

Gleiss Lutz

Deficiencies in European Community
Competition Law

Critical analysis of the current practice and
proposals for change

by

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A. Executive Summary

The fines imposed by the European Commission for competition law infringements have reached a spectacular level over the last decade, and have seen an even more drastic increase over the last couple of years. The current peak was reached when in 2007 the European Commission fined the undertakings participating in the *elevators and escalators* cartel EUR 992 million, only marginally falling short of the one-billion-euro mark. *ThyssenKrupp* alone was fined a remarkable EUR 479 million.

Statistics on the European Commission's fining practice clearly display that – as of 2006 – the fines imposed have ultimately exceeded reasonable levels. Whereas before 2006 the aggregate fines imposed over a whole year remained below EUR 1 billion and the average fine per undertaking did not exceed EUR 20 million, two years later, in 2007, the respective amounts had already increased threefold and more.

In the light of this increase, the legal foundation of substantive and procedural rules on which the European Commission's fine decisions are based needs to be reviewed and reconsidered.

In particular, Art. 23 of Regulation 1/2003, which forms the basis for imposition of the fines, does not meet the overriding requirement for a “clear and unambiguous legal basis”, thus violating the principle of *nulla poena sine lege certa*. As expressed in its current decision practice, the European Commission seems to exercise nearly unlimited discretion when imposing fines: the only criteria specified in Art. 23 (3) of Regulation 1/2003 for fixing the amount of fines are the gravity and duration of the infringement. Art. 23 (2) of Regulation 1/2003 merely stipulates that the maximum amount of the fine shall not exceed 10% of the total turnover generated by the undertaking in the preceding business year. Firstly, the parameters of “gravity and duration” are not detailed and specific enough to justify fines of several hundreds of millions of euros, and secondly, even the maximum amount is unclear, because the concept of “undertaking” is in dispute, i.e. whether undertaking means a group of companies or simply the legal entity responsible for the infringement.

The European Commission's attempt to specify the rules used to determine fines by issuing fining guidelines does not cure the deficiency described, because the principle of legal certainty can only be satisfied by formal legislation but not by administrative guidelines or practice. In addition, the European Court of Justice has recognised that the Community legislature itself must determine the essential elements of a specific matter. The Community legislature, by referring to the criteria of “gravity and duration of the infringement” and the limit of 10% of the turnover in Regulation 1/2003, has not itself determined all essential elements regarding the imposition of fines in European competition law.

In addition, the approach of the European Commission and the Community courts regarding intentional and negligent conduct of undertakings is not acceptable. The European Commission and the courts fail to make a clear distinction between intention and negligence. Further, the standards regarding the responsibility of an undertaking for actions of its employees are poorly defined. For instance, according to the European Court of Justice, the European Commission is not required to identify the persons whose acts reveal the intentional or negligent nature of the infringement.

Moreover, the broad interpretation of the “undertaking” concept that results in almost any group of companies being viewed as one undertaking means that more or less all parts of a group of undertakings may be held jointly and severally liable, irrespective of their actual role in the infringement. The currently applied concept of parent company liability is not governed by clear-cut legal provisions: On the contrary, such provisions are non-existent, and even the principles applied are not consistent. Due to the general applicability of the rule of law, and given the impact of the imposition of joint and several liability on a parent company for competition law infringements committed by a subsidiary, it can be concluded that company liability must be regulated by Community legislation, and that the principles of company liability cannot be determined on the basis of the Community courts’ case law.

Furthermore, the procedure applied by the European Commission, in particular its practice regarding the granting of immunity from fines and the reduction of fines in cartel cases under the “Leniency Notice”, violates the overriding principle of the presumption of innocence (*in dubio pro reo*), because it results in a shift of the burden of proof from the Commission to the undertakings. Under the Leniency Notice, an undertaking must prove that it and other undertakings infringed Art. 81 (1) EC, if it wishes to be eligible for immunity from fines or a reduction of fines. Further, the *nemo tenetur* principle is violated, which states that no one can be directly or indirectly obliged to incriminate himself. Both the Leniency Notice and the excessively increased fines virtually force the undertakings to cooperate with the Commission and, thus, to confess the infringement and incriminate themselves. In practice, in view of the extremely high fines, no undertaking can afford not to make use of the Leniency Notice.

