC Treaty.⁷⁷ This exemption is granted if the agreement contributes to improving the production or distribution of goods or promoting technical or economic progress, whilst allowing consumers a fair share of the resulting benefits. However, this exemption cannot be allowed where: (i) the agreement is not indispensable to the attainment of these objectives or (ii) there is a possibility of eliminating competition in respect of a substantial part of the products.⁷⁸ This provision along with the EC Regulation 2790/99⁷⁹ (EC vertical regulation) can give a guarantee of pro-competitive results in relation to vertical arrangements. The KFTC can uphold Article 19 of the MRFTA for vertical cases with a slight amendment to its exemption clause. If the KFTC implements Article 19 of the MRFTA for controlling vertical agreements, its legal provision should ensure the block exemption that is indispensable for the market, which will subsequently reduce the administrative costs.

⁷³Article 19 of the Act prevents (i) price fixing, (ii) determining terms and conditions, (iii) limiting outputs, (iv) territorial restrictions, (v) prevention of facilities, (vi) restriction of types of products, (vii) jointly managing main parts of business, and (viii) any practice lessening competition.

⁷⁴H.Y. Lee, *above* note 72, pages 617-8.

⁷⁵See Min Ho Lee 'Recent Developments in the Treatment of Collusion by Korean Courts' (2005) 4 *Journal of Korean Law*, page 159.

⁷⁶Article 19(2) of the MRFTA gives exemption benefits to horizontal agreements from authorisation by the KFTC where the practices are for (i) industry rationalisation, (ii) R&D improvement, (iii) resolving economic depression, (iv) industrial restructuring, (v) rationalisation of international terms and conditions, and (vi) enhancement of SMEs' competitiveness. These terms and expressions are not very clear to justify the arrangements for both of horizontal and vertical agreements. The KFTC offers details of criteria for exemption through the sec. III of the guidelines for review cartel [amended on December 21, 2007]. Nevertheless, this guidance of balance test of anti- and pro-competitive effects is not also clear. Moreover, this guidance is only for horizontal cases.

⁷⁷The prohibition of agreements contained in Article 81(1) EC Treaty is tempered by Article 81(3), which provides that an arrangement infringing that prohibition may still benefit from exemption.

⁷⁸For further discussion, see Wolfgang Kerber and Simonetta Vezzoso 'EC Competition Policy, Vertical Restraints, and Innovation: An Analysis from an Evolutionary Perspective' (2005) 28 *World Competition*, pages 510-2; Joanna Goyder, *EU Distribution Law* (4th ed.) Hart Publishing, Oxford, 2005, 30-2; Richard Whish, *Competition Law* (6th ed.) Oxford University Press, Oxford, 2009, pages 151-61.

⁷⁹Regulation 2790/99 OJ L336/21 on the application of Article 81(3) of the Treaty to categories of vertical agreements.

To conclude, vertical agreements that can benefit from exemption under Article 19(2) of the MRFTA should be considered lawful if the practice satisfies the following criteria: (i) an enterprise entering into vertical restraints lacks market power under the definition set by Article 4 of the MRFTA; and the agreement should either (ii) improve production and distribution, (iii) enhance R&D, (iv) promote state economic development, (v) improve competitiveness of SMEs; and (vi) should not increase its benefits by harming consumers.⁸⁰ The amendments to Articles 3-2, 4, 19, and 23 of the MRFTA can give Article 3-2 of the MRFTA a full authority to curb anti-competitive abusive conduct by dominant enterprises. Then, Article 23 of the MRFTA will be considered as a provision for unilateral or concerted acts which do not infringe Article 3-2 of the MRFTA where the enterprise is not market dominant. Moreover, Article 19 of the MRFTA will prevent anti-competitive agreements regardless of whether these are horizontal or vertical and regardless of market share. Often the best the KFTC can do is to offer a guidance of possibilities of some pro- and anti-competitive effects by vertical restraints. When the anti-competitive explanations have been eliminated, the pro-competitive explanations remain.⁸¹ For this reason, the KFTC should provide new guidelines for the application of Article 19 of the MRFTA to vertical restraints (hereafter, new vertical guidelines) that ensure efficient and pro-competitive vertical arrangements.

(B) MODERNISATION: NEW VERTICAL GUIDELINES

I. ONE-SIZE FITS-ALL APPROACH

The UBP and RPM Guidelines do not have an adequate level of balancing pro- and anti-competitiveness of vertical restraints. They can be replaced by the new vertical guidelines which cover both vertical price and non-price restraints. The new guidelines can allow an efficiency justification for vertical restraints. For the progressive development of the new vertical guidelines, the KFTC should distinguish between price and non-price restraints.

Regarding non-price restraints, the KFTC needs to, firstly, illustrate how they might encourage distributor investments to develop demand for manufacturers' goods in the relevant market.⁸² Secondly, the KFTC should scrutinise whether vertical non-price restraints may result in the promotion of inter-brand competition. All these pro-competitive justifications resonate as persuasive with competition lawyers and economists because the enterprises' incentives give them more confidence in their business profits.⁸³

With regard to the vertical guidelines for price restraints, the guidelines should articulate that certain restraints, such as minimum RPM with some degree of market power, should be regarded as quasi-*per se* violations of hard-core restriction. This standard does not have to require pre-existing market power. It allows for the possibility that an enterprise that does not possess significant market power will acquire it through a vertical arrangement by increasing

⁸⁰Easterbrook, *above* note 18, page 159. The author's suggestion of several vertical exemption criteria can be considered in the Korean regime.

⁸¹*Ibid.*, page 145.

⁸²Elhauge and Geradin, *above* note 46, page 651. The authors assert that a price restraint could not accomplish the same thing because the manufacturer could later add extra dealers who could free-ride on the investment and erode it with non-price competition or the manufacturer might adjust (or fail to adjust) future price.

⁸³*Ibid.*

the competitors' distribution costs.⁸⁴ For that reason, it does not require evidence that the enterprises have a significant market power at the time the agreement is entered into. Such an approach does, however, require evidence that the minimum RPM is likely to enable an enterprise to raise prices above the competitive level by raising entry barriers, driving rivals from the market, or increasing competitors' distribution costs.⁸⁵

II. NEW SAFE HARBOUR: MARKET SHARE THRESHOLD TEST

The central issue under the new guidelines will be to solve the problems of trade-offs between pro- and anti-competitive effects. Competition policy-makers should examine the market power and anti-competitive effects to allow for positive effects of vertical restraints. To establish a certainty in efficient vertical practices, the KFTC should examine the market share threshold test. It therefore should create a new safe harbour of the 30% market share threshold test to fit into the more inter-brand-competition-justified policy based on the certainty. This safe harbour provision is praised in another competition regime. The EC competition regime provides a good example of competition policy on vertical restraints.

Article 81(1) EC prohibits vertical agreements which may affect trade between Member States and which distorts competition within the Common Market. However, Article 81(3), the EC vertical regulation, and the EC vertical guidelines⁸⁶ provide exemptions from specific categories of vertical restraints and concerted practices.⁸⁷ The European Commission is aware that vertical restraints can have negative effects on competition only where significant market power exists.⁸⁸ The market share threshold test is, therefore, important to prevent possible abuses since it is more likely for undertakings to get exemptions by the tolerant policy on vertical restraints.⁸⁹ This approach also gives a legal certainty. These provisions not only prevent possible abuses of an enterprise's market power but also allow economic justification for reasonable business practices.⁹⁰

⁸⁴For further discussion of raising rivals' costs, see Steven C. Salop and David T. Scheffman 'Raising Rivals' Costs' (1983) 73 *The American Economic Review*, pages 267-71; Thomas G. Krattenmaker and Steven C. Salop 'Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price' (1986) 96 *The Yale Law Journal*, pages 230-49.

⁸⁵See Kevin J. Arquit 'Market Power in Vertical Cases' (1992) 60 *Antitrust Law Journal*, page 930.

⁸⁶Commission Notice, Guidelines on Vertical Restraints [2000] OJ C 291/01, [2000] 5 CMLR 1074.

⁸⁷*De Minimis* Notice [OJ] 2001, C368/13] also gives sufficient guides of safe harbour rule for vertical agreement exemptions. If the parties' market shares do not fall within the *De Minimis* threshold, they should be determined by the EC vertical regulation.

⁸⁸See V. Verouden 'Vertical Agreements and Article 81(1) EC: The Evolving Role of Economic Analysis' (2003) 71 *Antitrust Law Journal*, pages 526-7. Where an undertaking's market share does not exceed 30%, it will get block exemption benefits unless the agreement contains hard-core restrictions such as minimum RPM or absolute territorial restriction.

⁸⁹This EC Commission's approach to vertical restraint justification is clearly explained in the para.116 of the EC vertical guidelines. The EC Commission recognises the free-riding problem enough to justify vertical restraints that do not harm competition in the market. Nevertheless, to justify vertical restraints regarding the free-riding problem, the EC Commission is concerned more about pre-sale services. Therefore, free-riding justification might not apply to after-sale services.

⁹⁰The US Department of Justice also used to have guidelines for vertical restraints, providing market share threshold test. The now-withdrawn 1985 Vertical Restraints Guidelines of the Department of Justice utilised a screen of 10-20% for territorial and customer restraints, exclusive dealing, and 30% for tying. See Charles F. Rule 'Statement of Charles F. Rule Acting Assistant Attorney General Antitrust Division before the Committee on the Judiciary United States Senate Concerning the Justice Department's Vertical Restraints Guidelines on July 16, 1985' (1985) 54 *Antitrust Law Journal*, page 381.

The EC regime's provision is suitable for the Korean market since it gives more legal certainty and also flexibility in application of the law by means of the 30% market share threshold test. For that reason, an appropriate degree of market share threshold test should be included as the core part in the new vertical guidelines in order to give a certainty of enterprises' business practices.

III. CRITERIA OF ANTI-COMPETITIVENESS PRESUMPTION

The KFTC has to examine the degree of market power held by a company in vertical cases, nevertheless market power cannot be the only facet of its analysis. As a practical matter, the KFTC's analysis may often reach the same results as a market power screen, but it should involve a more sophisticated economic analysis that has as its goal the measurement of each restraint's economic effect on the competitive process. The KFTC needs to focus on inter-brand competition, specifically in horizontal cases –at either the manufacturer or the distributor level. It recognises that vertical restraints may facilitate collusion as well as enhance or protect a single enterprise's market power. Therefore, the standard in the new guidelines should consider all potential anti-competitive aspects of vertical restraints. The KFTC also has to list restrictions on minimum RPM with market power and non-price restraints with RPM, and should be hostile to these business practices although they may be only intra-brand restraints. Along with this hard-core restriction, the KFTC should consider other factors that may significantly impede competition through vertical restraints.

Certain vertical restraints with some market power can improve inter-brand competition. However, there is still a risk of excessive anti-competitive effects where the enterprise leverages horizontal or vertical market power through vertical foreclosure; the raising of entry barriers; and collusion. These, certainly, have a negative impact on competition, which the KFTC should be most concerned about.

In addition, the new guidelines should include the criteria for analysing whether there are less restrictive means as alternative to restraints.⁹¹ Despite the possible anti-competitive effects, restraints in certain circumstances generate valuable information and services by preventing free-riding. Recognising the value of such information and services, the KFTC can be reluctant to strike them down unless less drastic means for generating the same information and services are available.⁹² If there is an alternative mean of providing the same pro-competitive effect or efficiency, the KFTC should prevent these vertical restraints.⁹³ The new guidelines should include all of the considerations and criteria for the harmful factors by vertical restraints.⁹⁴

⁹¹This clause can be followed by the similar way in Article 81(3) EC Treaty.

⁹²Abbott, *above* note 21, page 579.

⁹³*Ibid*, pages 582-3.

⁹⁴An efficiency presumption is important to provide the main framework of the new guidelines, but the efficiency justification can be subject to challenge with regard to strategic purposes and oligopolistic relations. For further discussion, see also Oliver Williamson, *Antitrust Economics: Mergers, Contracting, and Strategic Behavior*, Basil Blackwell, Oxford, 1987, pages 128-30.

4. CONCLUSION

The Korean market has traditionally been considered as excessively concentrated by a few large enterprises, and the existing legal provisions on vertical restraints have not promoted efficiency and pro-competitive activities for this fear. The KFTC has not established satisfactory theories of vertical restraints and has shown its unfledged implementation of the law. Because the Korean competition law sufficiently controls market dominance and economic concentration, the KFTC's unnecessary concerns about vertical restraints can impede pro-competitive effects. Furthermore, the KFTC does not clearly implement the law in the context of economic theory, although some cases could have been covered by efficiency theories.⁹⁵ These cases still illustrate that the courts and the KFTC should develop their rationale to reach the evidentiary argument for vertical restraints. Although the KFTC's decisions in some cases were founded on economic theory, it has a long way to go to reach a sufficient level of efficiency-enhancement. The KFTC should bear this burden since its wrongful decisions may create a significant amount of costs to enterprises.

This article has considered the further development of vertical regulations in a way that may fit into the aims of the Korean competition law and national economy. However, several issues still remain unsolved. No satisfactory consequences will be reached until the courts carry out a comprehensive analysis of vertical restraints. A full economic enquiry into the actual impact of every vertical restraint would place a burden on the courts.⁹⁶ However, the retreat from the rigid rules by amendment will offer a potential change in examining vertical restraints. Then, the courts' analysis will play a relatively major role.

⁹⁵E.g. some RPM cases regarding pre-sale services, *L'Oreal Korea*, KFTC Decision 2002-368, 24 Dec. 2002; *Audi Volkswagen Korea Corp.*, KFTC Decision 2008-477, 31 Oct. 2008.

⁹⁶G.A. Hay, *above* note 71, pages 444-5.

The internationalisation of competition policy: The EU and the WTO between boldness and rally

JULIEN MOIROUX*

In the first section, this article explains the reasons for the internationalisation of competition policy. The second part seeks to make a critical reading of international rules and ongoing work within international fora and organisations and tries to explain why they have failed so far. The last section examines the legal system most suited to regulate competition on global markets.

1. INTRODUCTION

Aware of the challenges offered by economic globalisation and the growing interdependence of national economies, representatives of the most influential competition authorities in the world have agreed to open negotiations on drawing up international rules of competition at the summit of the World Trade Organization (WTO) held in Doha in November 2001.¹ The EU was the principal proponent of a Multilateral Agreement on Competition (MAC), and clearly wants to promote its competition law system as a 'test-bed for a globalized world'.² Facing consistent and strong oppositions from the developing countries and a 'two-faced' U.S. behaviour,³ the initial project of a MAC was dropped from the Doha Agenda in 2004. But the issue remains, more than ever, a hot topic to be discussed even outside the WTO.

Extensive cross-border mergers have indeed in recent years affected all sectors of the economy. The recent dispute in the GE-Honeywell merger is but one of these numerous cases that seem to call for a supranational regulation of competition policy. In addition, multinational companies took advantage of the environment created by trade liberalisation to increase anti-competitive practices, whose effects were felt in several regions of the world. It is therefore ironic to continue to defend the global liberalisation of trade and the dismantling of barriers to trade without putting limits on anti-competitive practices of private economic actors.

Does the globalisation of anti-competitive practices and mergers reflect the necessity for the internationalisation of competition law? Is there a need to rehabilitate the role of the State to regulate private economic powers and create a competitive World order? This

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¹The WTO was established by the *Marakesh Agreement Establishing the World Trade Organisation*, opened for signature 15th April 1994 (entered into force 1st January 1995).

²This formulation appears in a recent Opinion of the European Economic and Social Committee on 'The Challenges and Opportunities for the EU in the Context of Globalisation' OJ 2007/C 175/16.

³Emphasised by Aditya Bhattacharjya 'The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective' (2006) J.I.E.L. 293.

article aims to examine the legal system most suited to regulate competition on global markets and to make a critical reading of international rules and ongoing work within international forums and organisations. Above all, this article will try to put in perspective this new trend of control by the States of the legal regulation of competition in increasingly globalised markets in order to safeguard common interests.

The first part explains the reasons that caused the search for strategies for the internationalisation of competition law. The second part seeks to present the proposals that have been and are prepared not only by States but also by working groups within international organisations or by scholars. The last section examines the orientation towards the establishment of cooperation on a multilateral basis to conclude that this mode of cooperation contributes effectively in a gradual harmonisation of legislation and promotes the development of international and supranational rules of competition.

2. REASONS FOR THE INTERNATIONALISATION OF COMPETITION POLICY

The internationalisation of competition policy has been on the agenda since States have realised that in an era of economic globalisation, world trade could develop only if accompanied by a parallel competition regulatory framework that could prevent multinational companies from erecting trade barriers (A). In addition, States want to bring an end to unilateral measures resulting from the extraterritorial application of national legislations, which creates political tensions (B).

(A) FIGHTING AGAINST TRADE BARRIERS

I. TRADE BARRIERS RESULTING FROM THE PRACTICES OF TRANS-NATIONAL ACTORS

As a general proposition, the multiplicity, power, and autonomy of trans-national actors can subsequently lead to the internationalisation of anticompetitive practices. The liberalisation of global markets and the development of economic sectors have indeed encouraged the emergence of trans-national actors. Nearly 4/5th of the international trade and investment is based on multinational companies, giving them an obvious political, social, economic and cultural impact.⁴ This is a well-known phenomenon: companies have increased their investments abroad and directed restructuring operations and alliances with international partners in order to meet the needs of an increased competition in their traditional markets. In addition, the growing of overseas operations has led companies to revise their organisation and their strategies for acquiring an international dimension. The acquisition of a company abroad would give them immediate access to production capacities, a distribution network or a brand known in the targeted market.⁵

⁴See World Investment Report 1998: Trends and Determinants, UNCTAD/WIR/1998.

⁵For a detailed account on this process see Jones & Sufrin, *EC Competition Law: Text, Cases and Materials* (3rd ed.) OUP, 2007, pages 58 and 679.

One could easily imagine that, following the globalisation of political and economic life, these companies become quasi-autonomous, acting in the shadow of 'official' international actors through their pressure on national governments and in international fora. They constitute real lobbies which call into question the sovereignty of States, unable to exercise their full and exclusive powers. The infringement of State sovereignty concerns in particular the developing countries where trans-national companies gain control over natural resources, production or finance. In addition, these players are keen to use their power to put pressure, either alone or together with institutions representing their interests, on national governments and international organisations.

The practices of international companies such as the formation of international cartels aiming at fixing prices or allocating markets; international mergers; or abuses of dominant position aiming at preventing the entry of new competitors in a market may obviously affect international markets. In such a hostile context, States have gradually understood that the internationalisation of competition policy is an indispensable instrument both at the global level –to ensure the efficient functioning of international trade– and at the national level in order to preserve competition in domestic markets.

II. INTERACTIONS BETWEEN COMPETITION POLICY AND INTERNATIONAL TRADE

AN OBVIOUS RELATIONSHIP

The principles governing the application of competition policy and international trade rules are intrinsically linked. As highlighted by Sweeney,⁶ it is undeniable that there is a philosophical and practical interaction between liberal trade policy and a welfare driven competition policy. His argument is based on the fact that, economically speaking, both policies stem from the proposition that markets, operating where possible without artificial constraints, have the capacity to deliver significant welfare gains and raise standards of living. There is indeed no reason to disagree with the conclusion that in both cases a notion of market access is a key element in realising that object.

The reciprocal interaction can also be identified practically. Restrictive trade practices may frustrate a liberal trade policy, just as a protectionist trade policy can prevent strong domestic competition laws from fully delivering expected welfare benefits. Thus, a domestic cartel may operate to effectively exclude imports from the domestic market even though import barriers are otherwise low.⁷ On the other hand, high import barriers, by deterring foreign firms from entering the domestic market, may deprive consumers of many of the benefits they might have expected from a legal regime that would otherwise promote a vigorous competition.

⁶Brendan Sweeney 'Globalisation of Competition Law and Policy: Some Aspects of the Interface Between Trade and Competition' (2004) *MelbJIL* 15.

⁷See in particular the concept of 'mixed export cartels' in Brendan Sweeney 'Export cartels: Is There A Need For Global Rules?' (2007) *J.I.E.L.* 87.

International trade rules therefore play an important role in the implementation of national competition laws thanks to the so-called '*vice-versa*' element,⁸ which refers to the reciprocal interaction existing between trade and competition policy. Competition policy is indeed an effective instrument to fight against certain types of practices and agreements that discriminate against foreign companies and are harmful to international exchanges. However, the objectives of competition policy would be limited to achieving economic efficiency, consumer welfare and economic development –whereby the maintenance of competition is not a goal in itself but a means to achieve those objectives.

The links between trade and competition policy also appear in some bilateral, regional or international agreements, which have explicitly recognised the fact that trade fosters an effective application of national competition law. Thus, in the cooperation agreement signed on October 7, 1999 between the Japanese government and the U.S. government, the preamble recognises that the effective application of competition rules in each of the signatory countries is crucial to ensure the proper functioning of their domestic markets and their respective trade relations.⁹ This is also a practical expression of the principle of reciprocity, which is one of the most important principles in international public law.

The obvious links between trade and competition have led some governments to propose the opening of negotiations on the development of competition rules within the WTO at the beginning of the Doha Round of Trade negotiations.¹⁰ Yet there are also obvious differences between trade and competition that must be taken into account before considering a possible internationalisation of competition policy. A comparison of anti-dumping rules and competition rules offers a shiny illustration of these contradictions.

DISTINCTION: ANTIDUMPING OR COMPETITION LAW

First of all, anti-dumping rules and competition rules have goals, principles and problems of their own. They are usually regulated by specific provisions that do not apply to each other. Competition rules are designed primarily to protect competition. On the contrary, anti-dumping duties are not intended to fight against practices condemned under competition law but to protect the domestic industry.

Consequently, anti-dumping rules address practices that are not necessarily anticompetitive *per se* (even if they may fit the concept of predatory pricing), and dumping will not necessarily be characterised as anticompetitive under most national competition laws. Moreover, as a commercial instrument, anti-dumping is intended to fight against dumping and indirectly against national policies harmful to international trade. National governments are indeed responsible for many dumping that they create, promote or condone, for example, by artificially advantaging some of their domestic companies so that they make profits and then export their product at a price below the price charged by competing industries of the importing country.

⁸See WTO Doc. Report (1999) of the Working Group on the Interaction between Trade and Competition Policy (WGTCP) to the General Council, WT/WGTCP/3 11th October 1999, at paragraph 18. The Group was established by the Singapore Ministerial Declaration, WT/MIN(96)/DEC, adopted 13th December 1996.

⁹See Agreement between the Government of Japan and the Government of the United States of America concerning cooperation on anticompetitive activities, 8th Oct. 1999, accessible at <http://www.jftc.go.jp/e-page/internationalrelations/index.html> (6th August 2008).

¹⁰Doha Ministerial Declaration, WT/MIN(01)/DEC/1, adopted on 14th November 2001, especially paragraphs 23-25.

The differences between anti-dumping and competition policy objectives were particularly clear in the *Extramet* case,¹¹ brought before the European Court of Justice (ECJ). In this case, following the complaint of the sole Community producer of calcium metal P echiney, an anti-dumping duty was imposed by the Community on calcium metal imported from China and (formerly) the USSR. Extramet contended that P echiney was abusing its dominant position and that the anti-dumping procedure was inappropriate. The Court held that:

'(...) account must be taken of such anti-competitive practices and that an anti-dumping duty must not be imposed if its effect would be to maintain an unjustified advantage in the Community market resulting from a cartel or an abuse of a dominant position';

'It must next be noted that, in order to refute Extramet's argument, the Council referred, in the proceedings before the Court, to recital 15 in the preamble to the contested regulation, contending that, because of its specific nature, an anti-dumping procedure cannot prevent other actions from being brought in order to penalize anti-competitive conduct'.¹²

Nevertheless, ties between anti-dumping and competition rules are strong. Anti-dumping measures are intended to counter predatory pricing as part of international trade, where competition law shares the same objective, only within a national market. Dumping is defined by Article VI of GATT 1994¹³ as a discriminatory pricing practice, 'when a product is introduced into the commerce of another country at less than its normal value'.¹⁴ As a result, some governments particularly affected by anti-dumping duties (such as Korea, Japan or China) are trying within the WTO to link discussions on the introduction of competition rules and the ADA. They suggest in particular to reform anti-dumping rules of the WTO or even to replace them with competition rules.¹⁵

This suggestion originates from the premise that the fight against dumping can be dealt with in the framework of the general principles of competition and national procedures against discrimination on prices. They believe further that the absence of an effective national competition law promotes the situation where a domestic producer can benefit from an anti-competitive situation on its domestic market to develop a harmful dumping practice against the producers of the importing country. The substitution of an agreement would therefore remove the main cause of dumping by imposing an effective national competition policy.

¹¹Case C-358/89, *Extramet Industry v. Council* [1992] ECR I-3813; It was more recently confirmed by the CFI in case T-58/99, *Mukand et al. v. Council* [2001] ECR II-2521.

¹²*Extramet* Judgment, at paragraphs 14 and 17.

¹³General Agreement on Tariffs and Trade revised in 1994 after the Uruguay Round of Trade Negotiations.

¹⁴Article 2.1 of the Agreement on Implementation of Article VI of the GATT 1994 (ADA).

¹⁵These proposals are made within the Working Group on the Interaction between Trade and Competition Policy; in particular, see WTO Doc. WT/WGTCP/M/8, 10th June 1999 and WTO Doc. WT/WGTCP/M/14, 2nd July 2001.

The U.S. strongly opposes such a substitution mainly on the basis that anti-dumping and competition rules do not share the same goal and politic rationale.¹⁶ In fact, the discussion over the possible substitution of antidumping rules by competition law appears artificial. For example, the EU managed to regulate competition law and intra-community dumping through specific texts and provisions.¹⁷ Better than a substitution, the creation of a genuine ad-hoc supranational system of competition policy could resolve these issues, but there are still other difficulties to overcome.

(B) AVOIDING TENSIONS ARISING FROM THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS

I. THEORIES AND PRACTICES OF EXTRATERRITORIAL APPLICATION OF COMPETITION LAW: THE EU AND U.S. APPROACHES

More than an 'obstacle to further deepening of bi-lateral co-operation',¹⁸ the extraterritorial application of competition laws is one of the major problems caused by a lack of a supranational regulatory framework.

The proliferation of trans-national operations may lead to situations where several national competition laws can apply, for example when a trans-national operation has its effects located on several territories. The competition authorities concerned are often called upon to exceed the boundaries of the State on whose behalf they act, and enforce their national laws on other national territories under the effects-based theory (also known as the 'intended effects' test) creating obvious international tensions.¹⁹ As Geiger and Von Meibom explained, the problem is indeed that because of the trans-national nature of private actors, the practice of competition law reflects a continuing struggle between state sovereignty and the extraterritorial application of national laws. The internationalisation of competition policy is therefore seen as a means to address the difficulties arising from the extraterritorial application of national competition laws.

The most obvious case of extraterritorial application of competition law comes from the U.S. system. The interventional approach of U.S. Courts towards the conducts of undertakings situated outside the U.S. territory has long been analysed and criticised.

¹⁶See WTO Doc WT/WGTCP/W/88, 28th August 1998.

¹⁷See e.g. Council Regulation (EEC) No 812/86 of 14th March 1986 on protection against imports which are the subject of dumping between the Community of Ten and the new Member States or between the new Member States during the period throughout which the transitional measures laid down by the Act of Accession of Spain and Portugal apply (OJ L 78, 24.3.1986, pages 1–9).

¹⁸Alec Burnside and Yves Botteman 'Networking Amongst Competition Agencies' (2004) Int. T.L.R. 6.

¹⁹See Geiger, A. & Von Meibom, W. 'A World Competition Law as an Ultima Ratio' (2002) E.C.L.R. 446.

Burnside and Botteman rightly pointed out that the extraterritorial application of the Sherman Act, in particular through the ‘discovery procedure’, has limited the ability of the U.S. and EU governments to deepen their cooperation in the field of competition law enforcement.²⁰ It should however be added to their assertion that if the U.S. interventionist and extremist approach can be criticised, the EU’s soft conception of the effects-based theory is of no help to defuse the conflict.

In *Europemballage*²¹ the ECJ based its reasoning on the concept of the ‘economic entity’, meaning that the competence of the Commission relied on the fact that a company conducted its activities on the EC territory through a subsidiary, even though it was incorporated in a third State. The ECJ’s case-law evolved with the *Woodpulp* case.²² The Court had to decide on a case where the participants at a cartel had no physical presence, even in the form of subsidiary, in the EC territory. The court considered that it was the place where the agreement was being implemented which was decisive, not where it had been formed, irrespective of whether or not producers had appealed to their subsidiaries in the Community to make the contracts at the origin of the cartel at issue. According to the Court, ‘where producers established outside the Community sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market’.²³

The U.S. position allows the extraterritorial application of antitrust law if the practice takes effect or produces effects on American soil. The U.S. competition authorities have been recognised accordingly a discretionary power to apply U.S. antitrust law and can prosecute foreign companies on the basis of American law even when the anticompetitive restrictions do not directly impact on U.S. consumers.²⁴ In addition, the U.S. rules on discovery are criticised based on the fact that they may undermine EU procedures, especially in the context of leniency application.²⁵

A recent U.S. judgment allows tempering these concerns. The U.S. District Court for Northern California decided recently that communications made between a person and the European Commission pursuant to the latter’s leniency notice²⁶ cannot be produced on

²⁰Alec Burnside and Yves Botteman ‘Networking Amongst Competition Agencies’ (2004) Int. T.L.R. 1. However, it must be emphasised that one year later, Burnside adopted a more contrasted opinion on the topic, writing that ‘the most prominent bilateral relationship is of course that between the EU and the USA’, in Burnside, A. and Crossley, H. ‘Cooperation in Competition: A New Era?’ (2005) E.L.Rev. 234.

²¹Case 6/72, *Europemballage Corp and Continental Can Co Inc v. Commission* [1972] ECR 215, at paragraphs 14–16.

²²Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö and others v Commission of the European Communities (Woodpulp)* [1988] ECR I-5193.

²³*Woodpulp*, at paragraph 12.

²⁴Antitrust Enforcement Guidelines for International Operations, US Department of Justice and Federal Trade Commission, Apr. 1995, <http://www.usdoj.gov/atr/public/guidelines/internat.htm> (still in force as amended, 9/08/2008).

²⁵See Burnside, A. and Crossley, H. ‘Cooperation in Competition: A New Era?’ (2005) E.L.Rev. 252. The authors examine the effects of the discovery procedure in several landmark cases such as the cartel of vitamins, *Intel v. AMD*.

²⁶OJ C 45, 19.2.2002, pages 3–5.

discovery in the U.S.²⁷ If this decision means a decline of the discovery procedure, future co-operation will be easier which may prove a positive step. Indeed, unilateral tools such as the discovery procedure are useful, but there is always the risk that they will provoke hostility. In a hostile environment unilateralism is ultimately inefficient and politically dangerous. Therefore, further co-operation would facilitate the development of a global competition policy.

Burnside and Botteman commented that the differences between the 'implementation' doctrine applied by the ECJ and the 'substantial effects' doctrine applied by the U.S. antitrust authorities are 'of little significance and interest in practice'.²⁸ This position is questionable. Firstly, conflicts arising from the implementation of a State's competition law in another State actually show the importance that States attach to maintaining their sovereignty over their national territory. The differences between, in this case, the EU and the U.S. approaches therefore have a great practical impact.

Secondly, the political impact is even greater. The distinction existing between two conceptions over the territorial application of competition law directly affects State sovereignty. Indeed, handing jurisdiction to another State 'would involve a considerable sovereignty sacrifice because the exporting state would be relinquishing control over activities occurring within its borders probably involving its citizens'.²⁹ Often, the allocation of extraterritorial effect to a State standard is indeed nothing more than an attempt by a State authority to reach and impose its domestic law to a multinational company whose behaviour is contrary to its competition rules.

II. POLITICAL TENSIONS AND SUBSEQUENT ECONOMIC RISKS

DIRECT SOURCES OF CONFLICTS

The extraterritorial application of national competition laws is the source of many tensions between States because the simple application of a national law by a national court in a foreign territory with different competition rules poses obvious problems, which should prompt the adoption of international competition rules. Recent cases illustrate the difficulties that arise when several authorities are competent to apply the laws of different States. Thus, the well-known *Boeing-McDonnell Douglas* case almost led to a diplomatic crisis between the EU and the U.S.

Indeed, the U.S. authorities had approved the merger of these U.S. companies and had even lent their support to the operation, while the European Commission, anxious to maintain a sufficient level of competition in the market for air fleet, was not favourable. The green light given in *extremis* by the European Commission to the merger officially resulted

²⁷See the Order that was delivered by the US District Court of Northern California at: [http://www.cand.uscourts.gov/cand/judges.nsf/61fffe74f99516d088256d480060b72d/0f2bd10f52fd2f4e882572dc002faf0/\\$FILE/In%20re%20Rubber%20Chem%20Disc%20Order.pdf](http://www.cand.uscourts.gov/cand/judges.nsf/61fffe74f99516d088256d480060b72d/0f2bd10f52fd2f4e882572dc002faf0/$FILE/In%20re%20Rubber%20Chem%20Disc%20Order.pdf).