Further, according to Art. 23 (5) of Regulation 1/2003, the fines imposed under Art. 23 (1) and (2) of Regulation 1/2003 may not be of a criminal law nature. Despite the current practice of the European Commission and the Court of First Instance, this should not only be understood as a definition of the nature of the fines imposed, but also as a prohibition to impose fines with a criminal character.

In addition, the judicial control of fines imposed by the European Commission is too limited and therefore violates the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Judicial control is limited to the pleas raised by the parties, the Community courts do not fully examine the facts found by the European Commission, the undertakings concerned do not have the possibility to examine witnesses, and the courts have not established their own independent fining criteria.

The deficiencies identified require, in particular, the following improvements and modifications:

1. Specific rules should be incorporated in Regulation 1/2003 on the imposition of fines, which comply with the requirements of the principle of legal certainty, and which provide for a clear prediction of the amount of potential fines for competition law infringements.
2. Safeguards should be created to ensure that a fine may only be imposed on an undertaking if the infringement of competition law can be clearly established by negligent or intentional behaviour of one or more individuals. Further, the European Commission should be obliged to determine whether the actions of these individuals can be attributed to the undertaking, because they are the statutory representatives of the undertaking, or because the individuals were not sufficiently supervised by the statutory representatives of the undertaking.
3. The principles under which parent companies are held liable for infringements of subsidiaries should be clearly determined.
4. Compliance efforts, such as corporate compliance programmes, should be taken into account by the European Commission, either as a reason to deny responsibility of an undertaking for infringements of competition law, or as a mitigating factor in the imposition of fines.
5. Fines may not have the quality of criminal sanctions. Therefore, the fines imposed by the European Commission may not reach the level of criminal sanctions, and the objective of deterrence or general prevention cannot be decisive in determining the amount of a fine.
6. The rules on determining the amount of a fine should be related to the benefits obtained as a result of the infringement. Therefore, the determination process should mainly consider the damage caused or the benefits obtained as a result of the competition law infringement.
7. Undertakings must be guaranteed the same rights of defence in proceedings before the European Commission and the Community courts as in criminal proceedings. To this end, corrections of the leniency programme as currently applied are necessary in order to avoid collision with the *nemo tenetur* and *in dubio pro reo* principles. Steps must also be taken to ensure that contributions of an undertaking which is cooperating with the European Commission under the Leniency Notice are carefully scrutinised as to their accuracy by the European courts.
8. The newly introduced settlement procedure is a welcome innovation as regards streamlining of the procedure. However, the settlement procedure suffers from the same deficiencies that have been identified for the “normal” procedure. The Commission’s discretion with respect to the question of whether to enter into settlement negotiations or not, and if so, with whom, is very broad. Again, the Commission’s discretion must be limited.
9. The current deficiencies as regards judicial review should be remedied by establishing a system in which the European Commission merely acts as an accusing authority, whereas the Court of First Instance or specifically assigned judicial panels decide on the case and set the fine based on its/their own findings with unlimited ability to take evidence.

B. Introduction

The fines imposed by the European Commission (“**Commission**”) for competition law infringements have reached a spectacular level over the last decade, and have seen a sharp increase even over the last couple of years. The current peak was reached when the Commission fined the undertakings that participated in the *elevators and escalators* cartel EUR 992 million, only marginally falling short of the one-billion-euro mark. *ThyssenKrupp* alone was fined the remarkable amount of EUR 479 million.

Compared with the fines imposed in 2007, those imposed somewhat over ten years ago seem modest. In 1994, the highest fine imposed was significantly lower, at ECU 32.492 million¹, yet it still constituted the highest fine ever imposed at the time. This resulted from the enormous scope of the *cement* cartel, which comprised over 40 participants and affected the “bulk of European production”². The highest fine imposed in 1995, for example, amounted to ECU 11.5 million.³ *Bayer’s* fine of ECU 3 million in the *Adalat* case⁴ constituted the largest fine in 1996, while *Irish Sugar’s* fine of ECU 8.8 million was the record fine in 1997.⁵