²⁸See above, note 18, Int. T.L.R. 7.

²⁹Sweeney, B. 'Export Cartels: Is There A Need For Global Rules?' (2007) J.I.E.L. 87.

from concessions made by Boeing, which accepted to abandon exclusive contracts with several airlines (especially those with American Continental and Delta Airlines).³⁰

The media and scholars later revealed that the diplomatic pressure of the American diplomacy and of some EC Member States (whose industries were receiving Boeing orders crucial to their survival) have played an important role in the Commission's final decision.³¹

NATIONAL RETALIATION

U.S. unilateral practices or extraterritorial application of competition law have led some States to go beyond diplomatic protests and to resort to retaliatory measures.³² These measures were particularly numerous within the framework of GATT 1947, where it was almost impossible to reach a binding settlement of disputes. Indeed, the dispute settlement mechanism was long and could easily be extended. Above all, it was too much based on a political consensus.

These retaliatory measures have adverse consequences for businesses and call for a supranational competition regulatory framework in order to defuse this vicious circle. Indeed, these conflicts are threatening legal certainty for companies because the public authorities may interpret national competition rules unexpectedly, succumbing to pressures from foreign governments and anxious to protect their national economy. Furthermore, they can cause a disruption of the international trade which may harm companies' commercial strategies. More generally, I think that the lack of any international competition policy increases businesses costs, which, for example, are forced to abide by the notification procedures of several competition authorities. Accordingly, they are sometimes cumulatively sanctioned by different authorities reaching amounts that are not always justified. Assuming that some international rule is necessary, the next question is whether existing international attempts and arrangements are adequate.

³⁰Commission Dec. IV/M.877/CE, 30 July 1997, Boeing/McDonnell Douglas: OJ L 336, 8th Dec. 1997, page 16. The GE-Honeywell and Gencor cases are also a good examples, see Case T-209/01 and T-210/01, *Honeywell v. Commission and General Electric v. Commission* [2005] ECR II-5527 and II-5575; Case T-102/96, *Gencor v. Commission* [1999] ECR II-753; See also Donna E. Patterson & Carl Shapiro 'Transatlantic Divergence in GE/Honeywell: Causes and Lessons' (2001) *Antitrust*, pages 18-26.

³¹See Steve Rolinitis, Illinois State University, 'The Boeing-McDonnell Douglas Merger', 17/04/1997, available at <http://www.econ.ilstu.edu/dloomis/320web/steve.PDF> (25/08/2008); 'Case Study: The Boeing-McDonnell Douglas Merger' in *Electronic Journals of the U.S. Information Agency*, Vol. 4, No. 1, February 1999, available at <http://usinfo.state.gov/journals/ites/0299/ijee/toc.htm> (25/08/2008).

³²These measures are often unilateral trade sanctions which again demonstrate the ties between trade rules and competition policy.

3. ATTEMPTS AND FAILURES TO DEVELOP INTERNATIONAL RULES OF COMPETITION

Numerous proposals were made within various fora (scholars, international organisations, States' institutions) (A). However, and accordingly, numerous difficulties jeopardised the success of these attempts (B).

(A) FROM MUNICH TO DOHA: PROJECTS AND PROPOSALS

I. PROJECTS AND PROPOSALS FROM SCHOLARS

Scholars were the first group to develop ambitious proposals on the form that the internationalisation of competition policy should take. Thus, some have proposed supranational competition rules. These international rules, hierarchically superior to national rules, would bind the involved States to commit themselves to respect and to include them in their national legal system. At the same time, they would accelerate a movement of international harmonisation of competition law in each State. Others favoured a more flexible approach.

Hence, the so-called 'Group of Munich' had in 1993 proposed the adoption of a Draft International Antitrust Code (DIAC).³³ This group of scholars, mainly German, elaborated an original project since it did not create a supranational directly applicable system of competition law but it only compelled the signatory States to abide by some competition standards as part of their domestic legislations. The code incorporated the GATT principle of national treatment and sought to develop a minimum set of rules that Member States would commit themselves to transcribe into their national legislation, which would be directly applicable in those who had not implemented. Obviously, this direct applicability was inspired by the European Community system. Possibly, this last feature ultimately relegated the project to a mere attempt.

In particular, an international agency would be established to ensure that national authorities are effectively implementing the principles of the DIAC. Again, it can be argued that such an International Antitrust Authority was inspired by the European Commission. Moreover, the DIAC was only applicable to those cases involving an international dimension, the same way as the European Commission only is competent over cases having a community dimension. Since the Community system serves as a basis to this initiative, it would be logical to think that the same mechanisms of integration may apply. Therefore, such an international antitrust code could involve a 'spill-over effect'³⁴ which would foster the elaboration of competition laws based on the same standard, ultimately creating a global harmonisation in the field. On the one hand, it can be argued that it would represent the best theoretical opportunity to achieve something genuinely original. On the other hand, it is clear that there are yet too many obstacles to such an idealistic outcome, which will be demonstrated below.

³³The Members of this Group were in alphabetical order J. Drexler, W. Fikentscher, E. Fox, A. Fuchs, A. Heineman, U. Immenga, H.P. Kunz-Hallstein, E.U. Petersmann, W.R. Shuep, A. Schoda, S.J. Soltysinski, L.A. Sullivan.

³⁴On this particular point, see Peter Lloyd 'When Should New Area Be Added to the WTO?' (2005) World T.R. 275.

II. PROPOSALS AND ATTEMPTS WITHIN INTERNATIONAL ORGANISATIONS

There have been many initiatives within international organisations to establish international rules on competition. The Havana Charter was one of the most impressive projects given its context of elaboration. Based on the concept of comprehensive rules covering both State and private practices, it devoted a whole chapter to restrictive business practices.³⁵ The Charter was never ratified and was followed by the more modest GATT 1947, which examined the trade-competition interactions several times in the 1960s but with no concrete result. In the 1970s an ersatz of a Competition Code was finally negotiated within the framework of UNCTAD³⁶ at the request of developing countries, but its provisions are not binding.³⁷ UNCTAD therefore contributes, albeit in a limited way, to promote a culture of international competition.³⁸ Similar to the OECD, it encourages cooperation and dialogue between the governments of developing countries and developed countries to promote the establishment of effective national competition rules and policies.

The OECD indeed also carried out an important prospective work in the area of international competition policy. It has adopted a recommendation that includes a non-binding but fully functional system of notification between competition agencies. More importantly, the Recommendation includes a voluntary dispute settlement procedure, which resembles the GATT's dispute settlement mechanism, but has never been used.³⁹ However, the OECD is based on a system of voluntary cooperation between Member States. Its recommendations are not binding. It has no dispute settlement mechanism and furthermore, it is not universal.

At the WTO level, there is no comprehensive agreement on competition law but a constellation of specific, sectorial provisions that are relatively unutilised. For many commentators, the WTO represents the best opportunity to develop a comprehensive international competition policy. One could argue that this is doubtful after the failure of the Doha Round on this particular topic, however it seems that the universality of the WTO dispute settlement mechanism and the possibility to elaborate sectorial competition rules invite us to narrow the possibilities to the sole WTO framework. As Gerber recently emphasised,⁴⁰ what really matters and should be discussed at the WTO level, is the lack

³⁵This Charter foresaw the establishment of an International Trade Organisation (Chapter V).

³⁶United Nations Conference on Trade and Development, see www.unctad.org.

³⁷UN Doc. A/35/48 (1980) '*Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*'.

³⁸See Brusick, P. 'UNCTAD's Role in Promoting Multilateral Co-operation on Competition Law and Policy' (2001) 1 *World Competition*, page 23.

³⁹Recommendation of the Council Concerning Cooperation between Member countries on Anticompetitive Practices affecting International Trade, C (95) 130/final, especially pages 8 to 10 for the conciliation procedure.

⁴⁰Gerber, D.J. 'Competition Law and the WTO: Rethinking the Relationship' (2007) *J.I.E.L.* 707.

of confidence in WTO norms, practices and procedures being based on a robust concept of 'community'. Professor Luca Rubini further added that:

'the fostering of this [Community] dimension, based on the generalised respect of rights, the reasonable alignment of rights/incentives, and the awareness of shared rights/interests at the political/institutional and economic level, is a necessary precondition for any successful initiative in the field of international competition law in the WTO'.⁴¹

All these limited initiatives reflect the need for a more binding system that is not based on consensus. Some States have also tried to propose the creation of original systems to internationally regulate competition. Some are too much idealistic and clearly will never come to existence. Some are interesting, and will be presented below.

III. STATE AND 'LIKE-STATE' PROPOSALS

POSITION OF THE EU

The position of the EU reflects an evolution. In its 1996 Communication titled 'Towards an international framework of competition rules'⁴² the Commission clearly shows the position that it wished to promote at the Singapore Conference;⁴³ complementing the existing WTO framework on anti-competitive practices as a preliminary step to more ambitious proposals based on the Community model of competition policy. It proposed a progressive approach in favour of the adoption of a framework agreement, which would commit all WTO States to the adoption of effective domestic competition laws and internal structures. Ultimately this would 'promote equal conditions of competition world-wide; facilitate closer cooperation between competition authorities and pave the way for the coordination of international enforcement activity; promote a gradual convergence of competition laws'.⁴⁴

The Commission also proposed the creation of an instrument of cooperation between competition authorities allowing them to exchange information, and to notify their investigations to each other. Finally, the Commission considered that the WTO dispute settlement mechanism could be used when a country failed to adopt appropriate competition rules or to respond to a request for an investigation by another country. Sadly, the subsequent positions adopted by the Commission in its contribution to the WGTCP appear progressively less ambitious.⁴⁵ They generally focus on the advantages

⁴¹Martin Taylor 'International Competition Law – A New Dimension for the WTO' Publication review by Luca Rubini (2008) E.L. Rev. 448, emphasis added.

⁴²Communication from the Commission to the Council, 'Towards an international framework of competition rules' COM (96) 284 final, 18.06.1996, see http://aei.pitt.edu/3971/01/000109_1.pdf (11/08/2008).

⁴³First WTO Ministerial Conference held in Singapore between 9th and 13th December 1996.

⁴⁴Above, Note 30, at page 10.

⁴⁵Communications of the European Community and its Member States to the WGTCP, WT/WGTCP/W/193, 1st July 2002; WT/WGTCP/W/184, 22nd April 2002; WT/WGTCP/W/175, 26th July 2001; WT/WGTCP/W/160, 14th March 2001; WT/WGTCP/W/152, 25th September 2000;

that developing countries would benefit if such an international competition law system were to be established.

The European Commission is now in favour of signing a multilateral framework agreement on competition that would require Member States to respect the fundamental principles of the WTO such as transparency, non-discrimination and adoption of substantive rules limited to the prohibition of certain practices such as hardcore cartels.⁴⁶ In contrast it is interesting to point at the recent opinion of the European Economic and Social Committee, which advocates a 'planetary State governed by the rule of law' with 'the EU as an example for others to follow'.⁴⁷ Although not only focused on competition law and policy issues, this opinion seems to advocate a more hegemonic attitude of the EU than ever. An easy comparison can be drawn between this position and that of the U.S., which confirms the previous remark made about the political impact resulting from the differences between two conceptions over the territorial application of competition law, and its link with the principle of sovereignty.⁴⁸

POSITION OF THE USA

The U.S. government has called for a deepening of voluntary cooperation between competition authorities within the framework of bilateral and multilateral relations.⁴⁹ But it takes a reluctant attitude on the establishment of an agreement on competition policy within the WTO. The U.S. considers that it would be difficult to reach such an agreement taking into account the diversity of countries represented and the heterogeneity of their legislations⁵⁰ and it firmly rejects the application of the WTO's Dispute Settlement Understanding in this matter.

Moreover, as Griffin highlighted, such an agreement should be a compromise between diverging national interests and be differentiated according to the policies covered by the WTO.⁵¹ This position means that an agreement on competition rules should be based on the lowest common standard, and would somewhat reflect a race to bottom rather than an improvement.

WT/WGTCP/W/140, 8th June 2000; WT/GC/W/191, 2nd June 1999; WT/WGTCP/W/78, 7th July 1998; WT/WGTCP/W/62, 5th March 1998; WT/WGTCP/W/34, 2nd March 1998; WT/WGTCP/W/45, 24th November 1997; WT/WGTCP/W/1, 11th June 1997.

⁴⁶See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions, 'Global Europe Competing in the World' COM(2006) 567 final.
⁴⁷Opinion of the European Economic and Social Committee on 'The Challenges and Opportunities for the EU in the Context of Globalisation' OJ 2007/C 175/16.

⁴⁸See *above*, Section 2 (B) I.

⁴⁹See positions WT/WGTCP/W/204, 15 August 2002; WT/WGTCP/W/142, 3rd August 2000; WT/WGTCP/W/116, 25th May 1999.

⁵⁰WT/WGTCP/W/203, 15th August 2002.

⁵¹Griffin, J. 'The WTO Study of the Interaction Between Trade and Competition Policy: Timely and Controversial' (1997) 2 Int.T.L.J., page 39.

Indeed, in the same way it happens in the U.S. in company law with the 'Delaware Effect', some States would go beyond the minimum standard and others would stay above, offering a 'competition law forum shopping' where no harmonisation would be possible. In fact, such a system could merely work only if a principle of mutual recognition, as it exists in the EU, were to be imposed to everyone. The Most Favoured Nation Principle enshrined in Article I of the GATT 1994 agreement could serve as a basis for the mutual recognition, but it seems impossible given the limited integration currently existing at the WTO level.

(B) OBSTACLES TO THE DEVELOPMENT OF INTERNATIONAL UNIFORM RULES OF COMPETITION

Alongside the attachment of the States to the principle of sovereignty, which constitutes the current basis of the international legal order and has the effect to merely give a relative effectiveness to national and international courts because of a lack of private enforcement, other obstacles may hinder the elaboration of an international system of competition policy and have to be overcome.

I. DIVERSITY AND INCOMPATIBILITY OF LAWS AND NATIONAL INTERESTS

It was noted by Gerber that 'discussions of the potential role of competition law in the WTO often proceed as if the meaning of 'competition law' were self-evident. (...) Few address the question 'what kind of competition law would be introduced and what would the probable consequences of its operation be?'.⁵² A major obstacle to the adoption of a uniform international competition policy is indeed the cultural and historical heritage resulting in the different attitudes adopted by different countries towards economic power, freedom of contract, commercial law or equity. On top of these cultural differences appear differences in political or economic priorities established in accordance with objectives that meet the needs of each State at a particular time. Three main areas allow demonstrating the diversity and incompatibility that must first be tackled before envisaging a global system of competition policy. A comparison between the EU/U.S. systems provides a good example.

Firstly, concerning the method of analysis, it must be emphasised that the parameters taken into account in assessing practices or transactions subject to monitoring may vary according to the objectives pursued through competition laws. Thus, in recent decades economists have influenced competition policy. A specific character of the American analysis is based on the use of economics with the Herfindhal Hirschman Index (HHI), which takes into account the level of market concentration and its foreseeable increase after the proposed transaction to determine if it should be authorised. The EU authorities have traditionally followed a less economical approach than their U.S. counterparts; however following the modernisation process of competition law in the EU, the Commission now

⁵²Gerber, D.J. 'Competition Law and the WTO: Rethinking the Relationship' (2007) J.I.E.L 707.

uses a more economic based approach.⁵³ Concerning the control of concentrations, the U.S. authorities use the 'substantial lessening of competition' criterion in assessing the compatibility of a merger with existing rules. Under the EC Merger Regulation the Commission assesses if the operation threatens to 'significantly impede effective competition'.⁵⁴ Both tests have different consequences. Where the U.S. test is much wider and does not distinguish amongst the practices at stake, the European test allows relevant economic distinctions between coordinated and non-coordinated effects (unilateral price increases...).

Secondly, the incompatibilities are more obvious concerning the practicalities of implementation of competition policies. Although the European Commission now promotes a decentralised implementation of Community competition rules,⁵⁵ the European system is traditionally more centralised than the American system. The implementation of the EU competition law is entrusted mainly to the Commission and the role of Member States' authorities is comparatively reduced. In the U.S., the implementation of antitrust law is divided between the Department of Justice (DOJ), the Federal Trade Commission (FTC) and the States. Considerable differences also exist in terms of procedure. In particular, EC procedures are more informal than the U.S. antitrust law and procedural guarantees are less developed: The sanctions imposed by the DOJ have to be imposed by a judge, unlike in the EU where the Commission sometimes has a dual role of judge and party.⁵⁶

Finally, in terms of sanctions, the differences are again obvious and reflect different political, structural and economical approaches. Contrary to Community law, violations of Sections 1 and 2 of the Sherman Act may constitute crimes and be punished as such. The sanctions are particularly heavy and may result in imprisonment. The U.S. competition authorities are indeed convinced of the effectiveness of such a system in the fight against cartels, which is exemplified by the fine of 911 million dollars imposed in the Vitamin cartel case.⁵⁷ On the contrary, Article 23(5) of EC Regulation 1/2003 provides that the fines imposed by the Commission pursuant to the Regulation 'shall not be of a criminal nature'.⁵⁸

This is explained by the fact that Member States have not transferred their competence in criminal matters to the Community, which remains under the principle of national procedural autonomy. However, recent years have seen a clear shift in the Commission's

⁵³Especially in the field of vertical restraints, see Commission Regulation (EC) No 2790/1999 of 22nd December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, pages 21-25).

⁵⁴Council Regulation (EC) No 139/2004 of 20th January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, pages 1-22) Article 2.

⁵⁵The modernisation of EC competition law through Regulation 1/2003 was commented as promoting a decentralised enforcement of competition law.

⁵⁶See Jones & Sufrin, *EC Competition Law: Text, Cases and Materials* (3rd ed.) OUP, 2007, Chapter 1, page 21.

⁵⁷*USA v. Hoffmann La Roche Ltd*, Criminal No. 3: 99-CR-184-R, 20th May 1999.

⁵⁸Council Regulation (EC) No 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pages 1-25).

approach towards the American antitrust practice, especially through the imposition of heavier fines. In the Vitamin cartels case the Commission thus imposed a total fine of 855.22 Million Euros, including a fine of 462 Million Euros imposed to Hoffman-La Roche.⁵⁹

This approximation movement is not meaningless and testifies to the current awareness to overcome existing legislative disparities in order to develop a close co-operation between NCAs and to ultimately elaborate a comprehensive international competition policy. On top of these obstacles, the adamant conduct of developing countries towards an international competition policy further hinders the debate.

II. DEFIANCE OF DEVELOPING COUNTRIES TOWARDS A UNIFORM COMPETITION LAW SYSTEM

Generally, private anticompetitive practices have long been a concern for developing countries. As the turnover of many international companies has come to surpass the GDP of middle size developing countries, the latter have seen a growing need for a minimum of discipline on the formers' conduct in their markets. As a result the UNCTAD competition code mentioned above was elaborated, but there was and still is a lack of participation and co-operation of developing countries in the process of elaboration. How could such reluctance be explained?

Aditya Bhattacharjea emphasised the conflict existing between the developing countries perspective and others WTO Members.⁶⁰ According to his analysis, developing countries oppose a 'one size fits all agreement' meaning that they wish to give a greater importance to policy objectives other than the promotion of competition, which would result in a rigid agreement probably advantaging developed countries interests over developing countries concerns. Since 2001, developing countries have consistently pointed to the fact that the development of a multilateral framework on competition policy would be acceptable provided that it fulfilled several conditions.⁶¹

These included integration of the development dimension in all of its component parts; application of special and differential treatment in a more effective and consistent way; provisions relating to flexibility and the putting in place of provisions for technical assistance for countries that do not have legislation on competition policy; the existence of voluntary cooperation between national competition authorities and safeguards for national strategic objectives in the form of exemptions. Moreover, developing countries are fiercely opposed to a framework based on 'voluntary' co-operation (mainly advocated by the U.S.), considering that developed countries would not assist or inform their investigators in a co-operative way. In general, the arguments of developing countries are backed up by the fact

⁵⁹See IP/01/1625 21 Nov. 2001. This fine was the first of a long lasting deterrence practice, See Morten Hviid and Andreas Stephan 'The Graphite Electrodes Cartel: Fines Which Deter?' (2007); Wils, W. P. J. 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 World Competition, pages 183-208; Camilli, E. L. 'Optimal Fines in Cartel Cases and the Actual EC Fining Policy' (2006) 29 World Competition: Law & Economics Review, pages 575-605.

⁶⁰Aditya Bhattacharjea 'The Case For A Multilateral Agreement On Competition Policy: A Developing Country Perspective' (2006) J.I.E.L. 293.

⁶¹See Report of the WTGTCP (2001) WT/WGTCP/5, at paragraph 16; (2002) WT/WGTCP/6, paragraphs 17-20, 25-6, 70-76; (2003) WT/WGTCP/7, paragraphs 17, 24 and 38.

that they usually lack resources and experience in competition law. The lack of experience explains that they ask for an 'assistance agreement' on competition policy rather than a proper multilateral framework in which they could be marginalised. Finally, Bhattacharjea emphasises that the lack of resources explains the reluctance of developing countries towards the GATT/WTO dispute settlement mechanism, which may result in heavy trade sanctions.

4. TOWARDS A COOPERATION OF NATIONAL COMPETITION AUTHORITIES: THE CHOICE OF AN INTERMEDIATE APPROACH

Having analysed the reasons that underpin the internationalisation of competition policy and the historical and practical attempts to develop an international regulatory framework in this field, it is possible to formulate some remarks about the ideal system of international competition policy. In this respect, only two options appear to be acceptable both by scholars and authorities. They are either minimalist or extremist (A). It can be argued that the best solution rests on a genuinely new system, not necessarily within the WTO albeit based on it, which would borrow some features that have proven to be effective in the existing international practice (B).

(A) THE MINIMALIST AND EXTREMIST APPROACHES⁶²

The minimalist approach is advocated by the U.S. authorities and many American scholars. It is consistently explained and reiterated through the numerous contributions of the U.S. government to the WTO's DGTCF. The U.S. contest the opportunity to develop a binding multilateral framework within the WTO and are rather favourable to use the existing voluntary mechanisms for bilateral and multilateral cooperation including those established under the OECD. Taking forward their experience of bilateral cooperation, the U.S. authorities prefer to expand bilateral cooperation agreements with countries that already have antitrust legislation, and provide assistance in order to encourage other states to adopt their own competition laws. These agreements could then serve as a useful basis for seeking a convergence of national laws.

It is unlikely that this position could be translated into practice by a significant step forward. The dangers and difficulties of a unilateral application of antitrust law as well as the limitations of existing mechanisms on bilateral and multilateral cooperation and their failure to establish a credible foundation of a competitive international order were demonstrated above. In addition, such a position remains trapped in a nationalist vision animated by the desire to project at the multilateral level U.S. standards incorporated in the bilateral treaties that bind the U.S. to other States. The risk of a 'disguised unilateralism' could always resurface. Furthermore, it seems idealistic to establish a global competition policy or to

⁶²The rationale of my classification is the degree of harmonisation that would be achieved. The minimalist approach therefore refers to a minimalist harmonisation or to a situation where no harmonisation is possible at all. The extremist approach refers to a system where one single path is designed for everyone to follow, even developing countries.

expect a real convergence of national laws solely by means of the principle of positive comity or by means of voluntary cooperation between States. In addition, it is hard to see how a global initiative on competition policy could be, at first, limited to so few States, even if they are economically the most powerful. In fact this position appears dangerous.

This approach is based on a neo-liberal vision of competition law, which reduces its goal to a bare minimum, namely the elimination of State restrictions to competition impeding free access to the domestic market.⁶³ Accordingly, competition policy is not in itself worthy of being protected, contrary to trade liberalisation which remains, under this vision, the fundamental value. Unlike domestic laws that seek to strike a balance between trade and competition, an international legal order according to this approach would only serve the interests of free trade,⁶⁴ hence explaining the adamant position of developing countries mentioned above.

It has to be recalled that trade and competition, although closely related, have different purposes and goals and some areas continue to drastically separate them, sometimes creating a genuine antagonism. The multilateral trading system as resulting from GATT / WTO is a set of standards aimed at liberalising international trade and ensuring that governmental measures have not negatively affected foreign competitors within foreign markets. To serve this aim, the principle of market access puts primary emphasis on ensuring national treatment and non-discrimination between foreign and domestic competitors. However competition policy, taken in an objective sense, fulfils a regulatory purpose, trying to organise the competition on the market, which is not limited to the sole interest of competitors. An international competition policy, having regard to its purpose, would aim to be the regulator of private economic powers. Competition law is indeed more focused on private anticompetitive practices than on State measures.

The other extreme would aim at creating a genuine international competition legal order. This has already been proposed through the DIAC presented above. This proposal is undoubtedly the most audacious insofar as it seeks to create a true international competition legal order with the establishment both of an international competition authority and of a system of dispute settlement.

However, it has to be rejected. Although such a system represents, an ideal model to achieve, it must be recognised that States are not yet ready to support it, for all the reasons explained above, essentially because of its consequences on national sovereignty. Moreover, it is clear that such an approach would result in designing a single path for everyone to

⁶³Andreas Weibrecht 'From Freiburg to Chicago and Beyond – The First 50 Years of European Competition Law' (2008) E.C.L.R. 29(2), 81-88; R. A. Posner, *Antitrust Law* (2nd ed.) University of Chicago Press 2001, 24–6; Jones & Sufrin, (*above*) page 23.

⁶⁴Bork, R.H., *The Antitrust Paradox: A Policy at War with Itself*, Basic Books, 1978, (reprinted with a new Introduction and Epilogue, 1993), 426–9, quoted in Jones & Sufrin, (*above*) pages 25–26.

follow, without taking into account the needs and concerns of developing countries and the special and differential treatment, which is essential in the current international trade system.⁶⁵ It is thus interesting to consider a middle-way.

(B) THE DEVELOPMENT OF AN ORIGINAL 'MULTILATERAL AGREEMENT ON COMPETITION POLICY' (MACP)

I. THE MAIN CHARACTERISTICS OF THE MACP

As explained above the most representative proponent of this middle-way is the EU. Following the EU's contributions to the WGTCP the best opportunity appears to be the opening of negotiations between States in order to establish a multilateral agreement on competition whose content would consist of four elements:

- The definition of common basic principles within the WTO in order to ensure the effective adoption of competition laws by all WTO Members, including developing countries, and their effective implementation in accordance with the principles of transparency and non-discrimination;
- The adoption of substantive fundamental competition rules by seeking a consensus among States on a number of particularly harmful practices (hard-core cartels, abuses of dominant position...);
- The establishing of a multilateral cooperation between competition authorities, which includes the achievement of bilateral cooperation agreements, including those concluded between the EU and the U.S. with non-mandatory application of the principle of positive comity;
- The setting up of a system of dispute settlement and the question about the possibility of adapting the current WTO system to competition issues. Some authors seem to think that it would not be the most complicated step in this process as, according to them, the WTO has already held an antitrust case.⁶⁶

This system would be triggered when a State fails to comply with its international commitments stemming from the Multilateral Agreement (such as the obligation to adopt a competition law and ensure transparency and non-discrimination in the implementation of this Act). It would therefore look like the European system of implementation of Community law, with a possible action for enforcement brought by other Members, not by a supranational institution which would ensure a crucial equality between developed and developing countries.

⁶⁵Hunter Nottage 'Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment' (2003) J.I.E.L. 23.

⁶⁶Eleanor M. Fox 'The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition' (2006) J.I.E.L. 9 (2), 271-292; Jung Y. 'Modelling a WTO Dispute Settlement Mechanism in an International Antitrust Agreement: An Impossible Dream?' (2000) J.W.T., page 89.

The best aspect of this approach is its practicality. It is a credible basis for a short and medium term development of the roots of a genuine internationalised competition policy, since it promotes the search for common binding principles and the use of a multilateral dedicated system of dispute settlement. This system will be detailed below.

II. THE FIRST AND SECOND PARTS OF THE MACP: THE SEARCH FOR COMMON CORE PRINCIPLES

Firstly, the general framework of the multilateral agreement should incorporate the basic principles of the WTO that are transparency, national treatment and most-favoured-nation treatment.⁶⁷ These would constitute the first part of the MACP. Especially concerning the principle of transparency, it would compel Member States to disclose competition-related laws, regulations and legal and administrative decisions. On top of this obligation, Member States could agree to notify to the WTO any other document contributing to further transparency, which could foster developing countries to trust their industrialised partners. This would be an adaptation of the existing Article X of the GATT, which requires States to promptly publish all measures affecting international trade and to administer these measures in a 'uniform, impartial and reasonable' manner.

Transparency could be further enhanced by more cooperation between NCAs. Burnside and Botteman have emphasised the fact that networking amongst competition agencies is a good palliative to the absence of a world competition policy.⁶⁸ They clearly explain that voluntary 'bilateral cooperation' may result in a 'multilateral convergence'; yet they also contend that there is not enough cooperation to achieve this vision. It could be possible therefore to turn the problem upside-down and use competition networks not as a catalyst but as a complementary tool for the enforcement of the MACP.

Moreover, it is clear that these principles recognise certain rights and guarantees to private actors. National treatment and most-favoured-nation treatment⁶⁹ in the context of competition policy would indeed guarantee a form of equality amongst domestic and foreign industries and companies. In this respect, such a practice could on a medium term basis result in a principle of mutual recognition as it exists within the EU, where foreign and domestic companies would benefit from the same procedural rights and remedies before NCAs. The development of the private enforcement of the MACP would only be a practical consequence of these principles, where private actors, both domestic and foreign, could invoke a violation of competition rules and eventually claim compensation.

⁶⁷See in this respect the WTO's Working Document on Competition W/WGTCP/W/114 'The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency'.

⁶⁸Alec Burnside & Yves Botteman 'Networking Amongst Competition Agencies' (2004) *Int. T.L.R.* 1.

⁶⁹Respectively Articles III and I of GATT 1994.

Secondly, the core substantive principles of the MACP would apply directly on these private actors in order to create a binding discipline and to combat international anti-competitive practices. It is not the purpose of this article to discuss which substantive rule should be included and which should not (and only a few examples will be made) but it is clear that these substantive principles would represent the most ambitious part of the MACP as they would be the fruit of the convergences resulting from the application of the Agreement.

At first, only few principles would be incorporated into the Agreement. A 'compromise by drafting' would settle disputes by the use of ambiguous language. For example, despite the divergences existing between competition laws, there is a unanimous fight against hard-core cartels. Therefore, common substantive rules would be easy to agree on this particular topic, especially in the light of OECD's recommendations.⁷⁰ The same reasoning can be applied to export cartels. They are a form of agreement made between domestic companies in order to limit competition on foreign markets by fixing export prices or allocating markets.⁷¹ States are usually more lenient towards this practice because it allows penetrating foreign markets and it has no harmful effect on consumer welfare. However, as Sweeney emphasised, several States expressed, within the WGTCP, the need for an export-cartel rule.⁷² On the basis of such a rule, export cartels could be condemned *per se* as contrary to the common core principles enumerated in the first part of the MACP (especially the principle of transparency). Other common substantive rules on abuses of dominant positions and mergers could later complete these examples.

To this purpose, a 'clause of progress' would ensure the flexibility and easy revision of the Agreement in order to add new substantive provisions (agreed throughout a timely implementation of the MACP and competition networking) especially concerning mergers and abuses of dominant positions on which a consensus is still very hard to attain. An obligation to periodically assess the need to include new substantive rules would ultimately lead to the elaboration of an International Competition Code. In addition, insofar as the MACP contains binding elements it is possible that a 'derogation clause' may be considered necessary, for a number of reasons. In some cases the essential interests of a Member State may indeed be felt to outweigh the enforcement interest of another Member. As highlighted by the European Commission in its 1996 communication, GATT/WTO Members are allowed in exceptional circumstances to derogate temporarily from their obligations and take safeguard action to protect their domestic industries. Such an approach could be envisaged in competition policy, 'provided measures taken are time-limited, justified, non-discriminatory and transparent'.⁷³

⁷⁰See OECD C(98) 35/Final.

⁷¹Sweeney, B. 'Export Cartels: Is There a Need for Global Rules?' (2007) J.I.E.L. 10(87).

⁷²Communication from India' WT/WGTCP/W/216 (2002) at paragraph 3; 'Communication from China' WT/WGTCP/W/241 (2003) at paragraph 6. See also 2003 WGTCP Report, at paragraph 110, noting comments by South Africa; Report of Meeting by the Secretariat, WT/WGTCP/M/22 (2003) at paragraph 45, noting comments by China.

⁷³COM (96) 284 final, 18.06.1996.

III. THE THIRD PART OF THE MACP: THE CREATION OF A COMPETITION POLICY MONITOR (CPM)

Disputes concerning the compliance of national competition laws to the obligations of States set out in the agreement on competition could be resolved according to existing WTO procedures, as it aims at examining the conformity of a national law with the standards of the agreement or at assessing whether the Act is applied in a transparent manner by national authorities.

However, this compliance would still not be guaranteed because it is clear that the dispute settlement mechanism of the WTO was originally set up to resolve trade related disputes between Member States and it does not always take into account the dimension of competition and the specificity of international conflicts in this area. Moreover, concerning the enforcement of competition law, the WTO dispute settlement mechanism is deprived of several useful tools such as the possibility to address injunctions or recommendations aiming at improving the behaviour of companies, the possibility to inflict fines or lump sums, and crucially, the total absence of a private enforcement scheme. In fact, the WTO system is not adapted to the specificity of competition law and policy, especially concerning the high technicality of the subject and the sanctions that may be ordered, since they essentially consist in allowing a State the possibility to take retaliatory measures. Finally, the multilateral framework of the WTO is not concerned at all with illegal practices committed by private operators.

Thus, the creation of a dedicated monitoring mechanism would allow establishing a framework for a collective and periodic evaluation of the Member States competition policies, including those which have not fulfilled their commitments arising from the application of the MACP. It has been emphasised that a coherent interpretation and application of international competition rules can only be achieved by a single independent authority.⁷⁴ A Special Secretary, with a recognised expertise on competition law and policy could be appointed CPM to prepare periodic reports on the application of the MACP by the States and on the compatibility of their national competition policies with the multilateral agreement. The publication of these reports accompanied by non-binding recommendations would ensure the necessary political pressure –as it exists in the EU with enforcement actions.⁷⁵

These reports could be made public and also contain non-binding recommendations for these failing States. It would be to ensure compliance by Member States of their obligations by making more transparent their regulatory practice and the practice of their national authorities. It would therefore be a complementary mechanism rather than the competitor of the WTO dispute settlement mechanism.

⁷⁴Nicolaides, P. 'For a World Competition Authority: The Role of Competition Policy in Economic Integration and the Role of Regional Blocs in Internationalizing Competition Policy' (1996) *J.W.T.* 30(4), page 131.

⁷⁵Article 226 EC, although the possibility of fines introduced by the Treaty of Nice added a repressive flavour to this system.

5. CONCLUSION

There is evidence to support the claim that private barriers to entry are restricting the growth of international trade. This problem is expected to increase as businesses become more globalised and as tariffs continue to be reduced. Some of the most effective private barriers to entry –both horizontal and vertical– are said to be anti-competitive restraints. As explained in this article, existing unilateral, bilateral and multilateral devices have had only limited success against these barriers. The Doha Round of Trade Negotiations apparently also failed to address this important issue, and the current situation is certainly unsatisfactory, but it now clearly calls for a new system of international competition policy that could be designed within the WTO or in a distinct but closely related framework.

As Geiger and Von Meibom rightly pointed out, 'as desirable as a World Competition Law may be from the economy's perspective, its realisation in the short term and in one rush seems to be impossible'.⁷⁶ The elaboration of a Multilateral Agreement on Competition Policy therefore seems to be a well-balanced solution that would, on the one hand, compel the signatory States to adapt their competition legislations to the common basic principles agreed in the Agreement; on the other hand, they would cooperate in order to define common substantive rules so that a progressive internationalisation of competition policy can be achieved not being hindered by a binding and stringent harmonisation process.⁷⁷

⁷⁶E.C.L.R. 2002, 23(9), 453.

⁷⁷See on this particular topic: William Kingston 'Why Harmonisation is a Trojan horse?' (2004) E.I.P.R. 26(10), 447–460.

The new Commission settlement procedure for cartels: A critical assessment

ANDREAS SCORDAMAGLIA*

In view of its significant impact on cartel enforcement, the article attempts to describe and assess, from a legal, empirical and competition policy perspective, the newly introduced Commission Settlement Procedure with regard to the very goals it is purported to serve, i.e. legal certainty and procedural/cost efficiency.

1. INTRODUCTION

The introduction of a new set of expediting procedural rules in the area of public cartel prosecution should be viewed against the background of an ever more successful leniency programme that is constantly testing the Commission's administrative capacity. The increasing number of immunity applications has created an expanding backlog of cartel cases that would need to be dealt soon, if the goal is still to achieve timely and effective cartel enforcement. It is in view of this threat that, few months after taking office, Commissioner Neelie Kroes warned in her 'first hundred days' inaugural speech that the Commission 'risks becoming the victim of its own cartel-busting success'.¹

To face this administrative overload, she proposed an internal reorganization promoting a 'simplified handling of cases' and alluded to a 'direct settlement' procedure that would use enforcement resources more efficiently and effectively. She expressed the view that if,

'despite the efforts to improve anti-cartel enforcement, the Commission is not able to deliver swift enforcement with timely punishment, we may need to look at how some form of plea bargaining procedure could bring advantages in the context of European competition law'.²

Thus, the Commissioner hinted that the American model of 'plea bargaining' could be used as a blueprint for developing such a procedure in Europe. It is recalled, however, that similar procedures do exist in some Member States, such as in France,³ the UK and Germany.

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¹ Commissioner Neelie Kroes Speech/05/205, 'The First Hundred Days', 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005, International Forum on European Competition Law, Brussels, 7th April 2005.

² Above, Neelie Kroes Speech/05/205.

³ In France, Art.L.464-2 III and R.464-4 of the Code de Commerce provides for a procedure called '*procédure de non-contestation des griefs*', and in Germany the *Bundeskartellamt* adopted a procedure leading to a consensual fining decision (*einvernehmliche Bußgeldbescheid*). For a comparative approach see: Faruga J., '*Settlement proceedings in competition law: European comparisons - Les procédures de transaction en droit de la concurrence esquisse de droit comparé*' (2008), vol.1, Concurrences ; Burrichter J. & Zimmer D.J., '*Reflections on the Implementation of a 'Plea Bargaining'/Direct Settlement' System in EC Competition Law*', in Ehlermann C.-D. & Atanasiu I., '*European competition law annual 2006*', (2007) Hart, Oxford, page 612; Waelbroeck D., '*Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?*' (2008), GCLC Working Paper 01/08, page 32.

'Plea-bargains' or 'direct settlements'⁴ essentially consist in a procedural scheme that allows companies to admit involvement in a cartel, settle liability, and receive a reduced fine in bilateral discussions with the Commission, *in lieu* of having to follow the more costly and time-consuming full cartel investigation. Thus, as opposed to leniency, settlements do not reward companies for providing evidence or unveiling cartels, but recompense the companies' willingness to forego some important procedural rights in order to speed up the decisional process.

The rationale behind the introduction of an expedited settlement procedure lays on the premise that, handling more cases with the same resources leads to higher productivity in terms of decision delivery, hence ensuring timely and effective punishment and more chances of discovering a cartel. This ultimately leads to increasing overall deterrence.⁵ It is recalled that the Commission has discretion in prioritising its cartel prosecution,⁶ and in turning down leniency applications.⁷ As explained in its Annual Competition Policy Report, the Commission focuses its efforts on violations that have an impact in at least several Member States or in the EEA as a whole, and sometimes violations of limited size are given an investigative follow-up by National Competition Authorities (hereafter NCAs).⁸

In October 2006, the Commissioner announced that some 'first thoughts' had been elaborated in the form of 'settlements' whereby settling parties would 'acknowledge the scope, duration and severity of the infringement against an authorised minimum level of fine, which would take into account any leniency benefit and settlement reduction'.⁹ This suggested a complementary and independent application of the leniency and settlements procedures. The rules were further elaborated and one year later, the Commission presented for public consultation¹⁰ a package of measures introducing the new rapid settlement procedure for cartels. It consisted of a Draft Notice on Settlements¹¹ and of a Draft Commission Regulation proposing amendments to Commission Regulation 773/2004¹² relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 EC.¹³

⁴'Plea bargains' derive from criminal law and are essentially negotiated agreements, in which a defendant agrees to plead guilty or not to contest a criminal offence in order to settle a case. As opposed to the US, where Sherman Act violations amount to criminal felonies, in Europe competition infringements are not to be of a criminal nature (Article 23(5) of Regulation 1/2003). Therefore, the term 'direct settlement' was initially to be preferred as it referred to an official agreement to terminate an argument without the attribution of any criminal connotation. However, the adopted package does not refer at any point to the epithet 'direct'. This is probably due to the fact that a 'direct settlement' would be perceived as a *per se* decision, in the same way as the Article 9 of Regulation 1/2003 commitment decisions constitute autonomous, enforceable and judicially reviewable decisions. The recourse to the use of the term 'settlement procedure' instead of 'direct settlements' insinuates that the focus is not placed on the value of the decision as such, but rather on the procedure it entails.

⁵Below note 11, Recital 1 of the Commission Notice provides that '*the settlement procedure may allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission's delivery of effective and timely punishment, while increasing overall deterrence*'.

⁶Cases T-24/90 and T-28/90 *Automec II* [1992] ECR 2223, paragraph 77.

⁷Van Barlingen B. & Barennes M., '*The European Commission's 2002 Leniency Notice in practice*' (2005) EC Competition Policy Newsletter, Autumn, 6, page 6-16.

⁸2005 Annual Report on Competition Policy, http://ec.europa.eu/comm/competition/annual_reports/2005/en.pdf, page 64.

⁹Commissioner Neelie Kroes Speech/06/595, '*Delivering on the crackdown: recent developments in the European Commission's campaign against cartels*', The 10th Annual Competition Conference at the European Institute, Fiesole, Italy, 13th October 2006.

¹⁰Commission Press Release IP/07/1608, Brussels, 26th October 2007.

¹¹Draft Commission Notice on the conduct of settlement proceedings in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases.

¹²Draft Commission Regulation amending Regulation (EC) No 773/2004 as regards the conduct of settlement procedures in cartel cases.

¹³Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

Interested parties were given the opportunity to provide in a period of two months comments on the proposed package. In total 48 contributions were submitted.¹⁴ As a general remark, most contributions welcomed the Commission initiative but solicited that some features of the proposal should be further improved. Concerns have been expressed in particular with regard to the extent of the Commission's discretion throughout the whole procedure and the ambiguity of certain procedural and fining rules. On 26 March 2008, the Commissioner publicly announced that a revised form of the proposal was about to be adopted later in the year,¹⁵ stressing the pressing need of alleviating the procedural backlog. Effectively, in July 2nd 2008, the newly revised Commission Settlement Notice¹⁶ and the Commission Settlement Regulation¹⁷ entered into force.

In view of the impact of the newly introduced settlement procedure in cartel prosecution, this article tries to assess, from a legal and empirical perspective, the new procedure with regard to the very goals it is purported to achieve. In Part 2, this article provides a detailed examination of the reasons that prompted the enactment of such a procedure and opposes the theoretical risks it might entail in cartel enforcement. This 'cost and benefit' analysis should set the background for a better apprehension of the technical rules of each step of the settlement procedure (Part 3). Finally, the analysis shall serve as a basis to critically assess whether the enforcement goals the new procedure is purported to serve are met, and if so, at what cost (Part 4).

2. THE NECESSITY AND APPROPRIATENESS OF A 'DIRECT SETTLEMENT' SYSTEM IN EUROPE

(A) REASONS FOR ADOPTING A DIRECT SETTLEMENT PROCEDURE: A COMMISSION'S PERSPECTIVE

Cartel cases should be clearly distinguished from the other competition infringements. In the words of Commissioner Kroes, cartels investigations are typically long and procedurally complex. The excessive length of cartel proceedings is not only associated to the period of investigation leading to a Commission infringement decision, but also extends to the post-decision period caused by the numerous appeals brought by parties before the CFI. The need for the adoption of a new set of rules was also prompted by the fact that the existing legal framework was not designed to accommodate an expediting settlement procedure.

I. PROCEDURAL COMPLEXITY AND OPPORTUNITY COSTS

Procedural complexity is due to several factors. First, 'procedural burdens are exacerbated in the handling of cartel cases because the procedure involves multiple parties, each raising specific confidentiality issues'.¹⁸ Moreover, in each and every case brought the Commission is 'obliged to investigate every last substantive detail. Final decisions have to be

¹⁴The vast majority of the contributions (60%) came from law firms and law firm associations, 17% contributions came from associations representing industry and from chambers of commerce, 10% from national bar associations (10%) and the remaining 6% from academia and research institutes.

¹⁵Commissioner Neelie Kroes Speech/08/152, '*Competition policy objectives*', Address to Economic and Monetary Affairs Committee of the European Parliament, Brussels, 26th March 2008.

¹⁶Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, Official Journal C 167, 2.7.2008, p. 1-6.

¹⁷Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, Official Journal L 171, 1.7.2008, p. 3-5.

¹⁸Commissioner Neelie Kroes Speech/07/722, '*Assessment of and perspectives for competition policy in Europe*', Celebration of the 50 anniversary of the Treaty of Rome, Barcelona, 19th November 2007, page 4.

fully reasoned on the basis of [its] own analysis of the facts.¹⁹ Hence, the Commissioner explained that ‘average cartel file numbers tens of thousands of pages, all of which have to be screened for confidentiality issues’.²⁰

On top of that evidentiary barrier ‘parties often request the use of multiple different languages for the administrative procedure’²¹ which implies a great loss of time in translations. This highly demanding set of procedures led the Commission to reinforce, in 2005, its cartel-fighting capabilities by creating a dedicated Cartels Directorate in the DG Competition.²² Today, it is estimated that cartels expend approximately 35–40% of the Commission’s resources.²³ Neelie Kroes points that ‘the flow of immunity applications triggers a direct impact in terms of the number of inspections the Commission undertakes each year’.²⁴

There are two ways for dealing with procedural overload: firstly, by promoting decentralisation and secondly by streamlining the existing procedure. Decentralisation of cartel enforcement would produce procedural efficiencies gained through delegation of cases to NCAs. However, in the words of Commissioner Kroes:

‘in an ideal world, the Commission would deal with every application... Otherwise we might leave applicants in a situation of uncertainty, trying to second guess whether, and when, to rush to file separate applications with those national competition authorities which offer national immunity programmes’.²⁵

So, the Commission has a ‘moral’ and efficiency reason to evaluate every case that is brought to it and that affects the markets of multiple Member States.

While, decentralisation has undoubtedly brought about a burden-sharing potential that should be further exploited in the future, the most effective tool for alleviating the procedural complexity is the adoption of a simplified, and faster procedure that would discard some of the secondary tasks of the Commission’s investigation units.

II. LENGTH OF CARTEL PROCEEDINGS AND APPEALS

LENGTH OF THE COMMISSION DECISION

The burdensome character of cartel prosecution is also attributed to its increasing success that has had an impact on the decisional productivity of the Commission. From February 2002 up to the end of December 2006, the Commission received a total of 203 leniency applications (104 applications for immunity and 99 applications for a reduction of fine), meaning that the Commission received on average one such application every 3.5 months.²⁶ There has been a substantial build-up of cases with approximately 35–40 different applications having been handled simultaneously.²⁷ The 2006 Annual Report on Competition Policy²⁸ indicated that in 2006 the Commission issued 7 final decisions, according to which 41 undertakings were fined. That means that on average it took 3.4

¹⁹Above note 1, Neelie Kroes Speech/05/205, page 5.

²⁰Above note 18, Neelie Kroes Speech/07/722, page 4.

²¹Above note 18, Neelie Kroes Speech 07/722, page 4.

²²Above note 8, 2005 Commission Annual Report on Competition Policy, page 13.

²³Above note 3, Waelbroeck, D., (2008), page 33.

²⁴Above note 1, Neelie Kroes Speech/05/205, page 3.

²⁵Above note 1, Neelie Kroes Speech/05/205, page 4.

²⁶2006 Annual Report on Competition Policy, http://ec.europa.eu/comm/competition/annual_reports/2006/en.pdf, page 12–13.

²⁷Ratiff J., ‘Plea Bargaining in EC Anti-Cartel Enforcement - A System Change?’ (2007) European competition law annual 2006, Oxford, Hart, page 598.

²⁸Above note 26, 2006 Annual Report on Competition Policy.

months to issue a decision for each undertaking. At first glance, it would appear that the Commission's decisional productivity corresponds to the rate of cartel leniency applications. However, what is at stake here is not the decisional productivity, but the per-firm length of cartel investigation, which Motta computed to be on average 5.5 months, that is 2 months longer than the application rate.²⁹ Finally, according to Reynolds³⁰ it takes approximately three years³¹ for the Commission to reach a decision. Motta, in his recently published paper, confirms that period estimation and stresses that there is little evidence in arguing that the Leniency Programme has been able to cut significantly the time the Commission needs to successfully prosecute the case.³²

This obviously means that unless the procedure is accelerated the backlog of cases will increase exponentially, stagnating the procedural mechanism. Such a scenario would possibly infringe the general principle of 'reasonable time' requirement in the conduct of administrative procedures,³³ which is of constitutional value.³⁴ It is recalled that exceeding the 'reasonable time' in issuing a decision can constitute ground for its annulment, where it has been proved that breach of that principle has adversely affected the rights of defence of the undertakings concerned. Yet, as such it does not affect the validity of the administrative procedure.³⁵

LENGTH OF APPEALS BEFORE THE COURT OF FIRST INSTANCE (CFI) & THE EUROPEAN COURT OF JUSTICE (ECJ)

As explained above, another pole draining resources are the frequent legal challenges of the Commission decisions. Commissioner Kroes reported that 'a high number of enforcement decisions inevitably brings a corresponding increase in the number of legal challenges. One cartel decision triggers an average of 3 to 4 court cases'.³⁶

Veljanovski calculated that from 1998 to September 2007, the CFI has decided appeals on fines over ?6 billions, or, over 98% of all fines imposed by the Commission. Fines were appealed in 45 out of the 50 cartels (19 still pending) by one or more firms, i.e. in 90% of the cases. Moreover, empirical evidence suggests that 59% of these appeals (16/24) were successful in achieving an average reduction of 19.3% (i.e. from a total of ?1,753.4 million to ?1,415.5 million).³⁷ Given the great success rate in fine reductions appeals are to be

²⁹Average computed since 1996 date of adoption of the first leniency Notice; see footnote 31 below, Motta M., (2008) page 211.

³⁰Reynolds, M., and Anderson, D., 'Immunity and Leniency in EU Cartel Cases: Current Issues' (2006) European Competition Law Review 27, page 85.

³¹According to A. Stephan cartel cases currently average 3.5 years from the opening of the investigation to the delivery of the Commission's final decision, cf Stephan, A., 'The Direct Settlement of EC Cartel Cases', (2007), Working Paper - Commission Consultation submission, page 42.

³²Motta M., 'On Cartel Deterrence and fines in the European Union' (2008) European Competition Law Review 29, page 211.

³³Case C-282/95, *P Guérin automobiles v Commission*, [1997] ECR I-1503, paragraphs 36 and 37; Case C-238/99 P, *Limburgse Vinyl Maatschappij and Others v Commission*, of October 15th, 2002, paragraphs 167-171.

³⁴Article 6(1) of the European Convention of Human Rights and Article 47 of the European Charter of Fundamental Rights.

³⁵Case C-105/04 P, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, paragraph 42; Case C-167/04 P, *JCB Service v. Commission*, paragraph 72. For a detailed discussion cf Lenaerts, K., 'Some thoughts on evidence and procedure in European Community competition law' (2007) Fordham International Law Journal 30, page 1485.

³⁶Above note 1, Neelie Kroes Speech/05/2005, page 4.

³⁷Veljanovski, C., 'European Cartel Prosecutions and Fines, 1998-2007 - A Statistical Analysis' (2007) SSRN, page 5.

viewed as the natural route following the issuing of the Commission decision. The side effect of this trend is to delay on average by 3.5 years the final ruling, given that on the 50 CFI rulings delivered between 2003 and 2006 the average length of a CFI appeal was 3.5 years.³⁸

This established propensity to appeal is not positive for the cartel enforcement process, but could probably be limited by adopting clearer criteria on the setting of fines. As long as the Commission retains ample discretion in fine determination, appeals are inevitable, irrespective of the procedure followed. Therefore, the new settlement procedure, given its consensual nature and limited appeal potential, would probably significantly limit the scope of appeals, but will not bring to an end the appeal predisposition of parties that, irrespective of any fine reductions, would be eager to see their fine further reduced.

III. INAPPROPRIATENESS OF THE EXISTING LEGAL FRAMEWORK FOR REACHING CARTEL SETTLEMENTS

The DG Comp's activity to date furnishes numerous examples where the Commission found recourse to internal reorganisation and streamlining to respond to growing challenges of work overload.³⁹ The Court has allowed the Commission to 'take all the organizational measures necessary for the performance of that task where those priorities have not been determined by the legislature'.⁴⁰ A query arises, therefore, as to whether the 'simplified handling of cases' could be operated within the existing legal framework without laying down a new set of rules.

INFORMAL SETTLEMENTS

While the previous Regulation 17/62 prescribed no settlement procedure after the opening of investigations, Commission decisions of an informal nature did exist both in Article 81 and 82 cases where parties committed to so-called 'undertakings',⁴¹ or abided by 'recommendations'. Moreover, the Commission using its broad discretion as to the infringements it wished to pursue, saw fit to close a number of files on the basis of informal commitment decisions that briefly appeared in the Commission's Annual Report. Some horizontal-cooperation cases were settled in view of the 'exceptional circumstances' of the market, such as the *Euro Bank Charges case*, where more than 50 banks fixed bank-charges for exchanging currencies before the introduction of the Euro. Due to the contestable legal value and the lack of transparency of the aforementioned procedures the Regulation 1/2003 replaced the practice of informal settlements.

ARTICLE 9 COMMITMENT DECISIONS

Regulation 1/2003 has for the first time provided a legal framework for the Commission to formally conclude settlements on the basis of commitments offered by undertakings. According to Article 9(1) of Regulation 1/2003 the Commission may adopt a formal settlement decision, which makes commitments offered by undertakings legally binding without a finding of a competition infringement. While, in principle, such

³⁸Above note 31, Stephan, A. (2007), page 7.

³⁹For instance, the notification regime 'comfort letters' were issued in order to alleviate the administrative burden caused by the individual exemption notification system.

⁴⁰Cases T-24 and 28/90, *Automec II*, [1992] ECR 2223, paragraph 77.

⁴¹For extensive analysis, see Temple Lang, J., 'Commitment decisions and settlements with antitrust authorities and private parties under European Antitrust Law' (2006) *International Antitrust Law & Policy* - Fordham University School of Law, page 267.

commitments could have served the purpose of alleviating the overload of pending cartel cases they were not designed to deal with cartels. The procedure excludes from its scope cases where the Commission intended to adopt a fine,⁴² thus, automatically leaving out hardcore cartels.

There are several reasons for this choice. First, in Article 9 commitments parties do not accept any infringement of competition rules, which could clash with the leniency programme, where parties do have to admit it. Moreover, as opposed to other competition concerns, it was hard for the Commission to exonerate from liability parties in cases where mere participation to the anticompetitive behaviour (such as participation in a cartel) amounts to a *per se* infringement. Finally, compelling a party to commit not to participate in a cartel for the period following the commitment decision, without fining its past participation would definitely sit at odd with the general Commission's stance of zero tolerance and war on cartels.

THE LENIENCY PROGRAMME

Leniency as an investigation tool aims at discovering cartel cases and collecting evidence to discharge the Commission's burden of proof. Settlements, on the other hand, aim at simplifying and expediting the procedure leading to the adoption of a formal decision. Therefore, the former rewards the significant added value of the information provided, whereas the latter rewards concrete contributions to procedural efficiency.

The distinction is more blurred in the US, where plea-bargains are effected in the framework of the leniency programme. Plea-bargains have been used in the US as a procedure to collect evidence, as the US Leniency Programme covers immunity for first-in applicants only. This function is performed in the EU through the Leniency Notice, which covers fine reductions in exchange for evidence also for second and third applicants. This distinction explains why, in the US, plea-bargains take place during the investigation phase, whereas in the EU, they occur after the Commission investigation (e.g. after dawn raids or leniency).

Thus, in Europe, there is a clear distinction in terms of the aims of each procedure. However, would it be possible for the present leniency system to accommodate an expediting procedure?

Under the 1996 Leniency Notice, voluntary admission of infringement was possible as it provided that a significant reduction in a fine (10-50%) would be granted where: i) before the Statement of Objections (hereafter SO) is sent, an undertaking provides the Commission with information, documents or other evidence which materially contribute to the establishment of the infringement, and, ii) after receiving the SO, it informs that it does not 'substantially contest the facts' on which the Commission bases its allegations.⁴⁴ The subsequent Notices removed this possibility, but, as pointed out by Professor Lenaerts, nothing precludes the Commission from granting a reduction for an undertaking's non-contestation of anti-competitive conduct alleged in the SO.⁴⁵

⁴²Regulation 1/2003, Recital 13.

⁴³Explicitly mentioned in Commission MEMO/04/217 of 17 September 2004.

⁴⁴See Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ. C 207/4 (1996), Article D(2).

⁴⁵Above note 35, Lenaerts, K. (2007) page 1490.

While possible to include some elements of ‘settlements’ in the leniency programme, this would seem inappropriate because, drafted to complement it, the envisaged settlement procedure should be broader than leniency, inviting also non-leniency applicants to cooperate in order to achieve procedural efficiencies. For instance, if settlements were tied with leniency, following a successful dawn raid revealing sufficient incriminating evidence, the Commission would have been unable to expedite the procedure through a settlement.

THE FINING GUIDELINES

In addition to that, the 2006 Fining Guidelines allow reductions where undertakings have ‘effectively cooperated with the Commission’. While ‘effective cooperation’ could, in theory, enclose an early settlement, the term lacks sufficient precision and is of limited legal value given that Commission Guidelines are not binding or enforceable. This essentially means that the Fining Guidelines cannot serve as a basis for a very technical procedure such as the one leading to legally binding settlements. Moreover, the Commission has indicated that a party can choose self-incrimination as a line of defence in view of the possible rewards in the framework of the aforementioned ‘effective cooperation’, but this does not necessarily result in procedural efficiencies.⁴⁶

ADOPTING A NEW PROCEDURE – THE DEBATE ON THE LEGAL BASIS

From a legal point of view, it appears that ‘direct settlements’ could not and should not be accommodated within the current legal framework of Article 9 ‘commitment decisions’ or the leniency programme. Yet, old-fashioned informal settlements could still be reached but only in exceptional cases.

In view of the aforementioned considerations, the Commission proceeded with the adoption of a new procedure based on Article 33 of Regulation 1/2003 that authorises it to take appropriate measures in order to implement the rules of competition.⁴⁷ Although the list of such measures is not exhaustive, the nature and the reach of the measures listed indicate that they generally do not seriously affect the parties’ rights of defence.⁴⁸ It is in light of this restrictive reading of the Article that the new procedure raises some reservations about its legality, as it does affect the defence rights of the parties. So, possibly it would have been more appropriate for the Council to adopt the settlement procedure under Article 83 EC Treaty, by amending Regulation 1/2003.⁴⁹ The Commission, nevertheless, opted for a non-legislative adoption of the package having regard to the fact that settlements would not constitute a new type of decisions, similar to Article 9 Commitment decisions, but would take the form of an Article 7 infringement decision imposing fines, pursuant to Article 23 of Regulation 1/2003. Besides, it considered that all rights of defence would, one way or another, effectively be guaranteed.

⁴⁶Commission MEMO/08/458, ‘Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions’, Brussels, 30 June 2008, page 5.

⁴⁷According to Article 33(1) of Regulation 1/2003 ‘the measures may concern, inter alia, (a) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints; (b) the practical arrangements for the exchange of information and consultations provided for in Article 11; (c) the practical arrangements for the hearings provided for in Article 27’.

⁴⁸See Article 27 Regulation 1/2003.

⁴⁹Above note 3, Waelbroeck, D (2008) page 35.

(B) REASONS FOR ENTERING INTO A DIRECT SETTLEMENT PROCEDURE: A COMPANY'S
PERSPECTIVE

Commissioner Kroes pointed that companies involved will also accrue benefits⁵⁰ out of a settlement. These are both of financial and of procedural nature.

The first obvious incentive for companies to enter into settlement discussions is the reduction of the fine in return for cooperation. Of course the extent of the incentive is closely linked to the amount of the discount. So, companies applying for a fine reduction under the Leniency Programme could get an extra discount through settlements. The same applies for companies that do not or cannot qualify for leniency. Finally, first immunity applicants would also be inclined to cooperate under settlement because of the uncertainty that full immunity will effectively be granted, and of the other general advantages of the procedure, discussed below.

First, settlements offer a unique opportunity for companies to understand the potential extent of liability. Generally speaking, cartel cases are lengthy and the process involves the preparation of an array of written and oral submissions to the Commission, where usually the defendant is left 'in limbo' as to its liability and the financial penalty. Through settlement the defendants are given the opportunity to get a clear image of the objections raised against them and to be heard on those objections earlier in the procedure. An early appreciation of the objections gives less uncertainty as to the outcome of the procedure. In addition to that, defendants will have the chance to influence the Commission either at the early stage of the investigation in the interpretation of facts and objections or in relation to the level of fines.

Secondly, the immediate result of an expedited procedure is reflected on the lower legal costs incurred. Likewise, avoiding lengthy procedures will generate efficiencies in terms of time management for the companies' directors.

Thirdly, a very important, yet underestimated, advantage is that a consensual procedure might cause a lower reputational damage through adverse publicity. Estimating the level of reputational damage that cartel participants suffer from an official infringement decision, Motta and Langus conducted an event study analysis on the share prices of the infringing firms. The study showed that upon delivery of the infringement decision, share prices drop on average by 3.3%.⁵¹ Despite leading to an official infringement decision, settlements can mitigate such effects.

Finally, settlement decisions are usually shorter than those of the normal procedure and reveal less factual background, hindering access to conclusive evidence for potential plaintiffs that are willing to bring private actions for damages. Despite the late awakening of private enforcement in Europe, follow-on actions are increasingly more frequent, and the Commission has taken positive steps to further boost them.⁵²

The aforementioned advantages come at a cost. In that regard, the most important downside of the procedure is that usually through a settlement decision, companies effectively waive important defence rights, as well as their rights of appeal. So it is for companies to balance out the costs and benefits of the procedure and accordingly decide the profitability of a potential settlement.

⁵⁰Above note 18, Neelie Kroes Speech 07/722, page 6.

⁵¹Langus, G. and Motta, M., 'On the Effect of EU Cartel Investigations and Fines On the Infringing Firm's Market Value' (2007) European competition law annual 2006 - Oxford, Hart, pages 363-376.

⁵²See European Commission, White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165 final, Brussels, 2.4.2008.

(C) NEGATIVE EXTERNALITIES OF DIRECT SETTLEMENTS

Although settlements may accelerate the procedure and alleviate the backlog of cases, free resources and cut costs, they entail risks that should seriously be taken into account when devising the procedures. Those concern the inevitable lessening of deterrence, the obstruction on private enforcement and the possibility of unjust results produced by the bargaining power imbalances.

I. LOWER FINES – IMPACT ON DETERRENCE

Measuring the level of deterrence or the effect of competition policy on cartels is practically unfeasible due to the impossibility of calculating the number of cartels that exist in an economy. However, simple economics tell us that deterrence will be effective when a firm perceives that its expected net gain from participating in a cartel is lower than its expected cost, including the probability of being discovered.⁵³ By adopting a ‘settlement procedure’ the probability of being caught increases as a result of the freeing of Commission resources. Nevertheless, the level of deterrence might remain stable, or even decrease, given that the further reduction of the fine might be perceived by the firms as internalized lower cost of ‘doing business’.

Whether giving the possibility to firms to receive an extra fine reduction would negatively affect the levels of deterrence, depends to a great extent on the level of the reduction given. However, several commentators have argued that the current levels of fines are far too low for achieving deterrence.⁵⁴ For instance, Veljanovski acknowledged that the amended 2006 Fine Guidelines move to the right direction but estimated that the actual or expected fines are not likely to reflect consumers’ losses or deter price-fixing. If that is the case, even minimal extra fine reductions would have a negative effect on deterrence.⁵⁵

Nevertheless, there are also economists who adopt a more positive stance. For instance, Motta, based on a simple simulation, perceives that the fines as imposed according to the new Fines Notice are not of a ‘significantly different order of magnitude than the optimal fines’.⁵⁶ This approach is also advocated by Manzini who used an ‘optimal sanction formula’⁵⁷ to support this finding.⁵⁸ Espousing that position, we could a *priori* argue that a reasonable fine reduction through the settlement procedure would not have significant repercussions on the level of deterrence.

II. SETTLEMENT VS LENIENCY

Generous settlement rewards can be perceived by undertakings as effectively being equivalent to leniency fine reductions. This would have a negative impact on the success of the leniency programme as companies would find it preferable to carry on their cartel infringement and to fully cooperate with the Commission only once a cartel has been revealed (by an *ex officio* investigation or through an immunity applicant). Therefore, the Commission made clear from the very beginning that the levels of settlement rewards would be much lower compared to those of fine reductions.

⁵³Above note 51, Motta, M. (2008); Langus, G. and Motta, M. ‘The effect of EU antitrust investigations and fines on a firm’s valuation’ (2007) London: CEPR\Discussion Paper No.6176.

⁵⁴Spagnolo, G., ‘Leniency and whistleblowers in antitrust’, (August 2006), Discussion paper (No.5794) Centre for Economic Policy Research (www.cepr.org); OECD, ‘Report: Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes’, (2002) available at www.oecd.org/dataoecd/41/44/1841891.pdf; Combe, E. et al. ‘L’efficacité des sanctions contre les cartels: Une perspective économique’, (2006), Concurrences, 4, 10–30; Veljanovski, C., ‘Cartel Fines in Europe—Law, Practice and Deterrence’ (2007) World Competition 30, pages 65–86.

⁵⁵Above, Veljanovski, C., (2007) page 85.

⁵⁶Above note 51, Motta, M. (2008) page. 215.

⁵⁷The ‘optimal sanction formula’ determines the fine by only using objective actors, such as gain or harm.

⁵⁸Manzini, P., ‘European Antitrust in Search of the Perfect Fine’, (2008) World Competition 31, page 16.

III. WEAKENED PRIVATE ENFORCEMENT

In general, systems of direct settlement threaten the success of follow-on actions as a result of the fact that final decisions are 'inevitably much shorter',⁵⁹ thus containing, generally speaking, lesser details. It follows that private plaintiffs could find it difficult to rely on a Commission decision as irrefutable evidence to support a claim for damages. This constitutes one of the reasons why in the US defendants have a great incentive to plea-bargain, given that the risk of having to pay treble damages in follow-on actions is much more imminent following a normal full public trial procedure.⁶⁰ The impact on private enforcement is also tailored by the rules on disclosure. In the US the only information that is placed in the public domain is the identity of the firm, the admission of guilt and the level of the agreed fine. Obviously, from such limited information it is hard for private plaintiffs to extract evidence on the extent of liability and on the causation of the damage.

In Europe the trade-off between more private enforcement and more efficient public cartel prosecution is a very problematic one, as the Commission has placed both objectives high in its agenda. The recently published White Paper on Damages actions for breach of the EC antitrust rules⁶¹ reminds that the Commission's aim remains to ensure 'that all victims of infringements of EC competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered'.⁶² For instance, in the area of cartel related actions, the Commission promotes representative actions and opt-in collective actions.⁶³ The Commission however, stressed the complementary nature of private enforcement that does 'not replace or jeopardise, public enforcement'.⁶⁴ So where private enforcement jeopardizes the effectiveness of public enforcement, the latter should take precedence. Thus, given that generous rules on disclosure could put at risk the efficiency of the settlement procedure (by diminishing its attractiveness to settling parties), the Commission is more likely to opt for restrictive disclosure rules to the detriment of private actions. This, of course, depends on whether reaching procedural efficiencies (in the context of the settlement procedure) is viewed as part of the general policy goals of public enforcement or is thought of as a (procedural) advantage (or facilitation), purely serving the internal needs of the Commission.

IV. POTENTIAL ABUSES

Potential inconsistent solutions that would create unjust results are in fact possible. Both companies and the Commission can abuse of their respective rights contained in the procedure.

COMPANY POTENTIAL ABUSES

Some companies might find it opportune to enter into a settlement and later pull out of the settlement in order to have access to the Commission evidence and prepare its defence at a very early stage. This might be unfair *vis-à-vis* the other cartel participants who opt for the normal procedure, as they would be able to get access to the Commission file only after the issuing of the SO.

⁵⁹ Above note 18, Neelie Kroes, Speech 07/722, page 6.

⁶⁰ Above note 31, Stephan, A. (2007) page 23.

⁶¹ European Commission, White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165 final, Brussels, 2.4.2008.

⁶² Above note 61, White Paper, paragraph 1.2.

⁶³ Above, White Paper, paragraph 2.1.

⁶⁴ Above, White Paper, paragraph 1.2.

COMMISSION POTENTIAL ABUSES

USE OF PARTY SUBMISSIONS FOLLOWING A FAILURE TO REACH A SETTLEMENT

There is an inherent risk to the procedure that the evidence submitted by parties throughout the procedure would be used by the Competition authority, notwithstanding an eventual failure of the settlement procedure. For instance, the Commission would be naturally inclined to fall back to the aborted submissions and conduct a new targeted and expedited full investigation to base an SO under the regular procedure.

BARGAINING ASYMMETRY CAUSING UNJUST RESULTS

Settlement decisions are not really the fruit of mutual concessions of a negotiation procedure, but they often constitute the product of negotiation asymmetry between the defendant and the competition authority. For instance, for reasons of ‘corporate pragmatism’⁶⁵, firms might agree to settle at a disproportionately high price, in order to bring a premature end to risky litigation, and reap the advantages of early settlements. This could be particularly true in the EU, where the risk of unpredictable level of fines is imminent. Moreover, firms might fear that if a settlement is not reached the Commission will seek higher sanctions deriving from the dissatisfaction of being forced to fall back to the standard procedure.

(D) CONCLUSION

It has been shown that from a legal and empirical perspective, the Commission would, *prima facie*, benefit from an accelerated procedure that would free up resources. There seems to be ample room for improvement both with regard to the procedural complexity of system, and the length of the decision-making procedure. Moreover, the consensual nature of a settlement procedure could, *a priori*, slow down the pace of appeals. The procedure could be equally advantageous from the perspective of companies. Defendants, at the cost of waving important procedural rights, such as the right to appeal, could be given the opportunity to play an influential role on the Commission’s decision and fine, to better apprehend the objections, to save on legal costs and reputational damages, and to diminish the risk of facing follow-on claims for compensation. It has further been demonstrated that the current legal framework cannot properly accommodate any such settlement procedure for cartel prosecution and that the new adopted instrument was justified. Finally, settlements by nature involve serious trade-offs whose prioritisation falls in the sphere of competition policy with regard to both the negative impact that settlements can bring in terms of deterrence and the unjust results that derive from institutional and bargaining imbalances of the procedure.

Following the Chinese proverb that the ‘devil is in the details’, the new settlement rules are hereafter thoroughly examined, in particular, in light of the three examined aspects: the procedural efficiency sought by the Commission, the advantages sought by defendants, and,

⁶⁵Above note 31, Stephan, A. N, (2007, December), page 32.

the externalities that give rise to some trade-offs in the general sphere of cartel prosecution and enforcement.

3. THE DRAFT SETTLEMENT PROCEDURE

The settlement procedure from the very beginning to the end runs in parallel with the standard procedure, where it can fall back to if either party decides to pull out. The procedure consists of five phases. In *Phase I*, the Commission has the entire discretion to initiate the procedure after the preliminary phase of investigation, by deciding on whether the case is *rationae materiae* suitable for settlement. If suitable, it will give a time-limit of at least two weeks for the parties to express in writing their interest in entering into settlement discussions. If the Commission agrees to enter into settlement discussions (*Phase II*) it will disclose the 'essential elements' of incriminating evidence it possesses against the settling party, such as the incriminating facts, their classification, gravity and duration and an estimation of the likely fines incurred. If a 'common understanding' is reached with regard to the scope and qualification of the infringement, parties are given a certain deadline to send a 'written settlement submission' (WSS) (*Phase III*) which should contain an acknowledgement of liability, sufficient information, a waiver to access to file, oral hearings and translation requests, and finally an indication of a foreseeable maximum amount of fine. The Commission can endorse the WSS in its SO (*Phase IV*) and parties should confirm the endorsement within a period of at least two weeks. Finally, the Commission adopts a final decision (*Phase V*) where it can adopt the position expressed in the SO, and impose a reduced fine.

(A) PHASE I: INITIATION OF THE PROCEDURE

I. SUITABILITY OF A CASE FOR SETTLEMENT

As with Article 9 Commitments, the Commission is in the driving seat of the settlement procedure from the beginning to the end and benefits from a broad margin of discretion regarding the initiation, the abortion or the conclusion of the procedure. Thus, undertakings have no autonomous right to settle. The timeframe for the initiation of the proceedings is any point of time between the initiation of an investigation to the issuing of the SO.⁶⁶ Hence, the Commission rejected the proposals arguing that the procedure should extend to the period following the issuing of the SO, notwithstanding the fact that, at that stage, there is still potential for settlement, especially for those parties who did not agree to settle at the first stage.⁶⁷

Before opening the procedure the Commission should take into consideration the following elements to determine whether a case is suitable for settlement:⁶⁸ i) the probability of reaching, within a reasonable timeframe, a common understanding with the parties on the scope of the Commission's objections, ii) the prospect of achieving procedural efficiencies, and in particular, in view of the burden involved in providing access to non-confidential versions of documents from the file, iii) and the value of the settlement as a

⁶⁶Above note 16, Commission Notice, paragraph 9. See also Article 11(6) of Regulation 1/2003 and Article 2(1) of Regulation 773/2004.

⁶⁷In particular with regard to fining where the collection of data or technical legal arguments can still come into play.

⁶⁸Above note 16, Commission Notice, paragraph 5.

precedent. In order to make a reasoned judgement, the Commission should examine a variety of factors such as the number of the parties involved, their foreseeable conflicting positions on the attribution of liability and the extent of contestation of facts.

The broad discretion on the Commission's hand seems to be reasonable and justified, given that it is best placed to consider whether a settlement will produce procedural efficiencies. Yet, a more precise delimitation of the Commission's discretion could further increase the attractiveness of the procedure to interested parties.

II. EXPLORATION OF THE PARTIES' INTEREST

Provided the Commission considers that a case is suitable for settlement it will '*explore the interest in settlement of all parties to the same proceedings*'.⁶⁹ While the wording signals that all parties would be given equal opportunities to settle (irrespective of whether they are Leniency applicants) the wording is elusive as to whether there should be unanimous willingness on behalf of the parties to settle. So the Notice remains silent as to whether the Commission can settle and reduce the fine of only one interested undertaking, when the other parties to the same proceedings have not expressed such an interest. The question is pertinent and seems to be answered by the Commission's MEMO, which distinguishes between cases 'where all parties settle' and 'hybrid cases'.⁷⁰

The trade off between the two possible options is crucial. On the one hand, the 'hybrid solution' due to the simultaneous operation of two parallel procedures could lead to a further procedural onus and effectively annihilate the procedural gains. On the other hand, the willingness of one company to settle should not be negated by (nor be made dependent on) the other non-settling parties' willingness, which for a variety of reasons linked to their very involvement in the alleged cartel, could be divergent. As a matter of fact, partial settlements have been admitted by some NCAs across the EU, such as by the German *Bunderkartelgericht* and the OFT.

Parties have at least two weeks to declare in writing whether they envisage engaging in settlement discussions.⁷¹ This declaration does not imply an admission of participation in a cartel. Parties belonging to the same undertaking may appoint a joint representative. Joint representation, does not prejudge the finding of joint and several liability amongst parties of the same undertaking, but rather aims at achieving more efficient discussions.⁷²

(B) PHASE II: SETTLEMENT PROCEEDINGS

I. RULES OF THE PROCEEDINGS

The Commission has unfettered discretion to start discussions with the interested parties on a bilateral basis.⁷³ The pace and appropriateness of the proceedings are fully determined by the Commission.⁷⁴ For instance, the Commission may decide, in view of the progress made, on the order and sequence of the discussions as well as on the timing of disclosure of the incriminating evidence.⁷⁵ While leaving considerable discretion for the Commission with regard to individual treatment, the wording does not include any

⁶⁹Above note 16, Commission Notice, paragraph 6.

⁷⁰Commission MEMO/08/458, 'Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions', Brussels, 30 June 2008, page 4.

⁷¹Above note 16, Commission Notice, paragraph 9.

⁷²Commission MEMO/07/433, page 3.

⁷³Above note 16, Commission Notice, paragraph 14.

⁷⁴Above note 16, Commission Notice, paragraph 15.

⁷⁵Above note 16, Commission Notice, paragraph 9.

reference to the (implicit) principle of non-discrimination. As a result, the risk of favouritism *vis-à-vis* one of the parties is not eradicated.

Moreover, Commissioner Kroes has explicitly made clear that the Commission will not negotiate or 'bargain about evidence or objections'.⁷⁶ This, however, does not mean that all bargaining possibilities are excluded as some leeway for negotiation is left in practice. For instance, the Commissioner herself acknowledged that parties will 'have the opportunity to influence the Commission's objections through argument before the notification of the formal statement of objections'.⁷⁷ Thus, while the settlement procedure is not a 'forum' of negotiation, parties would be expected to bring forward their interpretation of events, and some flexibility would have to be shown by the Commission in order to come to a 'common understanding'.⁷⁸ For the sake of legal certainty and clarity, some authors propose that negotiations on the contents of the SO and of the final decision should be conducted on the basis of drafts to be disclosed to the undertakings before adoption.⁷⁹ Finally, the parties have the right to call upon the Hearing Officer at any time during the settlement procedure. The latter's duty is to ensure the effective protection of the undertakings' rights of defence,⁸⁰ especially that relating to access to evidence.

II. DISCLOSURE OF EVIDENCE TO THE SETTLING PARTIES

TYPE OF EVIDENCE

Under the normal procedure access to file is only allowed after the issuing of the SO. In the case of settlements the Commission will allow the parties from the early stages of the settlement discussions to be informed of the 'essential elements' taken into consideration so far, such as the facts alleged, their classification, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections.

Evidence disclosed at this early stage should enable parties to assert their views on the potential objections against them and allow them to make an informed decision on whether or not to settle. Throughout the procedure, the parties can potentially have access to further information. For instance, parties can request the Commission to grant access to non-confidential versions of any accessible documents listed in the case file, as long as they are justified for the party to ascertain its position regarding the time period or any other aspect of the cartel. The older version of the Notice also included the condition that the 'procedural efficiency is not jeopardized'.⁸¹ By wiping it out the Commission shows its intention to limit certain aspects of its discretion that could be perceived by undertakings as potentially abusive.

CONFIDENTIALITY RULES OF THE COMMISSION EVIDENCE

Parties may not, unless explicitly authorized by the Commission, disclose to any other undertaking or third party in any jurisdiction the content of the discussions held and of the documents used in view of the settlement.⁸² Breach of the confidentiality clause may lead

⁷⁶Above note 18, Neelie Kroes Speech 07/722, page 4.

⁷⁷Above note 18, Neelie Kroes Speech 07/722, p. 5.

⁷⁸Camesasca, P. et al., 'The 2008 Settlement Notice: Will the Commission Make it Work?' (2008) GCP, p. 7.

⁷⁹Above note 3, Burrenchter, J. and Zimmer, D.J., (2007) p. 617.

⁸⁰Above note 16, Commission Notice, paragraph 18

⁸¹Above note 11, Draft Notice, paragraph 17.

⁸²Above note 16, Commission Notice, paragraph 7.

the Commission to disregard the undertakings' settlement request and may constitute an 'aggravating circumstance' resulting in the imposition of an increased fine. While the importance of evidence is not questionable, the sanction against the breach of the confidentiality clause may appear disproportionate in light of the existing Guidelines on fines⁸³ that do not include such confidentiality considerations.

III. FROM THE 'COMMON UNDERSTANDING' TO A 'WRITTEN SETTLEMENT SUBMISSION' (WSS)

Once the discussions have reached the point of '*a common understanding on the scope of the potential objections and the estimation of the range of likely fines*' the Commission will grant 15 days for the undertaking to introduce a final written settlement.⁸⁴ If the parties fail to introduce such a settlement submission, then the settlement procedure comes to an end and the case falls back on the normal track of procedure of Regulation 77/2004.⁸⁵

(C) PHASE III: THE CONTENT AND EFFECTS OF THE 'WRITTEN SETTLEMENT SUBMISSION' (WSS)

I. THE CONTENT OF THE WSS

Parties opting for a settlement must introduce a formal request to settle in the form of a 'written settlement submission'. The WSS shall be formulated according to a specified template,⁸⁶ drafted along with the results of the settlement discussions, and should contain the following:

ACKNOWLEDGEMENT OF LIABILITY

An acknowledgement in unequivocal terms of the parties' liability for the infringement should briefly describe the basic parameters of their participation in the cartel under investigation, and particularly, its object and its possible implementation, its main facts and their legal qualification, the party's role and duration of participation. This seems to require more elements compared to the Draft proposal, which requested merely the main facts, the legal qualification and the duration.

INDICATION OF THE MAXIMUM FORESEEABLE AMOUNT OF FINE

The Notice requires that the parties should provide an indication of the maximum amount of the fine they foresee to be imposed by the Commission and which they accept. Such a calculation would be based on the 'range of possible fines' revealed by the Commission throughout the discussion phase. The Commissioner specified that 'the range is net of any other reduction',⁸⁷ hinting that a high degree of certainty will be revealed over the level of the fine. This is the method chosen in the US plea-bargaining system where a judge would have to inform the defendant before pleading guilty, of 'any maximum possible

⁸³See in particular Commission 2006 Fine Guidelines, paragraph 28.

⁸⁴Above note 16, Commission Notice, paragraph 17.

⁸⁵Point 19 of Commission Notice; Articles 10(2), 12(1) and 15(1) of the Regulation will apply.

⁸⁶Commission MEMO/07/433, page 3.

⁸⁷Above note 18, Neelie Kroes Speech 07/722, page 5

penalty, including imprisonment'. This is also the case with the German and French legal systems.

This method is not included in the legislative package. The Draft Notice, however, referred to settled case law on the necessary elements that have to be communicated to determine 'the range of fines'. Accordingly, the Commission should '*set out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently'*'.⁸⁸ This brings no added value to companies, as this information would have to be disclosed anyway by the Commission during the settlement discussion phase. So the only helpful indication is the 2006 Fining Guidelines,⁸⁹ which have received ample criticism with regard to their uncertain application. This has been a recurrent point of almost all consultation submissions and commentaries. Overcoming this uncertainty through Commission guidance would be crucial for appealing to settlement applicants and therefore a clarification of the different aims of the fine calculation seems to be imperative. Commissioner Kroes has rejected appeals to review the Guidelines for lacking sufficient transparency, doubting from the very beginning that allowing 'potential infringers to calculate the likely cost/benefit ratio of a cartel in advance will somehow contribute to a sustained policy of deterrence and zero tolerance'.⁹⁰

This is not convincing. As pointed by Ratliff, 'as a matter of principle, it is not clear why companies should not be able to calculate what fines they face if they infringe' as it happens with any other area of law, especially in view of the possibility of a lower number of appeals on the level of fines.⁹¹ In principle, the Commission also has an incentive to be more specific on the 'range of fines' as the settlement would have to be abandoned if it does not endorse the maximum fine proposed by the party. Besides, lack of certainty, in practice, might cause the following three problems. Firstly, given the uncertainty over the potential fine incurred, companies will be deterred from entering into settlements. Secondly, companies may fear that other settling parties have based their fines on different criteria leading to disproportionate fines. Thirdly, companies will have a natural tendency to reduce the fine, knowing that the Commission would be tempted to accept a lower fine at the risk of falling back on the normal lengthy procedural track.

Thus it would be preferable, if not to pronounce a precise potential fine, at least to provide clarifying guidance on the components that make up the potential fine based on the 2006 Fining Guidelines.⁹²

CONFIRMATION OF SUFFICIENT INFORMATION

The parties must confirm that they have been sufficiently informed of the Commission's objections and have been given the opportunity to make their views known. This provision aims at eliminating the risk of running further delays following the issuing of the final Commission decision due to possible appeals deriving from an infringement of their rights of defence. The provision is a legal fiction in the sense that no rule can *de jure* deprive the company from its right to appeal (see below).

⁸⁸Cases 100/80 to 103/80 *Musique diffusion française and Others v Commission* [1983] ECR 1825, paragraph 21; Case T-16/99 *Lögstör Rör v Commission* [2002] ECR II-1633, par.193; Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-0000, paragraph 428; Case T-15/02 *BASF AG v Commission*, paragraph 48; Case T-329/01 *Archer Daniels Midland Co. v European Commission (sodium gluconate)*, paragraph 361.

⁸⁹Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (06/C/210)

⁹⁰Above note 1, Neelie Kroes, Speech/05/205, page 6.

⁹¹Above note 27, Ratliff, J. (2007) p. 604

⁹²Some consultation contributions proposed that, ideally, a settlement should refer to a standard calculation scheme applied to all parties, the contents of which could be scrutinized by external auditors.

WAIVER TO AN ACCESS TO FILE OR ORAL HEARING REQUEST

The settling parties must also confirm that they do not envisage requesting access to the file or requesting to be heard again in an oral hearing. This waiver of rights aims at speeding up the procedure before the Commission reaches its final decision.

AGREEMENT TO RECEIVE THE SO AND THE FINAL DECISION IN AN OFFICIAL LANGUAGE OF THE EC

The parties must also agree to receive the SO and the final Commission decision in an official language of the EC. This provision obviously aims at reducing the cost and delay caused by translations often requested by parties.⁹³

II. EFFECTS OF THE WSS

THE RIGHT OF REVOCATION

Interestingly, once submitted, the WSS cannot be revoked unilaterally by the undertakings until the issuing of the SO. The settlement proposal ceases to be bounding on the parties only and when the Commission decides not to endorse it. According to the Commission, this flows from the fact that the WSS signals the parties' willingness to cooperate until the release of the SO. The prohibition of unilateral revocation has been confronted with disapproval by many commentators. Barring parties from revoking their WSS after the 'common understanding' serves no apparent reason. Parties willing to revoke unilaterally prior to the SO will withdraw from the procedure anyway after the SO, thus, potentially causing additional work for the Commission in trying to consolidate the various WSS in a SO. Moreover, it is not impossible that crucial new information amending the party's role in the cartel is revealed after reaching the 'common understanding' and prior to the issuing of the SO. That evidence should definitely be allowed and taken into consideration by the Commission.

THE RIGHT TO APPEAL

As opposed to US plea bargains, where parties explicitly wave their rights to appeal, such a provision would not be possible under EC Law and such a waiver would be legally void. Regulation 1/2003 requires its interpretation and application according to the rights and principles recognized by the Charter of Fundamental Rights.⁹⁴ Article 47 of the Charter stipulates that *'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'* In view of the constitutional value attributed to the Charter upon adoption of the new Treaty of Lisbon,⁹⁵ it would appear inconceivable for the Commission to legally bar any right of appeal. That is why the Notice affirms that final decisions are subject to judicial review in accordance with Article 230 of the EC Treaty.⁹⁶ But what is the practical value of such a right in the framework of settlements?

⁹³Above note 18, Neelie Kroes Speech 07/722, page 4.

⁹⁴Recital 37 of Regulation 1/2003.

⁹⁵Article 6(1) of Treaty on the European Union.

⁹⁶Above note 16, Commission Notice, paragraph 41.

Despite possessing the right to appeal, in practice, the situations of a successful assertion of this right are limited. One should distinguish between the various possible appeals. As acknowledged by Commissioner Kroes, in most cartel cases 'parties litigate to reduce the level of the fine, rather than to deny that the anticompetitive behaviour took place'.⁹⁷ This means that few appeals are expected to focus on the finding of liability, while more commonly, companies would appeal to reduce the attributed fine.

As for the former, the finding of liability, it seems that little room will be left for successfully arguing that the parties were not liable, in view of the 'unequivocal acknowledgement of liability for the infringement' contained in the WSS and their prior 'common understanding' with the Commission'. Hence, the only plausible argument would consist in making a case for a 'manifest abuse' on behalf of the Commission in the form of a constraint or of an intentional withholding of evidence. Besides, as pointed by Professor Lenaerts, the ECJ has implicitly recognized a right of an undertaking that has received a fine reduction for providing the Commission with facts proving an anticompetitive conduct, to contest those same facts.⁹⁸

Appeals on fines are more critical for companies. Here again the possibility of appealing is, in practice, to a great extent given up due the fact that the imposed fine cannot exceed the maximum fine proposed by the parties themselves. Moreover, arguing that at the time of their proposal some relevant information was unavailable or withheld by the Commission would be quashed by the confirmation of sufficient information in the WSS. Thus, it seems that appeals from settling parties are probably going to be scarce where parties could not reasonably have known that additional, crucial for the proposal, information existed.

The possibility of non-settling parties appealing against the decision is more likely to succeed. However, given the brevity of the evidential and factual motivation of the Commission decision, a judicial review will be restricted, unless the Commission is ordered to issue a new, more extended, version of the decision. For instance, in a similar set of circumstances, due to its shortened summary of facts and curtailed legal reasoning, the Bundeskartellamt had to replace a German 'consensual fining decision' by a new fully reasoned fining decision.⁹⁹

USE OF PARTY SUBMISSIONS FOLLOWING A FAILURE TO REACH A SETTLEMENT – AN OPEN QUESTION

Following a failure to reach a settlement, the Commission has committed not to use information acquired throughout the settlement procedure against any of the parties to the proceedings.¹⁰⁰ Yet, reasonable doubts persist. The problem arises from the non-separation of jurisdictional and prosecutorial powers of the Commission.¹⁰¹ The Commission finds itself in the hypocritical position of possessing evidence that it cannot directly use.

To tackle the issue, some commentators suggested that a new team of Commission officials should start the investigation and the prosecution anew, as the ones conducting the failed settlement procedure would be naturally inclined to fall back to the known incriminating information (for instance by requesting parties the same information anew). Others proposed to label the SWW acknowledgements as privileged and to return the

⁹⁷ Above note 18, Neelie Kroes Speech 07/722, page 4.

⁹⁸ See above note 35, Lenaerts, K. (2007), p. 1490 ; Case C-121/04 P *Minoikes Grammes ANE (Minoan Lines SA) v. Commission*, paragraph 66; Case C-111/04 P *Adriatica di Navigazione SpA v. Commission*, paragraph 91; Case C-110/04 P *Strintzis Lines Shipping SA v. Commission*, paragraph 63.

⁹⁹ Above note 3, Burrichter, J. and Zimmer, D.J., (2007), page 613.

¹⁰⁰ Above note 16, Commission Notice, paragraph 27

¹⁰¹ See Wils, W.P.J., 'Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law' (2006) *World Competition* 29, page 3-24.

documents supplied by the companies. Finally, some have proposed that the Commission should have two separate teams handling the case and the settlement process. Settlement discussions should be conducted with the first team and should remain confidential.

Summing up, no matter how hypocritical and antithetic to the Commission's enforcement goals, it would be unjust for undertakings that reveal confidential information for a specific purpose and for a *quid pro quo* to see that very information be used otherwise than originally planned, especially in view of the Commission's great discretion in terminating the settlement procedure.

(D) PHASE IV: THE STATEMENT OF OBJECTIONS (SO) AND THE PARTIES' RESPONSE

I. ACCEPTANCE OF THE 'WRITTEN SETTLEMENT SUBMISSION'

Endorsement takes the form of including in the SO the references with regard to the cartel description and its legal qualification, as well as, the imposition of a fine that does not exceed the maximum amount indicated by the parties. In practice, the Commission has indicated informally that the operative language of the SO will be exactly the same as the WSS.¹⁰² This suggests that the Commission will opt for a personalised SO incorporating the settling party's WSS instead of a general SO addressed individually to all parties involved. If so, two forms of SOs would have to be issued (one for settling and one for non-settling parties), which could cause procedural stagnation instead of acceleration, given that under the normal procedure there is usually a single SO addressed to all parties.

According to the Notice, the Commission's acceptance of the parties' submission takes place implicitly at the moment of the issuing of the SO. Yet, whether the Commission has actually accepted or rejected the written submission is completely subjective, as it is up to the parties to say whether their submissions are reflected in the SO or not. If the company interprets the facts of the cartel involvement differently than the Commission, then it has the possibility to renounce the settlement and mount a full defence.

II. REJECTION OF THE 'WRITTEN SETTLEMENT SUBMISSION'

While parties have no right to revoke their written proposal,¹⁰³ the Commission has no obligation to endorse it as it has the discretion to adopt an SO which diverges from the parties' submissions. If it decides to do so the general provisions regarding the time-limit,¹⁰⁴ the oral hearing¹⁰⁵ and access to file¹⁰⁶ shall apply, and the settlement is deemed to be withdrawn and deprived of any evidential value against any of the parties.

While the defence rights of the parties are judiciously returned, the capacity of the Commission to legitimately adopt –without any justification– a SO which does not endorse the parties' submission has been subject to criticism. The solution is problematic also in that parties get to know the Commission's decision only at the deliberation of the SO. It appears therefore, preferable to opt for an alternative solution whereby the Commission, prior to issuing its SO, will issue a decision informing the parties as to whether their submissions have been approved. Moreover, the 'common understanding' reached

¹⁰² AmCham consultation submission, page 5.

¹⁰³ Above note 16, Commission Notice, paragraph 22.

¹⁰⁴ Article 10(2) of Regulation 773/2004.

¹⁰⁵ Article 12 of Regulation 773/2004.

¹⁰⁶ Article 15(1) of Regulation 773/2004.

creates a legitimate expectation to the parties that their WSS will, *a priori*, be endorsed. Therefore, although the Commission needs to maintain the unilateral power to withdraw, this power should be exercised in reasonable circumstances. Diverging from that 'common understanding' may be due to three reasons: a) on a new reading of the legal or factual evidence already provided, b) on a new input of evidence that proves that the Commission has been misled or mistaken, or, c) on a disagreement over the proposed maximum level of fines. Should one of those arise, the Commission should legitimately depart by giving reasons to the interested parties. Certainly the side effect of such a solution would be to impose a significant procedural burden by compelling the Commission to motivate each decision especially having regard to the possible contradictions deriving from allegations of the settling parties. The impracticality of the solution is to a great extent dependent on whether the Commission opts for a general or an individualised SO and on the level of detail provided.

III. PARTIES ACCEPTING THE COMMISSION'S ENDORSEMENT OF THE SETTLEMENT IN THE SO

Parties have the right to express their views on the objections before the adoption of a final decision, just like in the normal procedure.¹⁰⁷ Issues may arise as settling parties might discover upon the delivery of the SO that evidence provided by the other settling, or non-settling parties, had not been disclosed to them. The Commission shall take into account those views and, where appropriate, factually or legally reassess its findings.

When the SO does endorse the settling parties' submissions, the parties shall, within a 'time-limit of at least two weeks reply to the Commission confirming (in unequivocal terms) that the SO corresponds to the content of their submissions.'¹⁰⁸

(E) PHASE V: COMMISSION DECISION AND SETTLEMENT REWARD

I. COMMISSION DECISION

DECISION CONFIRMING THE SO

Following the parties' confirmation response, the Commission is entitled, pursuant to Articles 7 and 23 of Regulation 1/2003, to issue a final decision upon consultation of the Advisory Committee and in view of the ultimate autonomy of the Commission College.¹⁰⁹ This essentially means that time will be saved as there will be no oral hearing or access to the file requests coming from the parties that have waived these procedural rights in their submissions.

DECISION DEPARTING FROM THE SO

The Commission retains the power to depart from its position expressed in its SO that endorses the parties' submissions. This can be a result of the Advisory Committee's different approach or of other considerations that came into play when deciding the case at the

¹⁰⁷Under Article 11(1) of Regulation 773/2004 and Article 27(1) of Regulation 1/2003

¹⁰⁸Above note 16, Commission Notice, paragraph 26.

¹⁰⁹Article 14 of Regulation 1/2003.

Commission College. Should this happen, the effects of the settlement as well as those of the existing SO will be null and void, and the parties will be offered a new SO and the chance to exercise all their procedural rights of defence waived throughout the settlement procedure. Essentially this means that the acknowledgements and confirmations would be deemed withdrawn and rendered unable to be used in forthcoming proceedings.

These provisions have been heavily criticised for giving, once again, too much discretion to the Commission. The fact that the Commission may legitimately depart from the parties' submissions, because of a divergent assessment of the Advisory Committee or the Commission College, deprives the parties of any legal certainty about the outcome of the procedure. The critique is accurate for the additional reason that there is limited scope for new information to come to the Commission's attention in the period between the issue of the SO and the final decision. Therefore, it would make sense to expect the parties to know that when the Commission decides to endorse a settlement in its SO it has the implicit backing of the College of Commissioners. Burrichter¹¹⁰ opined that the problem could also be mitigated by authorizing the Competition Commissioner to take the decision on behalf of the College, just like in Article 6 decisions of the Merger Regulation. Furthermore, just like in the case of deviations from the WSS, deviations from the SO position should normally be limited in cases where the Commission comes into the possession of new evidence, subsequent to the issuing of the SO, that materially contradicts previous evidence. If that were the case, it would make sense to expect the Commission to give reasons for departing from the SO position. Besides, the Commission itself acknowledges in its MEMO that '*departing decisions*) should occur only exceptionally if the usefulness of the settlement instrument is to be preserved'.¹¹¹

II. QUANTIFYING THE SETTLEMENT REWARD

The fine is determined in the final Article 7 decision that should indicate, *inter alia*, the undertaking's cooperation at the administrative procedure. The Notice provides that the Commission '*will reduce by 10% the amount of the fine after the 10% cap has been applied having regard to the Guidelines pursuant to Article 23(2)(a) of Regulation 1/2003*' and that any deterrence multiplier '*will not exceed a multiplication by two*'.¹¹²

In theory, the reduction should be significant enough to make up for the rights of defence foregone. Similarly, considering that the most important right given up is that of receiving an effective appeal before the CFI, it would be reasonable to set the level of reduction close to the average level of reduction achieved through CFI appeals, i.e. approximately 20%.¹¹³ According to others, the reward should correspond to the value of actually expediting the cartel investigation process. So, if efficiency is the *quid pro quo* for settling, some have proposed to adopt a sliding scale of settlement reward, with a higher reward offered in cases where the savings are greater (i.e. all parties settle) and reduced when they are less (some settle and some not). However, such a scale could be a constant source of uncertainty and additional disagreements between parties and the Commission. Parties might appeal against their own settlement if other companies have received a higher reward.

¹¹⁰Above note 3, Burrichter, J. and Zimmer, D.J. (2007), page 617.

¹¹¹Commission MEMO/07/433, p. 5

¹¹²Above note 16, Commission Notice, paragraphs 30 and 32.

¹¹³20% according to A. Stephan (Above note 31, in Stephan, A., (2007), p. 7) and 19,3% according to Veljanovski, C., 'European Cartel Prosecutions and Fines, 1998-2007 - A Statistical Analysis' (2007) SSRN, p. 5

So, irrespective of the theoretical basis of the *quid pro quo* upon which the reduction should be based, it constitutes a common ground that the settling members of the same cartel should all receive the same percentage and that this reduction should apply in all cases. This is in line with the Commission's position whereby 'all parties settling in the same case will receive equivalent reductions of fine, because their contributions to procedural saving will be equivalent'.¹¹⁴

Despite the fact that, *prima facie*, quantifying the value of the foregone parameters or the efficiency gains appears impossible, a careful examination of the reduction practice in the Leniency programme with regard to 'attenuating circumstances' could prove useful. For instance, in *Prym/Commission* (Case T-30/05) the Commission awarded a 10% reduction for the sole fact that a company had not challenged the SO.¹¹⁵ Thus, in view of the extent of the forfeited rights in the case of settlements, it would be fair to argue that the held 10% reduction is appropriate. Probably having that in their mind, most of the consultation contributions agree that the appropriate settlement reduction would be around 10-20% although voices for reductions up to 50% have also been put forward.¹¹⁶ NCA's practice could also be used as an indicator. For instance, in the recent UK case of the dairy cartel, early resolution agreements were reached between the OFT and with six out of nine defendants,¹¹⁷ by reportedly granting a 35% fine reduction.¹¹⁸ The French procedure provides for a 10% reduction of the total fine (calculated on the basis of 5%, not 10%, of the total turnover) for mere procedural efficiencies that could increase up to 30% when the parties offer commitments in order to remedy their infringements.¹¹⁹

Arguably the 10% reduction is not enough, given that board members would probably be willing to try out their chance before the CFI. Time will show whether undertakings will opt for the old route of lengthier and costlier proceedings with higher, but less certain, fine reductions on appeal.

4. IMPACT AND CRITICAL ASSESSMENT OF THE SETTLEMENT PROPOSAL

The detailed analysis of the settlement procedure enables to assess the effectiveness of the proposed system against the goals it is supposed to pursue. This juxtaposition can be attempted from the point of view of both the Commission and that of the undertakings. Likewise, it also seems imperative to consider the externalities that the new system might produce, especially with regard to its interaction with both the Leniency Programme and the private enforcement.

(A) ASSESSMENT IN VIEW OF THE COMMISSION GOALS

The procedural efficiencies produced by the proposal are noticeable, especially in alleviating the procedural complexity and reducing the length of the Commission decision. In addition to that, the risk of lengthy appeals persists but it is considerably weakened.

I. CONFRONTING PROCEDURAL COMPLEXITY AND THE EXCESSIVE LENGTHS OF COMMISSION DECISIONS

¹¹⁴Commission MEMO/07/433, p. 2

¹¹⁵Commission MEMO/07/353, 'Antitrust: Commission welcomes Court of First Instance judgments in needles and other haberdashery products cartel case', 12/09/2007

¹¹⁶A&O (10-20%), Antitrust Alliance (at least 20%), ABA (20-30% and greater for parties participating in both leniency and settlement programs. 40-50% Addleshaw Goddard LLP; AmCham 20-30%, AEDC 25%, Baker& McEnzie 25%, Howrey 30%,

¹¹⁷See OFT press release of 7th December 2007, <http://www.of.gov.uk/news/press/2007/170-07>, see also the previous OFT schools cartel settlement <http://www.of.gov.uk/news/press/2006/88-06>.

¹¹⁸AmCham submission, 'Position Paper on Commission Proposals on the conduct of settlement procedures in cartel cases', www.eucommittee.be/Pops/2008/COMP_cartels140108.pdf, page 2.

¹¹⁹See Carswell-Parmentier, L., 'Recent developments in French competition law - Commitments, Leniency and Settlement Procedures - the French approach' (2006) *European Competition Law Review*, 27, 616-630.

The procedure yields savings by not requesting access to the file or a formal hearing after the SO, by saving time on translations and by resulting in the drafting of a shorter SOs and final decisions. The majority of the savings come from the period between the SO and the final decision, when parties usually request access to file and oral hearings. According to Stephan, this period averages 12-13 months, meaning that the potential saving in time from the settlement procedure can be up to one third, given that a cartel case lasts 3 years on average.¹²⁰ So, significant resources can be freed through the proposed procedure. Savings are also affected throughout the SO preparatory phase, as parties can facilitate the speedier analysis of existing evidence. Finally, it is submitted that the Commission could achieve further time savings by accepting settlement offers also after the issuing of the SO note. This, however, could be possible only in well defined circumstances in order to avoid free-riding phenomena on behalf of non-settling parties.

II. CONFRONTING THE RISK OF LENGTHY APPEALS BEFORE THE CFI

It is recalled that 90% of the Commission decisions are appealed before the CFI, delaying on average the definitive decision by 3.5 years and using up the valuable resources of the Commission's legal service. In addition to that, the possibility of effectively bringing an appeal is of an underestimated importance, given that it influences to a great extent the decision to enter into settlement discussions at the first place. The confirmation of sufficient information and the wavers to the right of access to file and of an oral hearing formally expressed by the settling parties do not legally prejudice the right of parties to appeal. Nevertheless, it has been demonstrated that, given the limited circumstances under which the parties will be able to appeal, a de facto waiver to the right of appeal is formed through the proposed decision, especially for settling parties.

(B) ASSESSMENT FROM THE PERSPECTIVE OF UNDERTAKINGS

Generally speaking, there is a series of advantages for companies that participate in settlements. However, despite the straightforward advantages, procedural ambiguities that are present throughout the procedure might inhibit a company to proceed to a settlement.

I. THE ADVANTAGES OF SETTLING

Having regard to the advantages listed in Part I the following conclusions can be drawn:

FINE REDUCTION AND REDUCED COSTS

Despite the 10% set reduction, it still appears impossible for undertakings to estimate with a relative precision the reward that they are likely to receive. This rate would be particularly appealing to second and third leniency applicants, as well as to all undertakings that do not qualify for leniency.

The reduced length of the procedure will definitely be reflected on the undertaking's budget as it is estimated that the time needed for a decision to be delivered will be shorter per one third (1/3). Moreover, companies will not have to draft costly reports for the

¹²⁰Above note 31, Stephan, A. (2007) pagr 42.

Commission in the context of exchanges of information, thereby freeing-up valuable managerial resources. All these elements may affect the companies' predisposition of appealing against the Commission's decisions.

REDUCED RISK OF FOLLOW-ON ACTIONS

It is hard to quantify the potential risk for companies of follow-on actions, especially in view of the absence of consistent private litigation in Europe. Nevertheless, the success of follow-on actions is conditioned by two parameters: the precision of information given in the final decision, and the rules of disclosure. As explained below, while the brevity of the Commission's final decisions is an advantage for undertakings, the rules concerning oral and written submissions are still unclear.

THE SHORT SO AND FINAL DECISION

Obviously, the fact that the SO and the final decisions are expected to be 'shortened' and probably not fully reasoned will not help private plaintiffs to alleviate the burden of proof of the infringement. The legal test for proving the causation link between the cartel and the damage suffered is not evident, and more information than mere cartel participation is needed. However, the plaintiffs might petition to the judge to (or the judge might *ex officio*) ask the Commission to disclose further information. It is those rules on disclosure that are of focal interest in determining the private enforcement potential in the ambit of settlements.

RULES ON DISCLOSURE

Normally, written party submissions to the Commission in the framework of leniency are not discoverable under most national procedural rules. However, even when a cartel affects the European area only, the discovery of cartel activities in Europe could have some bearing on alleged cartel activities in other countries, and in particular in the US,¹²¹ where leniency submissions are discoverable under the national rules of procedure. The effect of such wide discovery is obviously to undermine the EC Leniency Programme. The Commission has sought to tackle the problem by intervening in US civil litigation to oppose discovery of EU leniency applications.¹²² In addition to that, it has introduced an oral statements procedure in the Leniency Notice¹²³ and is planning to adopt more restrictive rules on the discoverability of written statement. For instance, the recently issued White Paper on actions for damages explicitly provides that 'adequate protection (from disclosure) should be given to corporate statements by leniency applicants and to the investigations of competition authorities'.¹²⁴ The Commission justifies this provision on the ground that it seeks to 'avoid placing the leniency applicant in a less favourable situation than the co-infringers. Otherwise, the threat of disclosure of the confession submitted by a leniency applicant could have a negative influence on the quality of his submissions, or even dissuade an infringer from applying for leniency altogether'.¹²⁵ The same logic was *mutatis mutandis* applied in the 'settlement procedure', as settling parties would be more exposed than non-settling ones in the event of a request for discovery.

¹²¹Dechert On Point, 'European Commission proposed Framework for Cartel Settlements', Nov.2007, p. 2, http://www.dechert.com/library/Antitrust_25_11-07_European_Commission.pdf.

¹²²According to Reynolds, M and Anderson, D, 'Immunity and Leniency in EU Cartel Cases: Current Issues' (2006) European Competition Law Review, 27, p. 83, the Commission filed amicus curie briefs in US civil litigation relating to the Vitamins, Methionine and Choline Chloride cartels.

¹²³Commission 2006 Leniency Notice, paragraph 32.

¹²⁴Above note 61, White Paper, paragraph 2.2.

¹²⁵Above note 61, White Paper, , paragraph 2.9.

The final version of the Commission Notice added four new paragraphs concerning access to evidence.¹²⁶ At first, it clarifies that ‘normally public disclosure of documents and written or recorded statements received in the context of this Notice would undermine certain public or private interests, [...] even after the decision has been taken’.¹²⁷ The provision is the same as the one of point 40 of the Leniency Notice. The Commission takes a clear stance of no access to evidence, thereby excluding any real possibility for a private party to get access to the settlement submissions for successful follow-on (or standalone) actions for damages. Non-settling cartelists will have access but will not be able to make a copy by mechanical or electronic means of any information of the settlement submissions, and other parties, such as complainants will not be granted access to settlement submissions. In addition to that, the Commission retains the possibility, whenever the information is used after the Commission’s prohibition decision, to ask the Community Courts to increase the fine in respect to the responsible undertaking.¹²⁸ The Commission made sure that the same diligence would also apply in the case of national courts, as it provides that the settlement submissions will only be transmitted to competition authorities, provided that level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.¹²⁹

Finally, according to a newly introduced provision in the Notice, settlement submissions may be provided orally. Such oral statements will be recorded and transcribed at the Commission’s premises.¹³⁰ This solution might nevertheless cause the Commission to incur significant costs running counter to the underlying procedural efficiency objective. Yet, under settled jurisprudence,¹³¹ oral evidence constitutes equally good (valid) evidence, so the Commission added that it would not transmit settlement submissions to national courts without the consent of the relevant applicants.

Summing-up, generally, companies would be less inclined to settle when the risk of exposure to civil damages outweighs the advantages acquired through settlement. In the current legal framework, however, companies appear to enjoy a *de facto* immunity from follow-on law suits, given that not only does the settlement procedure result in shorter and less investigated decisions, but also it provides a virtually impenetrable scope of protection of the parties’ submissions against any type of generous discovery rules.

PROCEDURAL ADVANTAGES

All settlement applicants (including the immunity applicants) will benefit from the greater insight they will get regarding the Commission objections. The Commission will have to disclose all available evidence before proceeding to the SO. Furthermore, parties will receive from the Commission a ‘range of possible fines’ as a result of their infringement. As aforementioned, the degree of certainty over the range of fines is still subject to debate. Yet, parties will definitely have a sounder idea of the financial sanctions that would derive from a possible infringement decision, as they would be in the position to propose a maximum range of fines. Such a solution is particularly attractive in view of the uncertainties surrounding the application of the 2006 Fining Guidelines. Finally, the parties will have an active role to play in interpreting the factual evidence, in establishing the liabilities and in

¹²⁶Above note 16, Commission Notice, paragraphs 35–38.

¹²⁷Above note 16, Commission Notice, paragraph 40.

¹²⁸Above note 16, Commission Notice, paragraph 36.

¹²⁹Above note 16, Commission Notice, paragraph 37.

¹³⁰Commission 2006 Leniency Notice, paragraph 32.

¹³¹Above note 7, Van Barlingen, B. and Barennes, M., (2005), page 6–16.

setting the fines, and will also have the opportunity to influence the Commission's objections during settlement discussions.

The additional advantage of limiting 'reputational' damage could be the result of a shorter and less detailed final decision. The limited information about the particularities of cartel activity can only serve as a good purpose for companies. Besides, early acknowledgement of liability and the resulting reduced sanction can also accredit a company's mature management capacity.

Moreover, there is an additional issue of extreme importance, that of confidentiality. Given the very restrictive possibility of disclosure, confidentiality is very well protected. According to the Regulation 'information shall be confidential vis-à-vis third parties, save where the Commission has given a prior explicit authorisation for disclosure'.¹³²

Finally, as discussed below, private enforcement is substantially affected through settlements because of the brief and not fully reasoned decisions. Companies will, nevertheless, welcome more precise rules on disclosure that would form a safe-harbour against private actions.

II. THE DISADVANTAGES OF SETTLING

The aforementioned advantages come at a cost that, under the present proposal, goes beyond the mere waiver of defence rights.

The first issue is the lack of certainty with regard to the outcome of the procedure. The Commission has absolute and unfettered discretion on the initiation, termination and running of the procedure, and at no point of the procedure is accountable for its choices. Namely, it has the power to determine the suitability for the settlement of a case, the settlement itself or its discontinuation, the progress of discussions, the extent and timing of evidence disclosure, the adoption of an SO that departs from the WSS and finally the adoption of a final decision that departs from the position expressed in the SO. The latter case constitutes the most worrying manifestation of the Commission's discretion. Finally, the risk of favouritism or discrimination among parties is imminent given the lack of an express provision in the notice that renders equal treatment the guiding principle of the rules of the proceedings.

The second price to pay is the *de facto* giving up of the right to bring an effective appeal on the Commission decision. For the reasons explained above, there are very limited grounds for bringing such a successful appeal when companies agree to state that all their defence rights have been respected.

Finally, there is a series of issues of less critical importance that could affect the attractiveness of settlements. For instance, in cases of breach of the rules on confidentiality over the disclosed evidence, the legal impossibility of unilaterally revoking the WSS prior to the issuing of the SO and the risk of paying disproportionate fines could disincline companies from entering into settlements.

¹³²Article 10(2) of Regulation 622/2008.

(C) ASSESSMENT WITH REGARD TO THE EXTERNALITIES OF THE SETTLEMENT PROCEDURE

I. SETTLEMENTS AND THE LENIENCY PROGRAMME

While being autonomous and complementary to each other, the draft proposal contains some provisions that could affect the interaction of the leniency and the settlement procedures. Of course, as examined in *Part 2* the aim of the two procedures is different; leniency focuses on input of evidence, whereas settlements on input of procedural economies (efficiencies). Nevertheless, the interplay of the two procedures is evident. The Commission points that the incentive for companies to continue applying for leniency will be strong after the entry into force of the settlement procedure for three reasons: first, the fine reduction under the Leniency programme will be more significant than the one achieved through a settlement; second, once the settlement procedure starts, companies will no longer be able to apply for leniency; and finally, reductions of fines for leniency and for settlement will be cumulative.¹³³ Thus, there are incentives that are formed at the level of fining, and other that are of a procedural nature.

INCENTIVES FOR LENIENCY AT THE LEVEL OF SETTLEMENT FINING

The settlement reduction is completely independent of the leniency reduction but leniency applicants that decide to settle can cumulatively benefit from both fine reductions. The effect of a cumulative application of those two proceedings is to provide a further incentive to cartel members to come forward and blow the whistle to competition authorities. However, attractiveness is not going to be the same for immunity applicants (whistle-blowers) and fine reduction applicants (second and third applicants). Whistleblowers are in the privileged position of being granted full immunity. Thus, a possible further fine reduction would not, *prima facie*, induce them to settle early. However, full immunity is never certain and on top of that, through settlements, whistle-blowers can benefit from procedural facilitations (speedier solution, reduced costs, shorter SO leading to reduced risk of subsequent private actions). On the other hand, the remaining leniency applicants could have a much greater financial incentive to cooperate, given the uncertainty over the exact level of fines that they should be expecting. When companies do not qualify for leniency or when leniency is not available, a further reduction of 10-20% can be particularly attractive, especially when companies are convinced that the Commission is in possession of ample incriminating information.

INCENTIVES FOR LENIENCY THROUGH SETTLEMENT PROCEDURAL RULES

The first issue arises out of the provision that the Commission may disregard any leniency application that has been submitted after the expiry of the initial deadline for companies to express their interest in settling.¹³⁴ This provision brings about two important consequences. First, the period available to undertakings to submit leniency applications is significantly shortened compared to the provision of the Leniency Notice that grants undertakings the right to apply for immunity or fine reductions until the Commission issues

¹³³Above note 18, Neelie Kroes Speech 07/722, page 3.

¹³⁴Above note 16, Commission Notice, paragraph 13.

its SO. Secondly, once the Commission expresses its intention to engage into settlement discussions, signalling that it has already started investigations in a particular sector, it gives an incentive to all possible leniency applicants to immediately submit their application (in the absence of a second chance after the settlement deadline lapses). The aim of the provision is obviously to instigate early leniency cooperation, coupled with an early settlement, as it is unlikely that a party would initiate settlement cooperation without being willing to apply for immunity. Given that the invitation to engage in settlement discussion should, to a great extent, be perceived as an invitation also to submit a leniency application, it seems imperative to safeguard an accurately simultaneous notification of that invitation to all interested parties.¹³⁵

Summing up, it seems that the settlement would promote leniency applications, especially once a Commission *ex officio* investigation on a specific sector has been concluded. However, given the limited financial incentives it gives to immunity first applicants, the settlement procedure will not greatly affect first applicants to blow the whistle when the Commission is unsuspecting with regard to a particular cartel activity. Once the whistle is blown though, both financial and procedural incentives of the new procedure will prompt parties to apply for settlements and leniency alike. So, what appears to be clear is that the Commission is not only aiming at intensifying immunity applications, but also at inducing leniency applicants to settle.

II. SETTLEMENTS AND PRIVATE ENFORCEMENT

As discussed above with regard to follow-on actions, the Commission clearly prioritizes efficient cartel prosecution over private enforcement. It is in light of that trade-off that Commissioner Kroes has pointed out that what 'we need to look at very carefully is the link between this kind of direct settlement and civil litigation where plaintiffs seek damages'.¹³⁶ So, in principle the Commission seems to favour the effectiveness of the settlement procedure over the right to get compensatory damages for the victims of anti-competitive behaviour. This is a result of the Commission's prioritisation of public over private enforcement. While correct in principle, it is doubtful whether procedural efficiencies are to be considered as a *per se* goal of public enforcement rather than a means for its improvement. On top of that, as a matter of law, assertion of a right to compensation should in principle prevail over the goal of reaching procedural efficiency.

III. POTENTIAL ABUSES IN THE USE OF THE SETTLEMENT PROCEDURE

As indicated above, both the undertakings and the Commission might use the procedure to achieve goals other than procedural efficiency. Companies might be willing to enter into settlement discussions in order to get a comparative advantage against other cartel participants by having early access to evidence. On the other hand, the Commission might use the procedure to force parties to settle, to indirectly use the party submissions at a latter stage and to avoid a thorough investigation.

¹³⁵Commission 2006 Leniency Notice, paragraph 14.

¹³⁶Neelie Kroes Speech/07/128, 'Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe', Commission/IBA Joint Conference on EC Competition Policy Brussels, 8th March 2007.

COMPANY POTENTIAL ABUSES

It seems that, in its current state, companies will find it hard to abuse of the procedure by getting an early access to the Commission in order to mount, at an early stage, a full defence. This limited risk derives from the capacity of the Commission to progressively reveal the incriminating evidence and from the prohibition of revocation of a WSS once submitted. Parties could still, theoretically, pull out of the procedure just before presenting their WSS and after having been given full access to evidence. The time advantage gained from withdrawing is, nevertheless, minimal given that the Commission might either draft the SO anyway formally based on the submissions of the other parties, or informally benefit from the evidence already provided throughout the settlement discussions to quickly re-start targeted investigations and draft a new SO. Once the SO is drafted, all parties will be able to have full access to the Commission evidence and the time advantage given to the party is devoid of any practical value.

COMMISSION POTENTIAL ABUSES

Concerning the use of acknowledgements and information provided by the parties throughout the procedure, the current proposal clearly states that a potential failure in the settlement procedure would automatically void the submissions of any evidential value. As explained, in practice, it is hard to believe that the Commission will completely abandon the progress made and start from scratch its investigation. Moreover, the Commission retains legal capacity to use the procedure to fully prosecute a cartel member without granting him the advantage of a fine reduction, by abandoning or refusing to endorse a WSS.

5. GENERAL CONCLUSION

An ideal system should be drafted in such a manner that guarantees that the advantages deriving from an increased and accelerated rate of enforcement through the freeing of resources outbalance the costs that such a procedure might entail. Under the current state of affairs it is hard to express a clear judgement on whether, in aggregate, the proposal is beneficial for cartel enforcement. While the procedural efficiencies gained in terms of time and cost are clearly present through rules that are tailored to meet the needs of the Commission, uncertainties persist for companies in being positively predisposed to enter into settlement discussions. The Commission possesses the right to initiate, to abandon and even to neglect the settlement discussion throughout the whole procedure. Companies, on the other hand, benefit from a fine reduction, from reduced risks of follow-on actions for damages and from a variety of procedural advantages that yield cost savings and greater insight of the Commission's objections.

Settlements, by nature, involve serious trade-offs whose prioritisation falls in the sphere of competition policy with regard to both the negative impact settlements can bring about in deterrence and the unjust results that derive from institutional and bargaining imbalances

of the procedure. It is clear, that the existing settlement procedure was to a great extent intended to complement the leniency programme. It gives strong incentives to parties, through various advantages but also through well-thought rules of procedure, to cooperate with the Commission from the very beginning of the cartel investigation. The initial invitation to settle launched by the Commission will probably be perceived as an attempt to make publicly known a particular area of cartel investigation, giving cartel members a last chance to come forward and 'blow the whistle' before it's too late. Besides, in light of the high success rate of Leniency, the new Settlement procedure is likely to gradually replace the existing lengthier procedure of cartel cases.

While the coexistence with leniency seems cooperative (effective), the same is not certain with regard to reaching overall deterrence by means of private enforcement. The stringent rules of disclosure show that the Commission, while formally appearing to pursue two complementary objectives, i.e. those of streamlining the procedure and of enhancing private enforcement, in reality, is much more concerned with the former. If the settlement procedure becomes the usual procedure, one can hardly imagine how under the current regime cartel decisions would be followed-on by private damages actions, let alone by stand-alone ones. Thus, the current landscape illustrates the annihilation of the effectiveness of the initiatives proposed in the recent White Paper on damage actions and confirms the clear pro-public enforcement competition policy choice of the Commission.

Finally, only future practice can show whether the 10% reduction is to be regarded sufficient to give undertakings a strong incentive to join the new procedure. Undertakings will, in any case, have to carefully ponder on their strategic options in order not to jeopardise the procedural guarantees they enjoy under a full SO. Along the same lines, it remains to be seen whether the Commission will demonstrate the necessary flexibility and good faith in conducting the proceedings in a manner that safeguards legal certainty and aspires confidence to all parties involved.

How the Theory of Dialectical Antitrust Perceives the Role of Competition Authorities

OLES ANDRIYCHUK¹

Competition policy and law play a pivotal role in the development of the European market process. This role, however, becomes subject to revision in the time of recession. Historically each period of economic downturn is accompanied by severe critique and substantial limitation of the principles of free market with undistorted competition. Crisis cartels and similar otherwise restrictive practices often become not only tolerated but even encouraged by the regulators. This compromise is seen as an inevitable trade-off between competition and other legitimate societal goals, such as industrial growth, social stability, total welfare and sometimes even national security. On the other hand, each regulatory 'turbulence', which is caused by the revision of the role of competition within the markets, can be also seen as a fruitful time for introducing new elements to the competition policy itself and testing new theories of competition. Dialectical antitrust is one of these theories. This article explores the role of competition authorities in the period of economic crisis applying methodological apparatus of the theory of dialectical antitrust.

1. DIALECTICS AND ANTITRUST

The idea of dialectics has ancient roots, as every notion in legal philosophy. It is a method of analytical investigation which explores the object by its opposite. The process of dialectical analysis is more important than its very outcome. Every notion is seen as contestable by definition. Each tension between thesis and antithesis leads to synthesis, which in turn becomes a new thesis. Thereby the process of investigation moves to the next stage, where newly established synthesis is antithesised again (and again) by the new counterargument. This perpetual spiral contestation is seen as an essence of discovery process. In this sense dialectics rejects a holistic belief in an absolute truth, acknowledging that both thesis and antithesis can be simultaneously correct. Thus dialectical epistemology should not be seen in its simplistic form as a merely middle way between thesis and antithesis. It is a process-oriented enterprise; its value is not in the outcomes, but in the operation itself. In this sense dialectics has a lot in common with competition in the markets. Competitory process is also more important than its outcomes.²

Dialectics can be applied to the analysis of competition policy and law in several contexts. Apart from the abovementioned direct correlation between dialectical thinking

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²There are two conceptual visions of competition in the markets. According to 'utilitarian' approach, competition policy and law should be applicable only if they can generate better outcomes for society (economy, consumers, industries etc.). According to 'deontological' view, on the contrary, competition is seen as an essence of liberal democracy, which deserves its protection regardless of the outcomes it produces. The paper is developed according to the latter vision of competition.

and competitory process³ in the markets, dialectics can be used (and is implicitly used) for performing a balancing act, whereby competition as a societal value of healthy democracy 'competes' with other legitimate economic values for being prioritised by policymakers.⁴ In this situation, the policymakers have to decide which value should get its priority over the others. Often this act of balancing, due to its inductive nature, is undertaken by the regulators *ad hoc* on a case-by-case basis, although sometimes a rule-based approach can be also effective.

Dialectics is also presented in the domain of antitrust when a regulator has to decide which of available tools should be applied in order to 'fine-tune' a competitory process itself. In this case the choice is between *ex ante* or *ex post* instruments. Ontologically both methods do not exclude one another, because they are overlapping in the subject of their regulation. Therefore the tensions between *ex ante* and *ex post* regulatory tools are irresolvable and they can be seen in their mutually productive dialectical interdependence.

Another important area of the interplay between dialectics and competition lies in the comparison of different antitrust schools. Inasmuch as none of the mainstream doctrines is capable to solve all existing internal conflicts of antitrust policy, there is a possibility of applying the elements of different schools depending on the context. Such a synthesis should not be seen as a mechanical synchronisation, but rather as a polyphonic composition. This synthesis brings an added value to existing antitrust scholarship without reducing the original meaning of each school. Finally, dialectics is used in the analysis of competition policy for deciding *when* and *how* to draw the line between the *natural* and the *regulated* competitory process. The former is driven by the 'invisible hand'⁵ of the markets,⁶ while the latter is designed by legitimate public authorities. This last dimension of dialectical antitrust is the most important for defining the role of competition agencies in the period of economic recession. Therefore the following parts of this article are devoted solely to this aspect of the theory of dialectical antitrust.

³The term 'competitory' reflects the essence of competition more precisely than its synonym 'competitive', inasmuch as the meaning of the latter also semantically encompasses the notion of 'competitiveness' (i.e. the ability to compete). See *below*.

⁴See e.g. Phedon Nikolaidis, 'The Balancing Myth: The Economics of Article 81(1) & (3)', *Legal Issues of Economic Integration* 32(2), 2005: 'In competition law, 'balancing' can have two related meanings. First, it may mean the consideration of non-competition objectives... In this case, we have [either] expansion of the scope of competition rules beyond their traditional goals of protecting the competitive process... [or] the limitations on competition rules for the purpose of accommodating other policy concerns. For example, state aid is permitted under certain conditions for providers of services of general economic interest or for strengthening cohesion or for protecting the environment... In its rulings in *Albany* (C-67/96) and *Wouters* (C-309/99), the European Court of Justice also accepted that the attainment of social and regulatory policy goals in collective agreements and certain professional regulations, respectively, may also be weighted against competition concerns...'

⁵The idea of 'invisible hand' has been developed by Adam Smith in his famous 'The Wealth of Nation' work. According to this metaphor, an individual pursuing his own self-interest tends to also promote the good of his community. However Smith himself acknowledged the necessity for the limitation of certain economic behaviours: Adam Smith, 'An Inquiry into the Nature And Causes of the Wealth of Nations', Prometheus Books, 1991: 'People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices...'

⁶Christian Kirchner, 'Goals of Antitrust and Competition Law Revisited', 'The More Economic Approach to European Competition Law', Edited by Dieter Schmidtchen, Max Albert and Stefan Voigt, Mohr Siebeck, Tübingen, 2007: 'Competition is shaping the institutional framework of markets to a considerable degree. It is defining the limits of freedom of contract in order to keep the interaction process open and to keep the rivalry alive.'

2. THE IMPACT OF THE ECONOMIC CRISIS ON COMPETITION POLICY

As has been mentioned above, each economic crisis tends to shake doctrinal convictions of the advocates of liberal democracy in the omnipotent nature of free markets with undistorted competition. The reason for this partly lies in our uncritical perception of the mechanism of free markets as well as its assumed universality. Free markets as well as undistorted competition should be seen not as the most effective way of governing the economy (i.e. not in their utilitarian sense), but rather as a matter of principle, as an ideological presupposition of healthy liberalism (i.e. in their deontological sense). In that latter sense, the idea of free markets becomes uncompromising, since it takes its stand in the 'pantheon' of the decisive societal values. In this case no other discussion about the compromise is possible. On the contrary, if acknowledging that free competition is the issue of the *economic effect* and not only the issue of *the ideological choice*, it becomes possible to argue that in the difficult times free markets can be compromised to achieve more economically valuable short-term results. For the sake of consistency and due to the fact that the discourse of current debates about the role of competition in the times of recession is predominantly placed exactly in the latter, efficiency-based, reasoning, it is necessary to overview the main approaches to solving this conundrum.

Schematically one can define three conceptual approaches to the role of free market regulation in the period of recession. From the left side of the political spectrum, it is possible to argue that the recession shows ineffectiveness of competition ethos, inasmuch as competitory process has led the economy to the downturn. Therefore, the Smithian ideas of profit maximisation as the driving force of the economic efficiency should be either rejected or significantly limited. The role of state regulation should be, on the contrary, substantially increased, inasmuch as it is more predictable, 'fair' and balanced. The society cannot rely on the principle of free markets, since it is not a universal tool. In some situations it works well, in others it does not, and one cannot say in advance which outcomes the markets would generate next time.

According to moderate approach, the free market ethos has been proven to be insufficient and it has to be supplemented by state regulation. The advocates of this approach would claim that free markets cannot work without regulation, the economic recession shows that the regulatory control has to be more severe/better targeted and it should be expanded to some new areas in order to achieve better results. They do not see competition neither as a panacea nor a universal tool to generate efficiency. Therefore, competition policy should be redesigned in order to take into account 'the faults of the past' and prevent them in the future.⁷ Antitrust in this perspective is seen purely in its instrumental sense: As

⁷As an example of this approach see e.g. the speech of newly appointed Assistant Attorney General for Antitrust, US Department of Justice Christine A. Varney, 'Vigorous Antitrust Enforcement In the Challenging Era', Center for Economic Progress, May 11, 2009: 'As Shakespeare once put it – 'what's past is prologue'... The current economic challenges raise unique issues for antitrust authorities and private sectors. We are faced with market conditions that force us to engage in a critical analysis of previous enforcement approaches. That analysis makes clear that passive monitoring of market participants is not an option. Antitrust must be among the frontline issues in the Government's broader response to the distressed economy'.

far as it works, it should be supported, as soon as it stops working, it has to be redesigned. Antitrust for them is not (only) about competition and freedom to compete, but (also) about consumer welfare, market efficiency, industrial growth and economic sustainability.

From the right-wing ideological sight, competition is still the most appropriate solution to solve the crisis. Each economic crisis results in the survival of most adoptable and innovative companies. The recession is seen as a Darwinian evolutionary process, coming through which the companies and industries would become ever stronger. Regulatory intervention, on the contrary, is seen as a *Pandora box*, which is very dangerous to open and impossible to close afterwards. The recession is seen as a transition to new economy, once described by Schumpeter as ‘creative destruction’.⁸

None of the three scenarios are presented in their clear form in the present-day political discourse. Furthermore, paradoxically traditional advocates of strong state intervention, being driven by retribution sentiments want the governments to refrain from ‘unfair’ and ‘disproportional’ spending of tax-payers money for saving the banking and some other industries. They insist upon the punishment of greediness. On the other hand, those who traditionally advocate a libertarian approach to the economy, being driven by corporate solidarity, recommend the governments to bail out the industries and companies who suffered most. This is explained by the fact that banks and big manufacturers could be compared to a vascular system for the economy and employment respectively.

Some inconsistencies in the argumentation of all three approaches can be eliminated by understanding that the very notion – and not merely the role – of competition must be re-conceptualised. When competition does not work, maybe there is something wrong not in the idea of competition policy itself, but in the way how we perceive it. In the following section the paper offers a methodological tool for the analysis of correlation between the ‘invisible hand’ of the markets and the ‘visible hand’ of regulation from the perspective of the theory of dialectical antitrust.

3. INVISIBLE HAND AS A SOCIETAL LIBIDO

A superficial interpretation of the Smithian idea of the invisible hand of the markets makes an impression that markets can be self-sustained. According to this approach, every intervention into the market process is a violation of the principle of a free market economy. As has been pointed out by many authors,⁹ the idea of free-from-regulation

⁸Joseph A. Schumpeter, ‘Capitalism, Socialism and Democracy’, George Allen & Unwin, London, 1976 – ‘The opening up of new markets, foreign or domestic, and the organisational development from the craft shop and factory ... illustrate[s] the same process of individual mutation ... that incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism.

⁹The doctrinal critique of this point has been elaborated inter alia by two Italian thinkers and politicians Luca Einaudi and Giuliano Amato. Luca Einaudi conditioned the markets to their regulators, (‘carabineers who protect existing order’), - Luigi Einaudi, ‘Selected Economic Essays’, Edited by Luca Einaudi, Riccardo Faucci and Roberto Marchionatti, Palgrave Macmillan, 2006. This notion has been contextualised to the regulation of competition by Giuliano Amato i.a. in ‘Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market’, Hart Publishing, 1997.

markets ('cowboy-style') is semantically insolvent. It is unrealistic to contrast free market to state intervention. The notion of a functioning market inherently presupposes the rules under which it operates. To enable fluent transaction of goods and services the agents have to establish such compulsory preconditions as currency, time, place for agreements, scale of measurement, code of conduct, quality standards, liability for breaching the contract, defence against violence, consumer protection as well as many other prerequisites. The very existence of market is also subject to an enforceable legal system and strong protection of property rights. All those tasks are impossible to achieve without regulation. Even ultra-libertarian anarchic theories do acknowledge at least minimal role of public authorities in the marketplace. Inasmuch as regulation is unavoidable for the very existence of the markets, its presence does not make them automatically restricted. Thus markets can be dialectically free and regulated in the same time.

This empirical fact by no means diminishes the role of an 'invisible hand'. Quite the contrary, the 'invisible hand' is an indispensable component of the free markets; it constitutes the distinctive feature of them. The discussion between economic liberals and protectionists has a perpetual nature and rather productive consequences, the results of which can be harmful only when some party would definitely win them.¹⁰

Each individual by maximising its own welfare maximises the total welfare. The 'invisible hand' as an internal stimulus to generate welfare can be compared to the notion of *libido*. Both, invisible hand and libido, are driving forces for evolutionary development, yet none of them is surfacing. Indeed, the personal life without libido is meaningless. Libido constitutes the driving force for evolutionary development. Similarly, not only a freedom but also a desire to compete is essential for markets. However, although life without libido/invisible hand does not make much sense, life only with libido/invisible hand is impossible either. Libido and restraints go hand in hand. They are inseparable. The same is the case with the markets. An invisible hand of the market is inevitable but by no means sufficient component for its functioning. The visible hand of a regulator is indispensable as well. Both hands are in a dialectical interplay with one another. They are correlated as form and essence (one is impossible without the other). Often such interplay is nothing else than a conflict, but here it is the algorithm of market's functioning.

Societies which consider that competition constitutes a core value for their evolution require regulatory intervention in the domain of competition. Competition should be not only preserved, but also protected and, if possibly, promoted. Thereby states become responsible for the 'fine-tuning' of the competitive process and accordingly public authorities intervene in the markets for many legitimate reasons. Regulatory activities of the state are too broad to be coherent. Most of them are 'merely' incoherent, some fairly conflicting, whereas others are mutually exclusive. Since states are required to achieve conflicting goals by conflicting means, they often face the necessity to make rational (sometimes tragic) choices: One cannot prioritise everything. Competition as a societal value of liberal democracies also belongs to the public domain which has to be protected. However, competition as well as all other legitimate economic interests cannot be protected in its entirety. Hence, competition goals can be compromised, but only on the external level

¹⁰For the history of the discussion between advocates of 'invisible' and 'visible' hands in the UK context see Frank Trentmann, 'Free Trade Nation', Oxford University Press, 2008.

of regulation, where the balancing act requires compromises by its very essence. Yet on the internal level competition should be seen in its deontological sense, as a separate value, which is independent from other legitimate economic values, such as consumer welfare.¹¹

4. TWO TYPES OF MARKET FAILURES

Not all kinds of state intervention are directed to *repair* market ‘failures’, some are performed to *enhance* the proper functioning of the markets, others – to substitute them. The very notion of market *failure* is subjective and is predetermined by the external political choices rather than the descriptive theoretical models. Analytically, markets never fail. In this respect they are similar to Darwinian selection process, which can be modified but never abolished. Regulators accept some of the market solutions, others are not accepted, yet all of them remain to be the *answers*, which provide the *language* of the markets with its fullness, plenitude and completeness. From a market theory perspective, ‘the taste of the apples’ is not decisive. Institutionally, the markets of ice-cream and the markets of illegal drugs have much more similarities than the products, which are selling on them. The ‘colour’ of markets is irrelevant; the common feature of all ‘white’, ‘grey’ and ‘black’ markets is that all are driven by the invisible hand of the spirit of enterprise (on the one part) and external regulation of policymakers (on the other).

However, since the term market failure is commonly accepted, there is a necessity to distinguish between two different ‘failures’: An internal and external. The first is related to the proper functioning of the markets as a value-neutral system. Such ‘failures’ need regulation of the very mechanisms of the markets. They have to be fixed not because they provide the best solution for society, but because they have been broken. Thus the internal market failures take place when the market process does not work properly due to some inside (e.g. breach of contract) or outside (e.g. economic recession) factors. This type of market ‘failures’ would require regulatory intervention for the purposes of the market functioning as such. This intervention is undertaken for the correction of the markets regardless of their societal importance.

The second sort of market failures are related to the outcomes which markets offer. Even the proper functioning of the markets can cause negative outcomes for society.¹² Therefore it requires many different regulators to intervene, in order to correct this external failure. Thus the external market failures occur when the outcomes which are generated by the market process are unsatisfactory from the broader regulatory perspective. Thereby, on the one hand regulatory intervention is necessary for the markets themselves (i.e. regulation to correct internal market failures) and on the other – regulatory intervention is required to balance the outcomes of the markets with other legitimate societal values (i.e. regulation to correct external market failures).

¹¹According to those scholars who advocate act-utilitarian approach to antitrust, the ultimate goal of competition is protection of consumer welfare. Thinkers from deontological tradition (e.g. Austrian School or rule-utilitarians) consider that competition as a process should be protected, which in its turn will have a positive effect of consumer welfare.

¹²In the previous example of black markets, state regulators strive to prohibit them because they are illegal (hence, undesirable from the societal perspective). However, the illegality of black markets does not eliminate their ontological feature of being the ‘markets’.

5. COMPETITION - COMPETITORS - COMPETITIVENESS

The terms 'competition', 'competitors' and 'competitiveness' are often used in antitrust scholarship as synonyms. Yet these three terms have very different nature. The right to compete is not indispensable for the existence of competition, since technically competition can take place between only those who do not need their right to compete to be protected: They are ready to compete, relying solely on their own power and ability to survive within the market battle.¹³ The right to compete is a distinctive feature of *some* models of competition; nonetheless it is not the prerequisite of the very existence of competition.

The right to compete is an attribute of social-market economy, which emphasises not only on the procedural equality and *laissez faire*, but also on the distributive elements of the society, it considers that no society can guarantee a sustainable economic growth, unless it provides a fair share of its total welfare to all its members and not only to their most successful fraction. This is the reason, why the right to compete is considered as an important economic right. Its protection has not much to do with competition as such. It is protected not for the sake of preserving an effective competition, but rather for the expenses of it. They constitute two different economic substances.

Another 'phonetic twin' of competition, which has to be separated from it, is competitiveness.¹⁴ Competitiveness refers to the ability and readiness to compete, and does not depend upon existence of competition as such. Furthermore, there are several means how to achieve competitiveness, and only one of them presupposes competition. Competitiveness is an external feature, while competition is on the contrary an internal process.¹⁵ European industrial policy is a typical example of competitiveness. Its main purpose is external. It is preoccupied with the position of Europe in the international context. Currently competition is considered as a tool to achieve European competitiveness, but other economic policies do not necessarily share European premises in the effectiveness of competition. Some of them consider that a planned-economy can provide more efficient results in terms of their competitiveness (or ability to compete) within the international markets.¹⁶ The goals, related to industrial policy within the global economy can be achieved by several alternative means: Competition, protectionism, planned economy, authoritarianism...

As it has been emphasised for many times by the DG COMP and in particular by Commissioner Neelie Kroes, the European Union has its long history of correlations between industrial and competition policies, which now enters a new era.¹⁷ The Commission abandons an old-fashion approach to industrial policy, which is one related to

¹³The right to compete is seen by some scholars (e.g. Ordoliberal School) as a quintessential constitutional right (see i.a. Christian Joerges, Florian Rühl, 'Social Market Economy' as Europe's Social Model?', EUI Working Papers, Law, 2004/08.). Ordoliberal School places the emphasis on the passive rights to enter the markets for (predominantly) weaker parties. Therefore the criterion of 'workable' competition in this respect would be low barriers to entry rather than the desire to enter the markets (as it would be the case for Austrian School).

¹⁴The term 'anticompetitive' is used as an indicator of the harm to three different attributes interchangeably: (i) competition (ii) competitors (iii) competitiveness. Often these three notions are not synonyms, sometime even antonyms. What is harmful to one can be useful to others.

¹⁵Frank Easterbrook, 'Ignorance and Antitrust,' Antitrust, innovation, and competitiveness, Oxford University Press, 1992.

¹⁶e.g. Schumpeter argued that there was no inherent reason why central planning should work less well than free markets in the production of technological innovation.

¹⁷Neelie Kroes, 'Industrial Policy and Competition Law and Policy', 2006 Fordham Comp. L. Inst. 201 (B. Hawk ed. 2007) 'Industrial policy and competition policy: For Europeans... just putting these two notions in one sentence still tends to conjure up a great ideological divide, a divide between Colbertian 'dirigistes' and economic libertarians – on the one hand, a faith in the ability of governments to successfully build, direct and protect the supply side of the economy and on the other hand, a belief that markets should be subject only to rules to guarantee a level playing field, but that markets are otherwise best left to their own devices... As a result ... industrial policy has been rather bad-mouthed by the advocates of competition policy.'

protectionism and launches a new one, coherent with R&D and innovation-oriented purposes of the Lisbon Agenda.¹⁸ Competition policy plays an important role in this process, but both remain to be non-identical.

Despite the deep empirical interpenetration, the theoretical possibility of the separation between industrial and competition policy is still undisputable. Ultimately, they are interdependent and interchangeable tools for the regulation of the marketplaces, but their methods, priorities and emphasises, their very *raison d'être*, are distinctive. While industrial policy strives to achieve the best results within the context of external economic dimension, the competition policy, perceived in its deontological form, is predominantly internal and oriented much more on the process than the result.¹⁹

The difference between the right to compete and the right to competition is not only theoretical. By transposing the notion of competition from the domain of individual rights to the area of collective values, the nature of antitrust is changing: From means, it transforms into ends. Even ineffective competition deserves to be protected on the level of political choices and ideological beliefs. In this sense competition is a synonym of economic freedom.

6. CONCLUSIONS

So can the role of competition in the period of recession be reassessed? In other words, should we still trust in antitrust? The answer would be positive if competition will be seen as an independent societal value which deserves its legal protection and political support regardless of the outcomes it generates. This value should be seen dialectically as absolute, which can be however compromised due to its conflict with other absolute values. The role of competition is implicitly recognised even by the governments which provided immense financial support for some sectors of their economies. Thus even in cases where some commercial institutions have been nationalised, their management board remained to be independent from the states' influence. The reason for this is based in the understanding that an 'invisible hand' of the markets is a more efficient tool for achieving long-term economic benefits than direct state intervention.

¹⁸Neelie Kroes, 'Industrial Policy and Competition Law and Policy,' *ibid.*: 'I think it makes no sense to speak of industrial policy and competition policy as distinct, one from the other, let alone as antagonistic policies. I would rather define industrial policy as one, which frames the structural conditions necessary to ensure economic success in a globalizing economy. I therefore have no qualms in saying that competition policy should form a central plank in any industrial policy.'

¹⁹Compare the US attitude to the role of competition in industrial policy. Antitrust Modernization Commission Report and Recommendations, April 2007: 'Antitrust law in the United States is not industrial policy; the law does not authorize the government (or any private party) to seek to 'improve' competition. Instead, antitrust enforcement seeks to deter or eliminate anticompetitive restraints. Rather than create a regulatory scheme, antitrust laws establish a law enforcement framework that prohibits private (and sometimes, governmental) restraints that frustrate the operation of free-market competition.'

When a state bails out some industries, it is in the position to influence the future design of those industries. For instance, some countries have already proposed that their financial injections into the economy will prioritise environmentally efficient technologies. Similarly, support of the motorcar industry has already resulted in a proposal to implement a special satellite tracker, which would supposedly help the motorists in case of emergency.²⁰ The same approach can be implemented in the area of competition. Inasmuch as the pre-recession antitrust model has been already infringed by the inevitable state aid, it must be redesigned in the way which would enable the legislative and/or regulatory authorities to implement more innovative approaches to competition policy.

²⁰In the future this device can be also used to detect any excess of speed limits. The interest of regulator in this case becomes more tangible.

Should competition authorities integrate environmental protection into competition policy?

RUTH KNOX

1) INTRODUCTION

Competition law has been described by Portwood as one weapon in the armoury against the destruction of the environment¹. The present paper will assess the theoretical justifications and practicability of this assertion primarily in relation to the European Union and its competition authority, the European Commission.

My central argument will be that the Commission should integrate environmental protection considerations into its policy not only because it is constitutionally bound to do so, but principally because the recent shift in EC competition policy towards effects-based analysis necessarily requires the quantification of environmental benefits in applying the core competition law provisions of Articles 81 and 82. This quantification is demonstrably difficult unless the Commission adopts a more scientific 'economic' approach to assessing the effect on non-priced scarcities as well as priced scarcities in its assessments². However, I will argue that this dilution of analysis can only inhibit the robust and consistent application of competition law, especially given the pronounced emphasis in the Commission guidelines on pure 'traditional' efficiencies³, as well as the recent decentralising effect of Regulation 1/2003.

Nonetheless, the Commission ought to integrate environmental considerations into its decision to institute proceedings so as to fulfil its constitutional duty without creating conflict with the effects-based approach. A more communicative Commission should be developed using the 'multicriteria methods' stipulated by Aslaksen and Myhr⁴ to ensure that the most fundamental environmental concerns are remedied outside the realm of competition law, where it is arguably more effectively achieved.

My work will be divided into four sections. In Section One, I will evaluate the constitutional duty to integrate sustainable development into competition policy. In Section Two, I will assess the validity of the theoretical arguments claiming an inherent

¹ T Portwood, *Competition Law and the Environment*, London: Cameron May, 1994.

² J A H Maks, *The "New" Horizontal Agreements Approach in the EU: an "Economic" Assessment*, Paper presented at the Workshop on "Reform of EC Competition Policy" Jointly organised by EIPA and HWWA, 10-11 Dec 2001, Maastricht, available at: <http://www.fdewb.unimaas.nl/eurecom/ThenewhorizontalEUapproach3.PDF>, page 16.

³ The concept of 'traditional' efficiencies is delineated by Maks, *The "New" Horizontal Agreements Approach in the EU: an "Economic" Assessment*, Paper presented at the Workshop on "Reform of EC Competition Policy" Jointly organised by EIPA and HWWA, 10-11 Dec 2001, Maastricht, available at: <http://www.fdewb.unimaas.nl/eurecom/ThenewhorizontalEUapproach3.PDF>, page 5.

⁴ I Aslaksen and I Myhr, *The Worth of a Wildflower: Precautionary Perspectives on the Environmental Risk of GMOs*, *Ecological Economics*, Vol 60(3), 2007.

complementarity between the goals of competition law and environmental protection. In Section Three, I will explore the arguments for integrating environmental considerations into each of the three stages of competition law enforcement, i.e. at the level of exemption or justification under Article 81 and 82, at the level of designing sanctions and during the exercise of the Commission's prosecutorial discretion. In Section Four, I will outline institutional improvements to encourage greater integration between the various directorates to ensure effective integration of environmental considerations into competition policy.

2) THE INTEGRATION PRINCIPLE

(A) THE CONSTITUTIONAL NATURE OF THE DUTY TO INTEGRATE

Article 6 EC states that 'environmental protection requirements must be integrated into the...implementation of the Community policies and activities [...], with a view to promoting sustainable development'. In Article 3(1)(g) EC, one of the Community policies described includes 'a system ensuring that competition in the internal market is not distorted', i.e. competition policy. Given this express stipulation and the use of the imperative verb in Article 6 EC it is argued that the Commission and the European Courts alike should integrate the goal of 'sustainable development' into their activities and decisions on competition law.

Basaran argues that Article 6 EC does not create a constitutional duty, and that it merely 'constitutes a general political declaration whose parameters and scope are not clear enough'⁵. She argues that because the integration principle was not inserted under the title for competition policy before the Amsterdam Treaty, Article 6 EC only has declaratory status. However, despite the absence of clear designation a duty does apply because of the explicit recognition by the Commission itself in the XXIII Competition Report of the direct applicability of Article 6 EC to competition policy⁶. The duty to 'integrate' is not a matter for institutional discretion as Basaran posits.

Furthermore, in the case of *Albany*⁷, the European Court of Justice cited the Commission's tasks in applying competition law as including the goal of Article 2 EC of 'a high level of employment and social protection'.⁸ In that decision, the Court accepted a restriction of competition as 'inherent in collective agreements between organisations representing employers and workers', and that the 'social policy objectives' of Article 2 EC

⁵H R. Basaran, How Should Article 81 EC Address Agreements That Yield Environmental Benefits, *European Competition Law Review*, 27 (9) 2006, page 481.

⁶Commission, XXIII Competition Report (1993), paragraph 162, cited in H B Vedder, Voluntary Agreements and Competition Law, *Nota di Lavoro* 79 2000 available at SSRN:

<http://ssrn.com/abstract=253333> or DOI: 10.2139/ssrn.253333, at his own footnote 53.

⁷*Albany International*, 1999, Case C67/96 ECR I-5751.

⁸H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 127.

would be 'seriously undermined' if the agreements were subject to Article 85(1) (now Article 81(1)) EC. This constitutes concrete enforcement by the Court of the policy-oriented Treaty Articles. Moreover, Article 2 EC states that 'the Community shall have as its task...to promote...the quality of the environment'. Given the prioritisation in *Albany* of Article 2 EC's imperatives, its subsection on environmental considerations should *a fortiori* have an equal 'constitutional nature'⁹.

Nonetheless, I would agree with Basaran that Article 6 EC does not explicitly delineate how the Commission ought to integrate environmental considerations into competition policy. Therefore I would argue that the legislative Community institutions intended for the Commission to have discretion as to how it can include environmental considerations but not whether it should.

(B) THE REASONING BEHIND THE INTEGRATION PRINCIPLE

The reasoning behind the integration principle provides compelling insight as to why environmental protection and competition policy should be linked in practice. Firstly, 'the possibility of improving competitiveness by means of cleaner technologies, energy efficiency [and] internalization of environmental externalities'¹⁰ was described as a motivating factor in the European Commission's White Paper on Growth, Competitiveness and Employment. This statement explicitly recognises a directly proportional relationship between efficiencies and environmental protection as posited by ecological modernisation theory¹¹.

Furthermore, the integration principle resulted from the proliferation of sustainable development theory at the international level. The concept has been defined as a development 'that meets the needs of the present without compromising the ability of future generations to meet their own needs'¹². In simple terms, it requires economic and social development which is in accordance with environmental protection considerations¹³. It has been entered into 'constitutions, many domestic laws and international agreements'¹⁴.

The ubiquitous affirmation of the theory is, however, a weak argument for its specific incorporation into competition policy. Indeed, the concept of sustainable development has been criticised as having definitional problems. 'Sustainable' implies continuous or ongoing

⁹H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 131.

¹⁰Liberatore, 1997, page 109.

¹¹See Section 2(B) for an evaluation of EMT.

¹²Stockholm Declaration on the Human Environment, as cited by M W Gehring, *Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law*, Review of European Community and International Environmental Law, 15(2) 2006, page 175.

¹³H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 14.

¹⁴For instance, the Stockholm Declaration, above at footnote 12, as well as the Rio Declaration on Environment and Development, UN Doc. A/CONF 151/6/R.ev.1, 1992. Quote taken from M W Gehring, *Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law*, Review of European Community and International Environmental Law, 15(2) 2006, page 175.

activity, whereas 'development' implies a conservative steady state¹⁵. The scope of the concept has also evolved. For instance, the social sphere was only fully recognised at the 2002 Johannesburg Summit on Sustainable Development¹⁶. Given its broad and uncertain meaning, one could argue that competition authorities cannot effectively address environmental concerns without more specific guidance.

Behind the international ratifications, institutional actors have been motivated by growing concern about the environmental impact of rapidly developing liberal economies, and more specifically, of the integration of the European economy¹⁷. With growing attention on the depletion of environmental resources¹⁸ and the 'strong inter-linkages between economy, ecology and social development', sustainable development is a clearly prioritised policy goal which should be directly integrated into the process of fostering a competitive economy¹⁹.

3) ASSESSING THE COMPLEMENTARITY OF THE GOALS OF COMPETITION LAW AND ENVIRONMENTAL PROTECTION

(A) THE GOAL OF COMPETITION LAW

The main goal of competition law remains controversial²⁰. However, one of the shared premises among legal and economic theorists is that competition law should intervene when there is market failure, which is defined as a situation where the state of the market is such that companies can only maximise profit through raising price and limiting production²¹, i.e. when there is an inefficient use of scarce resources. Much debate has been generated about the correct focus of competition authorities for enhancing competitiveness most effectively. For instance, Schumpeter argues that encouraging 'competition in the provision of new commodities and technologies' or dynamic efficiency is what contributes to economic development²². This perspective focuses on economic efficiency of business practices.

An alternative model is the 'economic freedom' paradigm, which requires competition authorities to foster pluralism in the markets. Consequently, efficient use of resources is an indirect result of that model²³.

¹⁵ Available at <http://www.jsdnp.org/jm/glossary.html>.

¹⁶ MW Gehring, Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law, *Review of European Community and International Environmental Law*, 15(2) 2006, page 175.

¹⁷ Liberatore, 1997, page 109.

¹⁸ Available at <http://news.bbc.co.uk/1/hi/business/5305950.stm>.

¹⁹ MW Gehring, Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law, *Review of European Community and International Environmental Law*, 15(2) 2006, page 176.

²⁰ MW Gehring, Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law, *Review of European Community and International Environmental Law*, 15(2) 2006, page 173.

²¹ G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 55.

²² P Bennett, *Anti-Trust? European Competition Law and Mutual Environmental Insurance*, *Economic Geography*, Vol 76 (1) 2000, page 53.

²³ G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 23.

(B) THE GOAL OF ENVIRONMENTAL PROTECTION

Ecological Modernisation (EM) theory posits that continuous economic growth and environmental protection are compatible. 'Once society reaches a certain per capita income...further growth produces improvement in environmental quality'²⁴. More specifically, EM theory 'views environmental degradation as an indicator of poor and inefficient resource use'²⁵. Therefore, one can discern a presumptive complementarity with the core goal of competition law.

However, a central axiom is that the 'market can offer real policy solutions'²⁶ to environmental problems 'through the use of appropriate pricing mechanisms for both production inputs and outputs'²⁷. An example of such a mechanism would be the Polluter Pays Principle (PPP)²⁸. According to this principle 'the polluter should bear the expenses of [pollution prevention]'²⁹. This entails the internalisation of the externality of environmental pollution, meaning that the costs of pollution are passed on to the cost of goods and services. The implementation of PPP is achieved through state issued regulations. Arguably, this is incompatible with the 'economic freedom' conception of competition policy. It could result in less financially strong businesses leaving the market because they cannot pay the price of their pollution, thereby resulting in a more concentrated market structure.

Furthermore, a consumer total welfare analysis would quickly reveal an incompatibility with competition law because consumers are paying an increased price for a product with new pretensions to sustainability, thus decreasing utility to those who did not set out to buy an eco-friendly product.

A specific example of the conflict between competitiveness and environmental protection in the application of PPP is given by Bennett. He details how environmental liability insurance ensures adherence to PPP through the accurate linking between the premium paid and the risk posed by the buyer. However, in soft commercial marine reinsurance markets, i.e. where prices are pushed down due to fierce competition between insurers, the effective differentiation between premiums and risk is acutely distorted³⁰, meaning that bad risks do not pay a premium commensurate with the risk they pose to the environment.

²⁴D Wilkinson, *Environment and Law*, Routledge Introduction to Environment Series, Routledge Publishing, 2002, page 177.

²⁵R Hollander & G Curran, *The Greening of the Grey: National Competition Policy and the Environment*, *Australian Journal of Public Administration* 60(3) 2001, page 44.

²⁶R Hollander & G Curran, *The Greening of the Grey: National Competition Policy and the Environment*, *Australian Journal of Public Administration* 60(3) 2001, page 43.

²⁷R Hollander & G Curran, *The Greening of the Grey: National Competition Policy and the Environment*, *Australian Journal of Public Administration* 60(3) 2001, page 42.

²⁸Toke and Strachan in their article 'Ecological Modernisation and Wind Power in the UK', *European Environment*, Vol 16, Issue 3, page 156, explain how the third principle of EM theory is the 'polluter pays' principle.

²⁹D Wilkinson, *Environment and Law*, Routledge Introduction to Environment Series, Routledge Publishing, 2002, page 120.

³⁰P Bennett, *Anti-Trust? European Competition Law and Mutual Environmental Insurance*, *Economic Geography*, Vol 76 (1) 2000, page 57.

To counteract this, an International Group Agreement was signed by the International Group of Protection and Indemnity Clubs whereby the member insurance companies agreed not to engage in price competition on premium rates. This anti-competitive agreement ‘increases the Club’s power over their customers, making it difficult for individual shipowners to play off Clubs against one another and obtain premiums incommensurate with the risk they pose’³¹. Hence, indirectly, this agreement contributes to higher standards of environmental protection as the higher premiums demanded for bad risks should deter environmentally harmful activities.

From this analysis, we can see that it is blind optimism to assert an inherent complementarity between the goals of competition law and environmental protection. Their reciprocity is contingent upon what we choose as the most effective means of achieving competitiveness. We can already discern scenarios where competition policy ought to be restrained so as to better effect environmental protection. This paper will now progress to analyse how environmental considerations could be most effectively integrated into the implementation of EC competition policy.

4) IMPLEMENTATION OF THE INTEGRATION PRINCIPLE AT THE EC LEVEL

(A) THE APPLICATION OF ARTICLE 81

Changes in EC competition policy have reoriented the enforcement focus away from the goal of the economic freedom model towards enhancing economic efficiencies for consumer benefit³². Article 81(1) EC is designed to identify activities having as their object or effect the prevention, restriction or distortion of competition, and Article 81(3) EC creates a justification or exception for such activities where they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. Paragraph 24 of the Notice on Guidelines on the Application of Article 81(3) EC stipulates that ‘the prohibition of Article 81(1) only applies where, on the basis of proper market analysis, it can be concluded that the agreement has likely anti-competitive effects on the market’³³. As Boute argues, ‘despite the non-binding force of these Guidelines, it can be considered as an ‘authoritative interpretation of the law’³⁴. From this we can deduce that “the basic methodology of Article 81(1) is the effects-based approach’³⁵.

³¹P Bennett, *Anti-Trust? European Competition Law and Mutual Environmental Insurance*, *Economic Geography*, Vol 76 (1) 2000, page 62.

³²G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 46.

³³Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty Official Journal C 101 , 27/04/2004 P. 0097 - 0118

³⁴A Boute, *Environmental Protection and EC Anti-Trust Law: The Commission’s Approach for Packaging Waste Management Systems*, *Review of European Community & International Environmental Law* 15 (2), 2006, page 148.

³⁵H R Basaran, *How Should Article 81 EC Address Agreements That Yield Environmental Benefits*, *European Competition Law Review*, 27 (9) 2006, page 479.

Furthermore, in order to rely on the Article 81(3) EC exemption 'it must be shown that the agreement generates efficiencies... and that the pro-competitive effects outweigh the anticompetitive effects'³⁶. Hence, on the face of the legislation and Commission communications, the analysis conducted by both the Commission and the Community Courts in respect of Article 81 EC necessitates the 'economization'³⁷ of the benefits to be derived from environmentally-oriented activities.

The Community's purported policy of pursuing economic efficiency through the application of Article 81 EC as a means for enhancing competitiveness is justified because it 'provides a realistic benchmark by which to measure the presence of competition'³⁸. Economic analysis precisely determines the effect on both market and consumer welfare by quantifying 'competitive price levels, cost reduction and higher quality products and services'³⁹.

However, arguably this approach follows an unjustifiably narrow conception of economics. Madsen outlines two conceptions of economics. Firstly, the 'traditional' approach, which assesses how market activity affects priced scarcities such as reduced prices or cost savings. The alternative is the 'scientific' definition which assesses the efficient use of non-priced scarcities e.g. reduced waste packaging. Robbins argues that 'economics is entirely neutral between ends'⁴⁰, which implies that both scarcities could be easily integrated into economic analysis.

Nevertheless, Madsen highlights the operation of the Dutch competition law system prior to its reform in 1998. It stipulated that 'every competition restricting agreement or action was allowed unless it harmed the general interest'. Through the 'general interest' proviso, it followed a 'scientific' conception of economics in allowing anti-competitive behaviour which propagated efficient use of non-priced as well as priced scarcities. However, in practice, this reduced the levels of innovation and 'the Netherlands built a solid reputation as a cartel country'⁴¹, decreasing the efficacy of competition policy.

³⁶Alexander Schaub, quoted G Monti, *EC Competition Law*, Law in Context Series, Cambridge University Press, 2007, page 48.

³⁷H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 7.

³⁸G Monti, *EC Competition Law*, Law in Context Series, Cambridge University Press, 2007, page 22.

³⁹J A H Madsen, *The "New" Horizontal Agreements Approach in the EU: an "Economic" Assessment*, Paper presented at the Workshop on "Reform of EC Competition Policy" Jointly organised by EIPA and HWWA, 10-11 Dec 2001, Maastricht, available at: <http://www.fdewb.unimaas.nl/eurecom/ThenewhorizontalEUapproach3.PDF>, page 7.

⁴⁰J A H Madsen, *The "New" Horizontal Agreements Approach in the EU: an "Economic" Assessment*, Paper presented at the Workshop on "Reform of EC Competition Policy" Jointly organised by EIPA and HWWA, 10-11 Dec 2001, Maastricht, available at: <http://www.fdewb.unimaas.nl/eurecom/ThenewhorizontalEUapproach3.PDF>, page 5.

⁴¹J A H Madsen, *The "New" Horizontal Agreements Approach in the EU: an "Economic" Assessment*, Paper presented at the Workshop on "Reform of EC Competition Policy" Jointly organised by EIPA and HWWA, 10-11 Dec 2001, Maastricht, available at: <http://www.fdewb.unimaas.nl/eurecom/ThenewhorizontalEUapproach3.PDF>, page 8.

Alternatively, environmental benefits could be economized within the ‘traditional’ conception of economics enshrined in Article 81(3) EC. Indeed, environmental amelioration has been classed as an economic benefit in the Commission’s Guidelines on the Applicability of Article 81(1) to Horizontal Agreements⁴² where this leads to reduced environmental pressure. However, this arguably creates an insuperable barrier for many environmental agreements which do not generate economic efficiencies that can be proven in a cost benefit analysis. ‘How does one evaluate economically, for instance, the economic gains of protecting biodiversity or a landscape’⁴³?

Furthermore, it has been argued that cost-benefit analysis without qualitative assessment of the restriction is necessarily one-dimensional when dealing with the unique value of nature⁴⁴. Thus, Vedder argues for a combined quantitative and qualitative test for assessing restrictions of competition which allows non-economized environmental benefits to be ‘recognised as autonomous advantages capable of justifying an exemption’⁴⁵. Such a radical approach would generate perplexing inconsistency and inefficacy in the application of competition law much like the situation that developed in the Netherlands. Vedder later admits that this mechanism would entail ‘a shift of perspective from competition as an end in itself to competition as a means to achieve sustainable growth’⁴⁶. This approach entails a clear *detournement de pouvoir* by the Commission should it issue decisions based on purely non-competition considerations because this would clearly flout the explicit legal objective of Article 81 EC⁴⁷ and bypass the oversight of the Council and Parliament.

⁴²Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements OJ C 3, 6.1.2001, p. 2–30, paragraph 193.

⁴³A Boute, Environmental Protection and EC Anti-Trust Law: The Commission’s Approach for Packaging Waste Management Systems, Review of European Community & International Environmental Law 15 (2), 2006, page 155.

⁴⁴I Aslaksen and I Myhr, The Worth of a Wildflower: Precautionary Perspectives on the Environmental Risk of GMOs, Ecological Economics, Vol 60(3), 2007, section 3.

⁴⁵H B Vedder, Voluntary Agreements and Competition Law, Nota di Lavoro 79 2000 available at SSRN: <http://ssrn.com/abstract=253333> or DOI: 10.2139/ssrn.253333, page 14.

⁴⁶H B Vedder, Voluntary Agreements and Competition Law, Nota di Lavoro 79 2000 available at SSRN: <http://ssrn.com/abstract=253333> or DOI: 10.2139/ssrn.253333, page 16.

⁴⁷This can be shown in paragraph 4 of the Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements OJ C 3, 6.1.2001, p. 2–30, which states that “The Commission has to ensure effective competition is maintained”. Therefore, the primary priority does not encompass public policy considerations.

Furthermore, this approach creates the risk of Type III errors in competition law enforcement. Decisions constituting Type III errors rely on speculative, unstable criteria which do not facilitate the transparent predictability of competition policy⁴⁸. This inconsistency can be amply demonstrated by the furor generated by the *CECED* case⁴⁹. Here, the Commission assessed a voluntary agreement designed to phase out less eco-friendly washing machines under Article 81(3) EC. The Notice Guidelines stipulate that such an agreement would qualify for exemption provided that individual economic benefits accruing to consumers can be found⁵⁰. Failing that, an exemption may result from economized collective environmental benefits.

However, in *CECED*, the Commission outlined the collective environmental benefits as well as individual economic benefits accruing to consumers⁵¹. This superfluous inclusion of this 'collective line of reasoning'⁵² seems to indicate that environmental considerations, such as reduced emissions and electricity consumption, will result in a fair share for consumers in themselves and are capable of constituting standalone justifications for environmental agreements. This analysis is inconsistent with a traditional economic approach oriented towards a narrow conception of consumer welfare. For instance, this attention to qualitative efficiencies opens up the possibility for agreements to be exempted that internalise external environmental costs which are passed on to consumers. Despite its emphasis on their economization, the Commission's reasoning has veered towards Vedder's ideal conception of an exemption based on purely environmental benefits. This creates an intrinsic uncertainty and unpredictability in competition law enforcement which can only hinder its effective application.

Another reason for disallowing the integration of environmental protection into the application of Article 81 EC is Regulation 1/2003 which entails the direct applicability of Article 81(3) EC⁵³. This means that national courts will have the authority to declare an environmental agreement qualifying for the exception to Article 81(1). Given the uncertain weighting to environmental benefits in *CECED* and the other 'landmark case'⁵⁴ of *DSD*, a prominent risk has been created of the non-uniform balancing of consumer welfare and environmental considerations in national competition authority decisions across the Community space. Basaran corroborates this risk of diversity when she states that 'following the Modernisation Regulation, public policy considerations...were used as a pretext for the protection of national interests'⁵⁵.

⁴⁸H R Basaran, How Should Article 81 EC Address Agreements That Yield Environmental Benefits, *European Competition Law Review*, 27 (9) 2006, page 481.

⁴⁹*CECED* 2000 OJ L187/47.

⁵⁰Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements OJ C 3, 6.1.2001, p. 2–30, paragraphs 193 and 194.

⁵¹*CECED* 2000 OJ L187/47, at paragraphs 52–57.

⁵²H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 172.

⁵³Regulation 1/2003 On the Implementation of the Rules of Competition in Articles 81 and 82 of the Treaty (Modernisation Regulation) 2003 OJ L1/1, paragraph 4.

⁵⁴H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 194.

⁵⁵H R Basaran, How Should Article 81 EC Address Agreements That Yield Environmental Benefits, *European Competition Law Review*, 27 (9) 2006, page 481.

Hence, it is clear that the integration of environmental considerations can only distort the clear conception of economics denoted in Article 81(1) and (3) EC. The posture adopted by the Commission in *CECED* is in clear conflict with the legislation and guidelines on the role of public policy in competition decisions. This conflict can only morph into Community-wide inconsistency due to the risk of manipulation by national competition authorities to propound national environmental policies.

(B) THE APPLICATION OF ARTICLE 82

Vedder posits that environmental considerations could be integrated as a basis for arguing that there is no abuse of a dominant position under Article 82 EC and hence that this kind of behaviour is objectively justified⁵⁶.

In the case of *DSD*, an agreement between a dominant firm DSD and other waste disposal companies which facilitated the collection and recovery of sales packaging was condemned abusive of its dominant position under Article 82⁵⁷. It was formed to fulfil obligations derived from the environmental regulation, the German Packaging Ordinance. The Commission found that the high price charged by DSD for its own recycling services constituted an exploitative abuse and that an exclusionary abuse had been committed in preventing viable competitors from entering the market.

However, Vedder plausibly argues that this monopolistic situation is almost always an inevitable result of state regulations enforcing producer responsibility⁵⁸. The ordinance in *DSD* required the exemption system to cover at least one Bundesland creating an entry barrier of considerable sunk costs. Vedder argues that the emergence of a new competitor would be inefficient because of the multiplication of investment needed for the infrastructure.

Nonetheless, the Commission's consistent refusal to allow environmental protection for objective justification can be substantiated. As Vedder explains, the doctrine of objective justification is based on 'contractual freedom...and the need to protect competition'. Public policy does not form any part of this doctrine because Article 82 EC arguably covers more flagrant anti-competitive behaviour than that covered by Article 81 EC. To incorporate environmental considerations at this level of anti-competitive risk would seriously threaten the efficacious application of competition policy.

⁵⁶H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 202.

⁵⁷*DSD* 2001 OJ L166/1.

⁵⁸H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 221.

Furthermore, in the cases of *Hilti Ag*⁵⁹ and *Tetra Pak*⁶⁰, it was decided that restrictive measures did not qualify for objective justification despite being geared towards the public interest⁶¹, because there were less restrictive measures in place to achieve this goal. In *Tetra Pak*, the Court referred to 'adequate technical solutions...and a legal framework' intended to specifically solve the public interest concern in the facts. This constitutes an explicit recognition by the Commission of the superior effectiveness of other regulatory regimes to solve public policy concerns.

Finally, the Commission discussion paper even suggests that there is an efficiency defence embedded in Article 82 EC which is modelled on Article 81(3)⁶². As expounded above, pure efficiency analysis would guarantee a consistent and formulaic approach across the board for the competition law provisions which would be as equally muddled by the integration of environmental non-economic benefits under Article 82 as under Article 81.

(C) INTEGRATION AT THE LEVEL OF SANCTIONS

Environmental concerns could be integrated through altering the punishment meted out to anti-competitive businesses so as to also propound environmental goals. However, the contradictoriness of environmental and competition goals makes the choice of dual purpose sanctions deeply problematic. This conflict can be shown in the case of DSD.

After finding that DSD's payment system and exclusive control of the essential facility of the 'Green Dot' constituted an abuse of a dominant position under Article 82, the Commission then outlined its remedy. One part of the punishment was to require DSD to grant partial licenses to use the 'Green Dot' trade mark to competing exemption systems, in order to enhance competition and open up the collection and recycling market. This enhanced the likelihood of the emergence of multiple systems using their own distinguishing symbols, e.g. green, red and pink dots.

Vedder puts forward a double-edged critique of this pro-competitive sanction. Firstly, it will hinder the environmental goal. Due to the recycling decision being made by the consumer, 'the emergence of multiple systems is likely to confuse the consumer and lead to 'recycling fatigue'⁶³.

⁵⁹*Hilti AG v Commission*, T-30/89, 1991 ECR II-1439.

⁶⁰*Tetra Pak v Commission*, T-83/91, 1994 ECR II-755.

⁶¹G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 211.

⁶²G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 208.

⁶³H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 217.

Secondly, DSD opposed the obligation to license as imposing a duty to finance the cost of recycling and collection in advance, while not knowing what proportion of packaging would be used under their subcontractor's capacity. The Commission responded to this by instituting a quota system for the market players. If the quotas were not met by either DSD or its competitors, mutual compensation would take place. Vedder justifiably criticises this arrangement as hindering the working efficiency of the waste management system, which, in any case, was envisaged by the original pro-environmental legislation to take place in an arguably more efficient monopolistic market. This case provides an example of how 'doubling up' these two policy objectives when devising punishment is prohibitively difficult.

Finally, I would concur with Monti in that the integration of environmental considerations at this late stage would constitute a misuse of Commission powers. The aim of competition law sanctions is to maintain competitive markets and 'to deter firms from acting unlawfully'⁶⁴, but not to sustain an activist industrial policy within the realm of competition policy.

(D) THE PROPER LOCUS OF THE INTEGRATION PRINCIPLE

It is submitted that the Commission should fulfil its constitutional duty under Article 6 EC at the preliminary stage of assessing whether or not to take legal action under EC competition law as this is the most legally satisfactory and environmentally effective option.

Integrating public policy considerations towards the beginning of the enforcement process has already been instituted by the Community Courts. In the decisions of *Wouters*⁶⁵ and *Brentjens*⁶⁶, the Court applied the 'European rule of reason'⁶⁷, which stated that EC provisions prohibiting restrictions on the free movement of services did not apply to these activities, where particular national interests were being pursued. This approach was mirrored in relation to environmental protection in the case of *Preussen Elektra*⁶⁸ where the ECJ exempted a German law from competition law which reserved a percentage of the German energy market for renewable energy because this law forwarded a legitimate social goal⁶⁹.

⁶⁴G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 243.

⁶⁵*Wouters and Others v Algemene Raad van de Nederlandse Order van Advocaten* C-309/99 2002 ECR I-1577.

⁶⁶*Brentjens' Handelsonderneming BV*, C-115-17/97 1000 ECR I-6025.

⁶⁷G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 112.

⁶⁸*Preussen Elektra v Commission*, 2001, Case C-379/98 ECR I-2099.

⁶⁹MW Gehring, *Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law*, *Review of European Community and International Environmental Law*, 15(2) 2006, page 183.

However, it is submitted that the decision of non-action because of environmental concerns should be taken by the Commission during its initial investigatory procedure. Both *Brentjens* and *Wouters* represent examples of a Community Court responding to the Commission's poor exercise of prosecutorial discretion. 'It has...invented its own approach to reconcile conflicting interests, excluding the application of Article 81 when more powerful interests have to be attained'⁷⁰. This flagrant balancing of EC policies need not occur at the level of the Community Court, but could be achieved more cost-effectively and legitimately by the policy directorates of the Commission. As Bailey argues, 'Competition law is merely that: competition law. The decision of whether to enforce this competition law is a matter for competition policy'⁷¹. Once anti-competitive behaviour is prosecuted under the competition law provisions, the competition policy domain and its associated objectives are chosen, i.e. competitiveness and economic efficiency. For these to be attained most efficiently and consistently during enforcement, Court judgements should not need to devote time to balancing extraneous policy priorities when only a relatively cursory investigation can be effected.

This evaluation could be better achieved by the Commission during the exercise of prosecutorial discretion through the inclusion of more scientific analysis, substantial consultation with national authorities and greater cross-Commission dialogue on environmental cases so as to decide whether (or not) to bring an action under competition policy.

5) "COMMISSION INTEGRATION" FOR THE INTEGRATION PRINCIPLE: A NEW APPROACH

In order to operationalise the integration principle in competition policy in a legally consistent manner which does not hinder the effective enforcement of competition law, the Commission must join up its policy directorates to form a prosecutorial panel so as to make more fitting choices of pro-public policy and potential anti-competitive activities for prosecution.

Bennett explains how the structure of the Commission prevents this consensual approach. Collaboration between directorates is inhibited by their different working practices and the lack of formalised procedure for inter-directorate consultation⁷². Barker's description of a 'sectoral fragmentation of responsibility'⁷³ is particularly evident in relation to competition policy, where the DG IV decides by itself whether or not to grant an exemption on environmental grounds⁷⁴. This dislocation creates a risk that the pro-environmental benefits of anti-competitive agreements are not properly assessed.

⁷⁰G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 119.

⁷¹P Bennett, *Anti-Trust? European Competition Law and Mutual Environmental Insurance*, *Economic Geography*, Vol 76 (1) 2000, page 5.

⁷²P Bennett, *Anti-Trust? European Competition Law and Mutual Environmental Insurance*, *Economic Geography*, Vol 76 (1) 2000, page 62.

⁷³The Politics of Sustainable Development: Theory, Policy and Practice within the European Union, Edited by S Baker, M Kousis, D Richardson, S Young, Taylor & Francis Publishing, 1997, page 95.

⁷⁴P Bennett, *Anti-Trust? European Competition Law and Mutual Environmental Insurance*, *Economic Geography*, Vol 76 (1) 2000, page 62.

As Liberatore posits, ‘defining how to ‘better’ pursue environmental quality is a complex process where political and economic interests, scientific evidence and societal perceptions interact’⁷⁵. In relation to activities with environmental ramifications, a combined investigatory panel with representatives from DG IV and DG XI could take the prosecutorial decision on the basis of combined dialogue. Each DG could develop ‘red lines’ to determine which policy interest should gain priority in which circumstances. An example would be the Commission’s stance in *SpA Monopole Vs GDB*⁷⁶, where it held that environmental benefits could not excuse an abuse of a dominant position that excluded new market entrants⁷⁷.

Aslaksen and Myhr outline how dialogue between DG IV and DG XI could suffer because of their competing disciplines. They explain how this clash could be resolved by the use of multi-criteria methods⁷⁸, an evaluation methodology that considers different objectives by the attribution of a weight to each measurable objective.

Nonetheless, the evaluation of the environmental risk of these agreements or practices should not be carried out by Commission officials alone, as such an approach could fall prey to the criticism of *dirigisme*, where Commissioners assume they ‘know more about how to make the business work than the businessmen involved’⁷⁹. ‘Scientific experts can provide the best available risk assessment’⁸⁰, and including representatives from national authorities will help determine the exact environmental and market effect of the activities through ‘providing knowledge of local conditions and resources’.

⁷⁵Liberatore, 1997, page 112.

⁷⁶XXII Report on Competition Policy, 1993, paragraph 240.

⁷⁷P M Bailey, The Application of Competition Law and Policy to Environmental Agreements in an Oligopolistic Market, (2000). FEEM Working Paper No. 73.2000. Available at SSRN: <http://ssrn.com/abstract=248118>, page 15.

⁷⁸I Aslaksen and I Myhr, The Worth of a Wildflower: Precautionary Perspectives on the Environmental Risk of GMOs, Ecological Economics, Vol 60(3), 2007, in the section entitled ‘Fitness of purpose; the need for extended peer-review’.

⁷⁹G Monti, EC Competition Law, Law in Context Series, Cambridge University Press, 2007, page 116.

⁸⁰I Aslaksen and I Myhr, The Worth of a Wildflower: Precautionary Perspectives on the Environmental Risk of GMOs, Ecological Economics, Vol 60(3), 2007, section 4.2.

6) CONCLUSION

In sum, the Commission is bound by a constitutional duty to integrate environmental considerations into competition policy because of the express language of the EC Treaty. The Commission's explicit recognition of the binding nature of the integration principle corroborates this observation.

The Commission's methodology for weighing environmental considerations with competition policy risks inconsistency and inefficacy since these balancing policy priorities often do not complement each other. This theoretical conflict is demonstrated at the level of setting sanctions. Furthermore, the effects-based analysis necessary for both Article 81 and 82 constitutes a veritable barrier for weighing in environmental considerations. However, as Monti argues, the Commission's narrow focus on efficiency is beneficial for ensuring uniform application of competition law and consequent legal certainty across the EU territory⁸¹. Hence, at the level of applying competition law, 'it might be a proper choice for competition policy to concentrate on its traditional core business and not to bungle around with environmental externalities'⁸².

I submit that weighing in environmental considerations into the early decision-making stages of the enforcement process prevents the awkward economization of environmental benefits before the Courts. In order to effect this change, root and branch reform is required. Relevant directorates should be able to weigh their scientific and economic analysis together to come to a well considered decision for relevant action. This is the only way the respective policy concerns can be effectively addressed and constitutes a viable option for Vedder's *modus vivendi* for the integration principle⁸³.

⁸¹G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 119.

⁸²J A H Moks, *The "New" Horizontal Agreements Approach in the EU: an "Economic" Assessment*, Paper presented at the Workshop on "Reform of EC Competition Policy" Jointly organised by EIPA and HWWA, 10-11 Dec 2001, Maastricht, available at:

<http://www.fdewb.unimaas.nl/eurecom/ThenewhorizontalEUapproach3.PDF> page 16.

⁸³H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 4.

Egypt - Case No 2900/2008 Felonies of
Madinit Nasr Awal (25/08/2008);
(Appeal No 22622/2008 East Cairo)

Prosecution vs. Suez Cement Group, La Farge
Titan Group, Al-Amreya Simpore Group, Simx
Egypt (Assyout Cement), Egyptian Cement, Sinai
Cement, Misr – Bani Suef for Cement, National
Cement Company - The First Court Decision
under Egyptian Competition Law

MOHAMED ELFAR★

SUMMARY

The Egyptian Competition Authority undertook a research inspection in the cement market and it reached the conclusion that there is a price fixing and limiting production cartel among the 9 market players. It based its conclusion on several evidences. Most notably there was an agreement prior to the law to fix prices, there were a number of confessions by several chairpersons and other economic analyses of the market structure and sales and production capacities. The case was then referred to the competent Minister then to Prosecution and finally reached the competent Court. The Court imposed the maximum sentence of 10 million Egyptian Pounds fine on each participant.

CASE DETAILS

Upon the request of the Minister of Trade and Industry a formal request was referred to the Authority of the Protection of Competition and the Prohibition of Monopolistic Practices (hereinafter Egyptian Competition Authority or ECA) to study whether an anticompetitive infringement was taking place in the cement market. Accordingly, the ECA confirmed that this study falls within its competences and started with the definition of the relevant market.

RELEVANT MARKET (NORMAL PORTLAND CEMENT)

According to the Egyptian Competition law, the relevant market consists of the relevant product and geographical market.¹ The study concluded on one hand that the relevant product market was that of the Normal Portland Cement (hereinafter Cement) (which is

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¹Article 3 of the Law 3 of 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices.

the commonly used kind of cement). The report based its definition on the main argument that the product had no substitutes from the consumer's point of view due to its own special characteristics. On the other hand, it was found that the relevant geographical market is that of the Arab Republic of Egypt. This is because consumers did not have barriers regarding the transportation of Cement from one area to another. Moreover, no imports were made throughout the whole period of the study, although there was a reduction of import tariffs from 30% to 2% due to the fact that local prices were always cheaper than the international ones.²

The ECA limited the study to the period between May 2005, which is the date when the Egyptian Competition Law on the Protection of Competition and the Prohibition of Monopolistic Practices (hereinafter Competition Law) officially came to force, and July 2006 when the report was referred to them from the minister requesting the study. However, they took the period between 2002 and 2005 and the period after the referral of the request as indicative periods. It was therefore concluded that the relevant market was that of Normal Portland Cement in the Arab Republic of Egypt.

OBSERVATIONS ON THE CEMENT MARKET IN EGYPT

Moreover, the report indicated several findings on the relevant market. A) It was noted that there is a very limited number of producers of this kind of cement in Egypt (9 producers). B) There is a great deal of transparency in the market. The Ministry of Investment provides a monthly newsletter which has all the prices of cement in Egypt and the market shares of the 9 players. Besides, the reports published by the Chamber of Commerce show the prices in all governorates in Egypt. C) There was a direct contact between the 9 companies where they met and exchanged information and speculations about the future demands. A number of the undertakings involved stated clearly during the meetings with the ECA officials that prices were raised after their meetings in the Federation of Industry. It was also assured by the Chairman of the Chamber of Construction Utilities that the 9 producers had had closed meetings without meeting minutes and no one other than the producers was allowed to attend. He added that there were also other meetings that were held unofficially outside the Federation of Industries.

EVIDENCES BROUGHT BY ECA

Evidences were the following: 1) an official agreement under the auspices of the Minister of General Operations Sector among the competitors in 2003 (before the Competition Law was enacted in 2005) where its aim was to restore the stability of the prices in the market. This was due to the presence of vigorous competition among the competitors which lowered prices significantly and affected the interests of other investors. This agreement included a requirement to maintain a certain market share of their sales in the national market for each company and to decide a certain percentage of production for each undertaking according to its production capacity (limiting production). This agreement should have spontaneously come to an end in February 2005 after enacting the

²The Egyptian Cement is argued to have a comparative advantage due to the abundance of raw materials and cheap labour where they produce high quality cement.

Competition Law. However, this was not the case. The agreement remained unofficially in force as has been confirmed by one of the parties to the agreement during the meetings with the ECA officials. 2) The escalation of prices throughout the period of the study shows that it was never an individual act but also a collective one, although there has been an increase in the capacity of production and the actual production of these companies. What was notable also is that the company which has the lowest price maintained its market share while the other having the highest price also maintained its share throughout the period of the study. There was no attempt by any competitor to try to gain bigger market share or to benefit from a lower price. 3) Prices continued increasing among all the companies although production costs reduced which was the indication that all the producers were following the same strategy of increasing prices regardless of the production costs. It has been shown in the economic analysis that the maximum change of each market share throughout the whole period of study was 1% although the sales of the product varied a lot.

Accordingly, the ECA concluded that the 9 producers infringed Article 6(a) of Competition Law by concluding the agreement to fix and raise prices collectively.

Another infringement was found relating to the limitations of production. The ECA revealed the following evidences: 1) the presence of the previously mentioned agreement of 2003 which introduced limitations on prices and harmonised production capacities of the market players. 2) The export shares of all the market players varied greatly which divulges the presence of serious competition on export sales which is contrary to the situation regarding the national sales. This indicates that there were no limitations on the sales marketing when it comes to exports. 3) According to the economic analysis of the ECA, there has been considerable increase in usage of the production capacities of the 9 market players, however this has not been inversely reflected on the national sales. For example, the Suez Group (one of the 9 market players) increased its usage of its production capacity from 63% in 2004 to 76% in 2007 however, its market share in Egypt remained 31.9% in 2004 and 32.4% in 2006 which limits the change to 0.5%.

Accordingly, the ECA concluded that the 9 companies infringed Article 6(d) of the Competition Law they collectively agreed to restrict their sales marketing in Egypt.

The Board of Directors of the ECA sent the report to the Minister of Trade and Industry requesting him to initiate the criminal action against the 9 market players, for which he agreed. Public Prosecution, which is the only competent authority entrusted with the powers of undertaking criminal actions before the court, opened a criminal investigation whereby it confirmed the aforementioned data and evidences. However, that time all the defendants denied their participation in these criminal offenses.

COURT'S PROCEEDINGS REGARDING THE DEFENDANTS' CLAIMS AND ITS FINDINGS

The Court began its proceedings and heard the witnesses itself again where they confirmed the previously mentioned information. On the other hand, the defendants submitted expert reports to the Court. However, the latter clearly stated that it was not

obliged to respond independently to these reports. The Court added that it is absolutely free to consider and be convinced with some reports and to disregard the others as long as its conclusion is reasonable and can be justified from the documents presented. It is not clear what are exactly the justifications provided therein.

The defendants raised several other procedural claims regarding the unconstitutionality of certain articles in the law including Article 6 (the base of this case) and other issues. They claimed that Article 6 prohibits any contract or agreement to take place regardless of whether it came to force or not which is accordingly considered to be unconstitutional. However, the Court assured that in this case this argument was not plausible because the agreement has been put into force in practice and therefore they did not have personal benefit in raising this constitutional question.³ Accordingly, the question as to whether Article 6 is constitutional remains unanswered. In other words, is prohibiting the mere presence of an agreement even if not put into force constitutional?

Another claim by the defendants was that Article 25/2⁴ infringes the doctrine of the personality of sanctions as it obliges the undertaking which name is found in the infringement to be cooperatively liable for the fines ordered in the Court's judgment.⁵

The Court argued that it was true that until recently the Egyptian legal system did not recognize the criminal liability of legal persons because it was never needed within a planned economy. However, after the economic developments and liberalizations which led to a shift towards a free market economy the Egyptian legal system started recognizing the liability of legal persons. This meant that the Egyptian legislature accepted the introduction of the direct or indirect criminal liability legal persons. Furthermore the decision added that the doctrine of criminal liability of legal persons does not, in fact, contradict the individuality of the sanction. This is because the fines can be calculated from the financial statements of the undertaking and not from the personal financial statements of the Board members. Therefore, the Court concluded that it is possible to oblige any legal person (undertaking) to cooperate in the payment of the fine with the person who committed this infringement in the first place.

The defendants raised another legal concern. They assured that there was no evidence to prove the direct involvement of the managers and/or chairmen prosecuted or their criminal liability. The Court responded to this argument by assuring that this form of involvement in the economic crimes is presumed and that it is different from other general laws where involvement and knowledge about the occurrence of the crime needs to be proved independently. It added that the presumption is necessary because otherwise it would be hard to apply the economic policy as there would be considerable difficulties in applying the law and proving any crime. Accordingly, as long as the crime is proved, the knowledge and involvement of the defendants can be presumed. Therefore, the legal burden to prove otherwise is shifted on the defendants. They have to provide for sufficient evidence to prove the lack of involvement or existence of a reason that would deny their responsibility. Moreover, the Court added that the defendants in this case were senior officials in their companies and it would be hard to prove that they were unaware or not involved in committing these crimes.

³Having a direct benefit is a condition to accept any constitutional question in the Egyptian Legal System.

⁴Article 25 of the Egyptian Competition Law stipulates,

"The person responsible for the actual management of the juristic person in breach shall be subject to the same penalties stipulated for the acts committed in breach of the provisions of this Law, if it has been established that such person had actual knowledge of such breach and if his default on assuming the duties of his position as the responsible manager has contributed to the breach. The juristic person shall be jointly liable for the payment of the fines and compensation ruled, if the breach has been committed by one of its employees acting in the name or on behalf of the juristic person."

⁵This doctrine stipulates that crime should be directed to an individual in particular.

Furthermore, the defendants assured that there was no clear material evidence that proved the presence of an agreement. However, the Court argued that the law did not limit the understanding of the agreement to a certain form. To constitute an agreement, it is enough to have consenting wills, regardless of the agreement being written, oral, clear or implied. The Criminal Court is free to build its own conviction from any source it wants to prove this agreement. If there was no material evidence such as a memorandum or meeting minutes, which is logically impossible to be caught, then the Court becomes free to build its belief on any direct or indirect evidence submitted in the case. If there was no clear evidence it can rely on circumstantial evidences. In this case, this circumstantial evidence will only provide several indications but when put together they would lead to a reasonably logical conclusion.

Finally, the defendants raised several economic justifications; however the Court rejected them as it was convinced by the report of the ECA and the testimonies of the witnesses in the case.

In a comprehensive reasoning the Court concluded that the court is free to choose from the evidences provided. Evidences must not be discussed on their own and it is not necessary that each evidence lead to a certain conclusion on its own. As noted earlier, the picture should be taken as a whole, so that when all the evidences are put together they would lead to a conclusion that is logical and reasonable.

The Court finally decided that the two crimes of limiting output and price fixing were correlated in a manner that it could not treat them separately and should therefore, be treated as a single crime.⁶ As a result, it ordered the 20 defendants (Directors and Chairmen of the 9 Companies) to pay 10 million Egyptian Pounds each, which was the maximum penalty for these crimes at the time.⁷

The defendants appealed to the Court of Appeal. They did not bring up any competition law defense. They rather focused on already raised procedural aspects before the High Court. As a result, the decision was upheld in 31/12/2008. This latter decision is now rendered final and has become thus the first court decision under competition law in the Egyptian history.

REFLECTIONS AND OBSERVATIONS

In this unique judgment (as it is the first) the Court has been able to address several issues that have long been debated before this decision. The High Court in its reasoning provided sufficient legal argumentation for every detail therein. Accordingly, it was logical to persuade the Court of Appeal to uphold the decision (as it did). There are few conclusions that can be drawn. However, there are still several questions that will need to be answered by future judgments.

⁶The Egyptian Law of Criminal Procedures stipulates in Article 35 that if there is more than one crime and they cannot be treated separately then they should be treated as one crime and the punishment should be of the harsher offense.

⁷The Law number 190 of 2008 increased the ceiling of the maximum penalty from 10 million Egyptian Pounds to 300 million Egyptian pounds. (1 = 8 L.E approximately)

1. What is the constitutionality of Article 6 concerning horizontal restraints in case of agreement or contract being concluded but caught before its implementation? The Court refrained from considering this concern raised by the defendants because in the present case the agreement has been proved and has been applied since 2003.
2. The Court has sufficiently responded to the second claim of the undertaking whether the managers were legally co-responsible. It assured that the Egyptian legislature has accepted this idea as part of the new liberalization trends in the economy.
3. The Court also affirmed the important doctrine concerning the criminal liability presumption of the managers once their undertaking was proved to be involved in an anticompetitive practice. The Court assured that economic legislation differs in this regard from the other branches of law that require clear and separate evidences to prove the presence of the intention and/or knowledge of the criminal act.
4. Finally, the Court discussed one of the most important issues in this case: the defendants objecting to the lack of evidence and the reliance of the judgment only on economic studies prepared by young inexperienced economists. In this regard, the Court said that it can choose from whatever evidence provided, direct or indirect or in any other form, including but not limited to circumstantial evidence. This assures that concerted practices can still fall within the scope of the current Egyptian Competition Law, which is not limited to an agreement or contract as it might be thought from the wording of the Article.

Greece – Decision No 428/V/2009 of the
Greek Competition Commission

Greek Competition Commission fines the Piraeus
Port Authority and Mediterranean Shipping
Company for breach of Articles 1 of Greek Law
703/1977 and 81 EC –
A bizarre competition analysis.

VERA LAZARIDI*

ABSTRACT

This case note examines a complaint filed with the Greek Competition Commission (GCC) by two local carriers against the Piraeus port operator (PPA) for abuse of dominance in breach of articles 82 EC and 2 of Greek Law 703/1977, which was subsequently expanded to cover a prohibited collusion between PPA and MSC, an international carrier and important customer of PPA for port services, in breach of articles 81 EC and 1 of Greek Law 703/1977 on the basis of a contract between them contemplating services offered to transshipment cargo. The GCC found a prohibited vertical collusion by way of anticompetitive effect and fined both PPA and MSC.

I. FACTUAL BACKGROUND

The Piraeus Port Authority S.A. (“PPA”) is an entity controlled by the Greek State, which by law holds 51% of its shares. The port serves both as a hub for transshipment cargo (i.e. cargo destined for onward carriage by ship to other ports in Greece or in other countries) and as final destination for local cargo. PPA aims at serving the public interest, operates under the rules of private enterprise and enjoys administrative and financial independence. PPA has been granted a series of exclusive rights (*de lege* monopolies), namely, to use and exploit the infrastructure (including its construction and maintenance) of the shore and sea zone of the Port of Piraeus until 2042¹; to exploit the Container Terminal (“SEMPO”), i.e. the area where PPA keeps the infrastructure and personnel for servicing containers; and to offer services to all kinds of ship-transported cargo².

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¹This exclusive right arises from a concession Agreement dated 13.02.2002 with the Greek Republic.

²The GCC pointed out in its introductory remarks that PPA, being an undertaking to which exclusive rights have been granted, has a special responsibility towards the users of the port in its dual role as the entity responsible for the management and development of the port and as the provider of port services, whereby it holds a legal monopoly. The special responsibility of PPA translates into not discriminating unjustifiably between the users of the port; moreover, its discretion to enter into special agreements with shipping companies must be exercised with a view towards balancing the handling of transshipment and local cargo, i.e. if transshipment cargo is handled on special terms, local cargo must not be adversely affected (See 94/19/EC: Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689 – *Sea Containers v. Stena Sealink* – Interim measures) OJ L 015, 18/01/1994, pp. 8–19 para 75 et seq.).

Mediterranean Shipping Company S.A. (“**MSC**”) is a company active in the business of international container carriage, being the second largest carrier globally. PPA and MSC entered into Contract 71/2001 and its amendment, Contract 59/2002, with a ten-year duration (the “**Contract**”), whereby the parties stipulated a special regime for the provision of transshipment cargo services including the following: priority service to the MSC’s vessels at the facilities of PPA in accordance with pre-determined tariffs, observance of particular specifications for performance/productivity and the safeguarding of MSC’s rights deriving from the contract³. Indicatively, tariffs with substantial discounts apply for services relating to transshipment cargo (moves in transit, storage in transit and siftings) vis-à-vis MSC, which are lower than the charges for transshipment cargo services to third users. MSC in return undertakes the obligation to handle through SEMPO a volume of transshipment cargo which amounts to approximately 500,000 moves per annum. It is expressly agreed that MSC vessels carrying transshipment cargo will be served by priority in terms of berthing, provision of necessary means and personnel for loading/discharge, conduct of loading/discharge operations and for the shifting of cargo to and from stacking areas.

II. CLAIMS

Two Greek undertakings, competitors of MSC, SARLIS S.A. and SARLIS & ANGELOPOULOS LLP lodged a complaint with the GCC in May 2004 stating that PPA abused its dominant position in the market for services related to the port infrastructure

³In particular, it was agreed that in case of services similar to those agreed in the Contract being rendered at any time in the future at the area of SEMPO either by PPA or a third party at lower charges than the current ones for both types of cargo, the MSC tariffs will be adjusted accordingly. Furthermore, PPA undertook the “*moral obligation*” during the term of the Contract not to grant to other shipping companies any privileges or tariff adjustments which are disproportionate compared to the Contract itself.

under Articles 2 of Law 703/77⁴ and 82 EC due to the (i) imposition of unfair trading conditions to the users of the Container Terminal (SEMPO), (ii) application of dissimilar terms to equivalent transactions, and (iii) limitation of the movement of containers to and from the port of Piraeus causing damage both to the port users and the end-customers (consumers). The complainants, in their supplementary memoranda in November 2004, raised the issue of cumulative application to the initial complaint of Articles 1 of Greek Law 703/1977⁵ and 81 EC due to prohibited collusion between PPA and MSC. The extension of the complaint against PPA and MSC concerned (i) the stipulation of terms in the Contract limiting the ability of PPA to freely negotiate the entering into similar agreements on the provision of privileges to third party competitors of MSC and (ii) the stipulation of performance terms regarding port productivity which effectively prevent a functional and profitable service to all other users. As a consequence, the Contract was allegedly identified with a prohibited vertical collusion.

The General Directorate of Competition (“GDC”) of the Greek Competition Commission (“GCC”) submitted to GCC a report in relation to the application of Article 2 of Law 703/77 and Article 82 EC as regards the PPA practices, reserving itself to revert with a fresh report after having examined the Contract in the context of Articles 1 of 703/77 and 81 EC. The supplementary report was submitted on 09.08.2006 and both reports were subsequently consolidated into a single one with proposals. The case was heard in fifteen sessions of the GCC Plenary and the decision was issued on 23rd January 2009.

III. THE ASSESSMENT

The GCC first examined the alleged breach of Articles 1 of Greek Law 703/1977 and 81 EC, to continue with the possible breach of Articles 2 of Greek Law 703/1977 and 82 EC.

⁴The content of which reiterates the text of Article 82 EC referring to the national market and the corresponding effect on trade.

⁵The content of which reiterates the text of Article 81 EC referring to the national market and the corresponding effect on trade.

PROHIBITED COLLUSION – ARTICLE 1 OF GREEK LAW 703/1977 AND ARTICLE 81 EC

The GCC identified the Contract as a vertical agreement⁶ between undertakings which are active at different business levels, falling within the scope of application of Article 1(1) of Greek Law 703/1977 and 81(1) EC. According to the case law of the European Court of Justice (ECJ) on Article 81 EC, competition may be distorted not only by agreements limiting competition between the undertakings concerned, but also by agreements prohibiting or limiting competition between one of the interested parties and third parties⁷. The same applies for Article 1(1) of Greek Law 703/1977. This is particularly the case when, through an agreement, the parties are trying, by excluding or limiting competition on the part of third parties on services, to impose or establish an unjustified advantage to their benefit and to the detriment of consumers, something that would be contrary to the general underlying aims of Article 81 EC.

As regards the application of the Block Exemption Regulation (BER) 2790/1999⁸, the GCC found that PPA has the monopoly in providing port services to the cargo handled through the port of Piraeus and in providing access to its harbor facilities, concluding that it has a market share far in excess of 30% in the relevant market for the provision of port services to local cargo in Central and Southern Greece to which the Contract is relevant. Thus, PPA was found to fall outside the scope of the presumption of legality on the basis of Article 3(1) of BER 2790/1999. The GCC argued further that the provisions of the Contract which secure servicing by way of priority and performance obligations, as described above, constitute “quantity forcing” on the supplier, PPA, in which case the market share of the buyer is examined in relation to the 30% threshold (article 3(2) of BER 2790/1999). In this case the Contract would not qualify for exemption as well, given the market share of the buyer, MSC, which holds a dominant position in the market for carriage of local cargo containers. The GCC held that even if BER 2790/1999 applied, the block exemption benefit would be withdrawn (as proposed by the GDC), since the Contract in question produces results which are incompatible with Article 81(3) EC in the area of

⁶See the Guidelines on Vertical Restraints of the European Commission, OJ 2000/C291/01, para 229.

⁷See Joined cases 56 and 58/64 *Tabissements Consten S._R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 299.

⁸Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, O J L 336 , 29/12/1999 pp. 21–25.

southern/central Greece which constitutes a self contained market (i.e. the contract does not contribute to the improvement of production or of distribution of goods or to the promotion of technical or financial development and it does not at the same time grant to consumers a fair share of the benefit reaped). Upholding that view, GCC moved on with a full assessment under Articles 1 of Greek Law 703/1977 and 81 EC accordingly.

The GCC unanimously concluded that the object of the contract was not abusive, as there was no intention of the parties ex ante to foreclose the rest of the SEMPO users. For the purposes of examining any anticompetitive effects of the Contract, the GCC focused on a “package” of services granting priority of service to MSC for transshipment cargo (priority in berthing, means and personnel for loading/discharge, conduct of loading/discharge, provision of stacking space for transshipment cargo, shifting transshipment cargo from stacking areas). The GCC observed that throughout the relevant period the port of Piraeus had reached a point of saturation where, in terms of capacity (facilities/equipment/personnel), it failed to meet all users’ demand for operations concerning both local and transshipment cargo at that time. As a result of the application of the Contract, PPA undertook disproportionate obligations vis-à-vis MSC, which resulted into the defective servicing of other users⁹ and their further exclusion from the market of container carriage of local cargo and transshipment cargo through Central and Southern Greece. Thus, the contractual terms resulted into (i) inability of the users of port services carrying local cargo to compete on equal terms with MSC at the local cargo market, with a further impact on effective competition (since the financial freedom of both PPA and third party carries (existing or potential) was prejudiced) and (ii) foreclosure of the market and creation of high barriers to entry for potential newcomer MSC competitors either in transshipment or in local cargo¹⁰. Quite interestingly, at this point of its assessment, GCC identified two separate markets, one for local cargo and one for transshipment cargo, observing that they were connected to the extent that MSC carried mixed cargo on its vessels, which effectively meant that the local cargo of MSC, to which the special regime contemplated in the Contract would not apply, enjoyed de facto preferential treatment when carried together with transshipment cargo, “*thus, the treatment reserved by PPA vis-à-vis a customer who is active primarily in the market of transshipment cargo, cannot be separated from the impact it may have on the market of local cargo*”.

By a majority of 6-5 the GCC ruled that the companies breached Articles 1(1) of Greek Law 703/1977 and 81 EC by way of a prohibited collusion having as effect the prevention, limitation or distortion of competition, in particular by limiting and controlling production and distribution through the application of dissimilar conditions to equivalent transactions against other trading parties which were placed in a disadvantageous position in competition.

⁹Indeed, by applying dissimilar conditions to the provision of equivalent port services to users, a change was marked on the market conditions of the specific commercial sector, leading to the absence of actual or potential competition.

¹⁰The priority servicing together with commitment of the port infrastructure in an unequal manner in favour of MSC resulted into delays of work and increase of the operational costs of other users, depriving them of the opportunity to achieve economies of scale and thus weakening their position in the market. As regards the weigh between the anti-competitive effects and any advantages potentially reaped, based on a rule of reason approach, the GCC noted that the attracting of transshipment cargo into the port of Piraeus can be achieved with less burdensome consequences for the rest of the users of the port. As additional effects the GCC marked the increase of the market share of MSC in both local and transshipment cargo and the simultaneous decrease of the market share of other carriers.

The minority opinion, on the contrary, noted that the complaint was unfounded for the following reasons: Preferential treatment entails applying dissimilar conditions to equivalent transactions and in this case the transactions were not equivalent. Taking an economic-based approach, the minority of the GCC explained that by virtue of the Contract governing the terms of transshipment services, MSC offered to PPA –contrary to the rest of the SEMPO users– additional prestations/benefits, namely (i) guaranteed minimum cargo, (ii) long-term commitment (iii) scheduled calls and (iv) increased productivity due to the size of ships. Precisely because of the fact that the two separate product markets are interrelated, the benefits offered by MSC in the market of services to transshipment cargo were passed on to the local cargo market as well, to the extent local cargo was carried together with transshipment cargo. Consequently, as the GCC minority concluded, “*the prestations/benefits from MSC regarding local cargo are dissimilar to those offered by the rest of the users and have a measurable financial value for PPA [...] if the user of the port offering additional prestations/benefits does not enjoy privileges proportionately, then such user would run the risk of less favourable treatment compared to the rest of the users*”¹¹. The minority opinion underlined the failure of the majority to analyze the value of the additional benefits, while not arguing at the same time that such value is zero or negligible. In the opinion of the GCC minority, the rapid increase of the MSC market share was compatible with the market conditions as well as with the general development of MSC during the period in question.

ABUSE OF DOMINANCE – ARTICLE 2 OF GREEK LAW 703/1977 AND ARTICLE 82 EC

Pursuant to the ECJ case-law, an undertaking holds a dominant position in the meaning of Article 82 EC, when it enjoys a legal monopoly for the supply of certain services¹². GCC found that PPA, by holding a legal monopoly in the market for port services at the Port of Piraeus (in its dual capacity as entity responsible for the port management and provider of port services), constitutes a mandatory commercial partner to the other port users thereby securing for itself the independent behaviour which characterizes the existence of dominance¹³. However, with regard to the provision of port services to the international container carriers who are active in the carriage of transshipment cargo, the port of Piraeus is potentially interchangeable with approximately 20–30 other ports in the Mediterranean and therefore Piraeus does not hold a dominant position in that relevant market and has a market share of approximately 10%. On the contrary, Piraeus was found dominant in the market of local cargo services as there was almost zero interchangeability with other ports of the Mediterranean, with the Port of Piraeus being the most advantageous (primarily in terms of cost of carriage) with regard to the carriage by sea of cargo destined to or shipped from the area of Central and Southern Greece. GCC moved on to examine abuse of its dominance in the market of local cargo services.

¹¹The GCC found that from the effect of the contract (for the period 2002–2005) it is derived that the local cargo of MSC amounted on average to a proportion of 20% of its total cargo handled through Piraeus, which corresponds to a proportion of 37% of the total local cargo throughput at the port. According to the GCC minority it was self-evident that the user who provides 37% of the turnover of a business (such as increased productivity due to the economies of scale and the scheduled calls) may benefit from proportionate privileges, this being particularly so when the privileges, as a result of simultaneous presence of both types of cargo are in tandem and either decrease or increase in a linear proportion with the additional prestations/benefits.

¹²See Case 311/84 *Telemarketing* [1985] ECR 3261.

¹³See Case T-83/91 *Tetra Pak International SA* [1994] ECR II-755.

The majority of the GCC concluded the examination of the abuse of dominance in the market of services to transshipment cargo by stating its full agreement with the GDC report regarding abuse and effect on trade¹⁴. After carrying on the relevant open voting, the majority opinion of the GCC resolved that in this case “*it was not proved in the earlier proceedings that there was an infringement of Articles 2 of Greek Law 703/1977 and 82 EC*”.

The minority of the GCC, however, based on the same facts, found abuse of dominance of PPA according to Articles 2 of Greek Law 703/1977 and 82 EC in the market for services to local cargo (loading/discharge and storage), as PPA imposed unfair prices for the services provided. The pricing of PPA for loading/discharge services in the market of local cargo, where it holds a dominant position, was significantly higher than the pricing of loading/discharge services for transshipment cargo (which is a market where PPA faces intense competition from other Mediterranean ports) and such difference in pricing cannot be justified on the basis of cost, since it did not derive that there was any significant cost difference. The comparison between the throughput of the total volume of local cargo and of the total volume of transshipment cargo served throughout the relevant period reveals that a fair allocation of the cost on the basis of the moves required to serve both types of cargo¹⁵ would render the average cost for local cargo service significantly lower. In other words, both services (offered during the same time period) required the same personnel and equipment, and had, in general, the same common cost, which should have been divided depending on the volume of cargo (moves) that each service requires. It was thus clear that PPA was charging excessively for the loading/discharge service of local cargo, an inelastic market in terms of demand, where it holds a dominant position, whereas it charges transshipment cargo with much lower prices on the basis of the competitive conditions in the market. Further, the examination of the storage services to both types of cargo (which were found exactly the same) revealed that the price for storing local cargo was considered excessive and PPA did not provide any evidence to the contrary.

In examining the effect on trade, the GCC minority argued that the saturation of the available storage space at SEMPO, which was a result of PPA abusing its dominance, forced carriers of local cargo to arrange for storage at private storage spaces and thus to pay excessive storage and transportation dues, thereby rendering them less competitive. The ultimate result of all this was an increase in retail prices to the detriment of consumers. According to the dissenting opinion of the GCC Plenary, the above highlighted abuse of dominance of PPA is clearly proved from the fact that following the lodging of the complaint by the complainants, measures were taken by PPA and there was some significant improvement in the operation of the port regarding the rest of the carriers. All the features presented above shaped, in the opinion of the minority of the GCC members, an abuse of dominance on the part of PPA under Articles 2 of Greek Law 703/1977 and 82 EC.

¹⁴The consolidated report of the GDC (Report of February 12, 2007) characterized as abusive: (i) the grant of rebates by PPA to MSC on storage dues for transshipment cargo, as there was no objective justification to differentiate between those dues and dues for local cargo (constituting in essence the same service); (ii) the servicing of local cargo compared to transshipment cargo in whole (unfair prices); (iii) the priority in berthing and allocation of equipment taken together with the specifications that PPA committed to achieve vis-à-vis MSC, given that such conduct effectively amounted to constructive refusal to supply to other port users, the attraction of transshipment cargo not serving as objective justification in that regard. Moreover, GDC verified on the basis of relevant ECJ case-law that an infrastructure such as port or airport constitutes substantial part of the common market when due to the volume handled through it and its importance for trade there is possibility to substantially affect trade within the common market, in particular in terms of foreclosure. PPA was found to be part of the common market wherein effect on trade was noted on the part of GCC with regard to both Article 81 and 82 EC in accordance with the relevant guidelines (Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ 2004/C 101/07)).

¹⁵Costs are calculated according to the performance of moves (i.e. lifting the cargo from the vessel, placing in on the docks, lifting it from the docks and placing it on the vessel etc).

IV. FINES

Finally, the GCC imposed fines taking into account the time period during which the anticompetitive behavior manifested itself in practice (i.e. from 01.07.2002 until, and including, 2004, noting that in any case, from the year 2005 onwards, the situation was significantly improved). The GCC weighted the criteria of the guidelines on fines noting that the infringement is imputable on both undertakings, as it cannot be argued that the unlawful practice is attributed exclusively to one of the two due to the fact that the other was financially weaker and thus had no leeway for negotiation. The GCC fined PPA with the amount of 1.280.197.43 Euros and MSC with the amount of 1,283,871.27 Euros (amounting to 1% of its turnover). The GCC pointed out that PPA bears a heavier liability compared to MSC given that, in its capacity as the entity managing the port, PPA was in a position to know and assess the exact conditions of operation and the capacity of the port. For this reason, according to GCC, PPA constituted the only operator who could have remedied the problems and inefficiencies occurred in the relevant market, something that it actually did from 2005 onwards.

V. Comment

The above legal assessment may strike the impression on the reader that, when looking at the majority and minority opinions separately, two different cases were heard, based on the same facts and excluding one another. The first seems to be an Article 81 case, a clear collusion between PPA and MSC which has an anti-competitive effect on the national and Community market for services to local cargo, in which case no abuse of dominance concerns arise. Nevertheless, few remarks with regard to the methodology of the GCC analysis are pertinent.

In examining a potential exemption under BER 2790/1999, the GCC stated that PPA has the monopoly in port services provided to local cargo and was led to the conclusion that the 30% threshold does not apply, thus, a full assessment under Articles 81 EC and 1 of Greek Law 703/1977 had to be carried out. However, the 30% threshold under Article 3(1) of BER 2790/1999 refers to *the relevant market on which the supplier sells the contract goods or services*, that being the market of services to transshipment cargo, which is the subject-matter of the Contract and wherein PPA (the seller) holds a market share of less than 10%. What is more, it is indeed peculiar that the GCC majority found an exclusive supply obligation under Article 3(2) of the BER 2790/1999, something that does not seem to fit the background of the case, as the Contract did not contemplate such an exclusive obligation.

¹⁶The GCC rested on the premise that the results of the Contract, which refers to the market of services to transshipment cargo, reflect on the market of services to local cargo, because local cargo occasionally benefits from the Contract terms when carried together with transshipment cargo. It could be argued, however, that this fact alone is not sufficient to sustain the conclusion of the GCC that the local cargo market is indeed the relevant market affected by the Contract. On this basis, it could be further argued that there is a *de minimis* effect of the Contract, since the market share of both PPA and MSC does not exceed the 15% threshold in the transshipment market and the local cargo market was not adequately illustrated as a relevant market affected by the Contract (see para 7 (b) of the Commission Notice on Agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (*de minimis*) OJ 2001/C 368/07).

The GCC's argument that in any case, even if the agreement benefited from BER 2790/1999, the presumption of legality must be withdrawn¹⁷ since "*the agreement in question produces results which are incompatible with Article 81 para 3 EC at least*" is not backed by the required economic-based analysis of the Guidelines on Vertical Restraints¹⁸ in conjunction with paragraph 5 of the Guidelines on the application of Article 81(3) of the Treaty¹⁹. Moreover, according to paragraph 75 of the Guidelines on BER 2790/1999, a withdrawal decision can only have an *ex nunc* -and not an *ex tunc*- effect (i.e. the exempted status of the agreements concerned will not be affected until the date at which the withdrawal becomes effective). The period to which the infringement refers consists of the years 2002 – 2005, since it is expressly admitted in the text of the decision that the port conditions rendering the performance of the Contract unlawful were remedied by PPA after 2005.

The GCC majority, in its assessment of the anti-competitive effect of the Contract, identifies such effect as a direct result of the application of the Contract terms. In light of the absence of a meticulous analysis of the factors that need to be examined in case of an anti-competitive effect²⁰ and taking into account that the GCC admits in this same decision that the conditions producing such an anti-competitive effect (i.e. the saturation of the port) are mainly attributed to PPA, the finding of such anti-competitive effect seems to rest on a somewhat contradictory and unsafe legal foundation regarding causality.

The GCC majority evidently marks a disproportionate turn in argumentation when it reaches the examination of the case under Article 82 and sums up its assessment by way of reference to the GDC Report (which found abuse of dominance), denying that abuse of dominance can be proved by the earlier proceedings in question. However, elements pointing towards an Article 82 case are indeed present even in the argumentation of the GCC majority itself: The "special responsibility" of PPA within the framework of its dual role; the saturation of the port, which was not illustrated clearly as a direct effect of the Contract, but rather as a behaviour for which a port operator is unilaterally responsible in harmony with ECJ case law²¹; and, finally, the explicit acceptance by GCC that PPA met (unilateral) action to remedy such saturation after the period of examination in question as well as the verification of PPA's sole responsibility in that regard in setting fines²².

²¹See C-179/1990 *Mercati Convenzionali Porto di Genova Spa* [1991] ECR I-5889, paras 18-19, where the ECJ clearly qualifies the behaviour of a port operator imposing on persons requiring services unfair prices, or limiting technical development to the prejudice of consumers, or applying dissimilar conditions to equivalent transactions with other trading parties with an abuse of dominant position.

²²The decision reads: "*PPA knew exactly the conditions of operation and the capacity of the port and was, as a result, the only one who could have remedied the relevant problems occurring*" tacitly admitting a unilateral conduct.

Book Review: Competition and
efficiency in the Arab world
Edited by Khalid Sekkat,
Palgrave Macmillan, 2008, Price £58

Mohamed ElFar*

This book, published in 2008, aims at providing an assessment of competition and efficiency in four Arab countries, namely Egypt, Jordan, Morocco and Tunisia. It is divided into six chapters. The first chapter provides a general introduction to the economic status of the four chosen countries focusing on their economic performance, business landscape and likelihood of competition therein. Moreover, it sheds the light on the economic reforms pursued by these countries.

The following chapters begin with a discussion over the major economic developments and reforms which were undertaken in each of these countries. They further continue with an assessment of the manufacturing sector in each country, degree of concentration, degree of imports penetration and the status of competition in the market. Finally, each chapter concludes with an evaluation of the respective competition law regime.

More specifically, Chapter Two deals with Egypt, which began its privatization programs and reform plans during the 1990's. Among several useful observations on the country's economy, the authors note that 80% of the Egyptian industrial production is from food products, textiles and wearing apparel, chemicals and engineering industries. They assure that specialization and concentration constitute basic features of the Egyptian economy. Finally, they provide an assessment of the Egyptian competition law where they point out several deficiencies.

In Chapter Three concerning Jordan, one again can notice that most of the industries are highly concentrated. However, the authors note that the market power of such concentrations is diminished through a range of governmental policies and high import penetration. Furthermore, they undertook a very interesting questionnaire, submitted to 50 companies, from where it became clear that 52% of the companies surveyed were not aware of the presence of a competition law. Moreover, 90% of those companies indicated that they do not need to go to report to the Competition Directorate any infringements. However,

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the other 10% noted that they either have filed or will file complaints due to copyright infringements. This denotes, according to the authors, lack of awareness among market players of the content of the law and its objectives due to the potential presence of several infringements in the market.

Turning to Chapter Four on the situation in Morocco, it appears that during the 1990's the economy began to open up to global economies through regional and bilateral trade agreements. Its market is highly specialized and concentrated in wearing apparel and food products. It is argued that this might expose the economy to the danger of being dependent on certain industries. The authors continue with the assessment of the Moroccan Competition law. They demonstrate that the competent competition council lacks both the power to undertake investigations on its own initiative and the power to request documents from market players. Eventually, they conclude that there is not effective implementation of competition law in Morocco up-to-day due to the lack of the government's commitment to undertake the necessary market reforms.

The final country considered is Tunisia. As in the previous chapters, a general overview of the developments of the economy and the market structure is first discussed. It appears that Tunisia has exceptionally been achieving several successes with regard to growth rates and the diversification of the economy. Nonetheless, the author assures that it still suffers from '*many inefficient governmental controls on economic activities, lack of competition, immature and imperfect capital markets and poor corporate governance*'.

Ultimately, the concluding chapter recapitulates the aforementioned ones. The data forming the basis for the analysis of the four Arab countries date from up to 2001. Given that this book was published in 2008, one might have expected more updated information that would have given a more precise overview of the current situation in the countries concerned. In addition, it would have been worth mentioning the Aghadir Agreement which was concluded among the four countries under consideration. This agreement deals with Free Trade zones, but includes explicit articles on competition among the four member states. Generally speaking, it was expected that this book provide more updated information and wider coverage of the Arab world rather than being limited to just four countries.

Book Review: Jürgen Basedow (editor), *"Private Enforcement of EC Competition Law"*, Kluwer Law International, 2007, ISBN 978-90-411-2613-9.

Daniel Zrihen¹

Until recently, infringements of the competition rules of the EC Treaty (Articles 81-89 EC) have been almost exclusively dealt with under the public enforcement channel of EC competition law, i.e. by the European Commission and the national competition authorities of the Member States. The other channel of enforcement of EC competition law, i.e. private enforcement, was brought to the foreground by Regulation 1/2003 (Modernisation Regulation)², which abandoned the former centralised system of prior notification and authorisation and introduced a new decentralised system of legal exemption and *ex post* assessment where national competition authorities and national courts play a vigorous role in the application and enforcement of Articles 81 and 82 EC. The central aim of that development was the improvement of the effectiveness of EC competition rules through the decentralisation of their enforcement and the working of public and private enforcement channels in tandem. A divisive debate on the right of the victims of anti-competitive conducts (contractual or not) to bring legal actions before national courts for breach of EC competition law was triggered by the recognition on the part of the European Court of Justice (ECJ) in its *Courage and Crehan judgment*³ of the importance of the right to damages and was followed by a heated and indeed broad deliberation depicted in the Green⁴ and White⁵ Papers on damages actions of the European Commission. Currently, the private enforcement of EC competition rules constitutes one of the hottest policy choices and one of the thorniest legal issues for the European Commission. The corresponding Directive proposal is thus eagerly awaited. In the wake of the Green Paper, the Max Planck Institute for Comparative and International Private Law (directed by Professor Jürgen Basedow) convened an international conference in Hamburg on 6 and 7 April 2006 in order to contribute to the debate which was launched by the Commission. The present book, published in 2007 by Kluwer Law International, presents the papers and proceedings of these two days. It should be stressed from the outset that the expertise and experience of the contributors uphold the validity and the significance of the comments and views made thereof, thereby rendering the book a useful tool for both scholars and practitioners.

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²Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, p.1-25.

³Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, where the ECJ recognised a right to compensation to anyone who has suffered losses from a violation of Articles 81 and 82 EC in order to guarantee the effectiveness of the EC competition rules. The conclusions of this judgment were subsequently confirmed in joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619.

⁴Green Paper on damages actions for breach of the EC antitrust rules, COM(2005) 672 final.

⁵White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, 02.04.2008.

The book is made up of eleven ground-breaking presentations that were delivered by practitioners, academics, economists and European policy makers. These presentations address the most significant questions raised in the Green Paper from both a Community and a comparative perspective and each one is followed by a summary of the subsequent debate. As mentioned above, although the conference took place before the adoption of the White Paper, all the questions raised and the issues discussed thereof remain on the current agenda in view of the awaited next legislative step on the part of the European Commission. The thorough way in which the hottest issues in this area of EC competition law are discussed and the valuable insight provided for by the authors led me to write a review about this comprehensive book regardless of its 'age'.

The book starts with a thorough presentation of Emil Paulis (former head of the Policy and Strategic Support Directorate in DG Competition) on the main policy issues with regard to the private enforcement of EC competition law. After stressing that private enforcement is a complement to -as opposed to a substitute for- public enforcement, he addresses the most crucial issues in this area of law and policy, such as the need for more vigorous rules concerning access to evidence, the passing-on defence theory that he identifies as "one of the most difficult legal issues", the need to favour consumer claims and the question of collective redress, and eventually the issue of coordination of public and private enforcement, especially when it comes to leniency.

In the second presentation, Professor and former Advocate General of the ECJ Walter van Gerven explains in great detail the relevance of the *Courage* case and how guidance could be found by national courts in Article 288 EC and the *Francovich*⁶ liability case law. He however stresses that this could not replace a codified system and hence emphasizes the need for a comprehensive legislative intervention at the Community level.

The book continues with a comparative analysis involving the experience from the national laws of the United States (Hannah Buxbaum), of Germany (Wulf-Henning Roth), of France (Laurence Idot) and of Italy (Carlo Castronovo). In each case, the contributors draw upon their national experiences in private enforcement to set out useful and detailed practical recommendations and conclusions as to how the respective issues could be addressed in the broader and more peculiar Community regime.

⁶Joined Cases C-6/90 & C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357.

Following the comparative analysis, some key issues on the substance of the debate are thoroughly addressed. From an economist perspective, Professor Martin Hellwig (Bonn) deals with the important issue of the calculation of damages and discusses in particular the problem of the passing-on defence of losses sustained in an upstream market to customers in a downstream market in the context of horizontal price-fixing cases.

Professor Ralf Stürner (Freiburg) deals with another hot issue, namely the question of the claimant's burden of proof in providing evidence in civil proceedings and the related question of access to evidence, which plays a key role in rendering damages actions effective. He proposes to encourage, through a provision in a Directive, national courts to grant a reduction in the requirements of specification of facts and evidence in appropriate cases where the relevant facts are in the sphere of the opponent or third persons, according to the ALI/Unidroit Principles of Transnational Civil Procedure.

Professor Astrid Stadler (Constance) focuses her presentation on the question of collective actions which is another fundamental issue in ensuring the effectiveness of private enforcement. The *rationale* of collective actions is that small claimants are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. Mechanisms allowing the aggregation of claims, would allow victims to receive compensation. After examining the various options for the design of collective actions (joint actions, test cases, actions brought by associations and class actions), she explains why, according to her view, only class actions (whereby one affected individual or association brings an action on behalf of identified or identifiable victims) are an efficient means of private enforcement where important damages have occurred, both in terms of compensation and deterrence.

Dr. Ulf Böge, President of the German Cartel Office, focuses his presentation on the important question of the conflicts that may arise from the interrelation between the private and the public enforcement channels of EC competition law, concentrating in particular on the interaction between leniency programmes and damages actions. After explaining that companies could be deterred from applying for leniency by weighing the reduction of fines against potential damages actions, he outlines possible policy options to enhance the attractiveness of leniency programmes and in particular argues for favouring leniency applicants over non-cooperating firms in civil proceedings.

In the final presentation, Professor Jürgen Basedow (managing director of the Max Planck Institute for Comparative and International Private Law and former chairman of the German Monopolies Commission) examines the crucial questions pertaining to jurisdiction, applicable law and forum-shopping. Given that most damages actions based on infringements of the EC competition rules have an international (or at least transnational) dimension and involve cross-border elements, all the issues highlighted in this final part of the book are bound to be at the centre of attention in a multi-jurisdictional environment. Indeed, the said issues increasingly constitute important battlegrounds, especially in claims involving EU-wide cartels or other cross-border anti-competitive conducts.

To sum up, this book underlines the significance of private enforcement as a compensatory as well as a deterrence tool against anti-competitive conducts. As Jürgen Basedow highlights in his introduction: « *fines may reach high amounts of money, but they do not compensate the losses caused. And if they do not match the prospective profit to be earned by the cartel members, they cannot provide for an effective deterrence against cartelization* ». Not only does the book provide a detailed examination of the most important legal issues of private enforcement of EC competition law, but it also contains a comprehensive analysis of the different options set out in the Green and the White Papers, which helps the reader to elucidate the major challenges that remain to be faced before the adoption of a legislative proposal by the European Commission. The structure of the book is solid and its quality is indeed high. The contributions are thorough and clear, focusing less on theoretical considerations and more on concrete policy proposals as to how the most puzzling issues of this challenging area of EC competition law can be dealt with. Post modernisation and at a time when the European Commission, having considered and assessed the input provided to it as a response to the Green and White Papers, is expected to adopt a legislative proposal, this book constitutes a precious tool for students, academics, practitioners, judges and all those engaged in or faced with issues of enforcement of EC competition law, be it within its public or private channel.

Aim:

The *ICC Global Antitrust Review* aims at encouraging and promoting outstanding scholarship among young competition law scholars by providing a unique platform for students to engage in research within the field of competition law and policy with a view to publishing the output in the form of scholarly articles, case commentary and book reviews. The Review is dedicated to achieving excellence in research and writing among the competition law students' community around the world.

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