In a first step towards implementing stricter fines, the Commission fined *Volkswagen* ECU 102 million⁶ in 1998, topping the list of fines at the time. However, the largest fines imposed in the following years (ECU 13.5 million in 1999⁷ and ECU 73.3 million in 2000⁸) conveyed the impression that the imposition of a three-digit million fine remained the exception. This impression was blurred shortly afterwards when the Commission heavily fined two cartels in 2001 and 2002. For its participation in the *vitamin* cartels, *Hoffmann-La Roche* was fined EUR 462 million⁹, while *Lafarge’s* fine for its participation in the *plasterboard* cartel amounted to EUR 249.6 million.¹⁰ However, similar to the *cement* case, these cartels were also outstanding in terms of intensity. *Hoffmann-La Roche* was fined for its participation in no less than eight distinct price-fixing and market-sharing cartels affecting the world-wide vitamin markets. The then Competition Commissioner, *Mario Monti*, stated that these cartels constituted “the most damaging series of cartels the Commission has ever investigated due to the sheer

1 Commission of 30 November 1994 - Cases IV/33.126 and 33.322 – *Cement*, OJ of 30 December 1994, L 343/1.

2 Commission Press Release IP/94/1108.

3 Commission of 29 November 1995 - Cases IV/34.179, 34.202, 216 - *Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven*, OJ of 23 December 1995, L 312/79.

4 Commission Press Release IP/96/19.

5 Commission Press Release IP/97/405.

6 Commission of 28 January 1998 - Case IV/35.733 - *Volkswagen*, OJ of 25 April 1998, L 124/60.

7 Commission Press Release IP/99/957.

8 Commission Press Release IP/00/589.

9 Commission of 21 November 2001 - Case 37.512 - *Vitamins*, OJ of 10 January 2003, L 6/1.

10 Commission of 27 November 2002 - Case 37.152 - *Plasterboard*, OJ of 28 June 2005, L 166/8.

range of vitamins covered which are found in a multitude of products from cereals, biscuits and drinks to animal feed, pharmaceuticals, and cosmetics.”¹¹ The *plasterboard* decision showed that it was “the largest in terms of value to have been covered by a Commission cartel decision over the last ten years or so.”¹² Additionally, the Commission identified as aggravating factors that “the cartel affected 80% of the consumers in the European Union” and that this was the second infringement committed by two of the fined undertakings.¹³ However, considering the highest fines imposed between 2003 and 2005 (EUR 99 million in 2003¹⁴, EUR 67.1 million in 2004¹⁵, and EUR 56.6 million in 2005¹⁶) the record fines of 2001 and 2002 do not represent a general trend but, again, only significant fines owing to special circumstances.

Then, in 2006, the Commission’s aim to step up its own fining practice became evident. It issued no less than three decisions in which the undertakings with the highest fines were sentenced to penalties in the three-digit millions. In the *bleaching chemicals* cartel *Solvay* was fined EUR 167 million¹⁷, in the *methacrylates* case *Arkema* EUR 219.1 million¹⁸ and, finally, in the *synthetic rubber* case *Eni* received a fine of EUR 272.3 million¹⁹. In 2007, the Commission continued its trend of increasing the amount of imposed fines. *Siemens* was fined almost EUR 400 million²⁰ before the Commission set the previously mentioned current record by fining *ThyssenKrupp* in the *elevators and escalators* cartel.²¹

It should be noted that administrative fines are not the only pecuniary loss suffered by undertakings that participate in cartels, as they also have to face civil claims for damages filed by customers and consumers. The enforcement of such claims is also strongly supported by the Commission.²²

The Commission’s steady upward trend since 2006 is illustrated in Figure 1, which lists the ten highest cartel fines ever, both per case and per undertaking. With the exception of the extraordinary *vitamins* and *plasterboard* cases, all of these cases were decided only in the last two years.

11 Commission Press Release IP/01/1625.

12 Commission Press Release IP/02/1744.

13 Ibid.

14 Commission of 1 October 2003 - Case 37.370 - *Sorbates*, OJ of 13 July 2005, L 182/20.

15 Commission of 3 September 2004 - Case 38.069 - *Copper plumbing tubes*, OJ of 13 July 2006, L 192/21.

16 Commission of 30 November 2005 - Case 38.354 - *Industrial bags*, OJ of 26 October 2007, L 282/41.

17 Commission of 3 May 2006 - Case 38.620 - *Hydrogen peroxide*, OJ of 13 December 2006, L 353/54.

18 Commission of 31 May 2006 - Case 38.645 - *Methacrylates*, OJ of 22 November 2006, L 322/20.

19 Commission of 29 November 2006 - Case 38.628 - *Synthetic rubber*, OJ of 12 January 2008, C 7/11.

20 Commission of 24 January 2007 - Case 38.899 - *Gas insulated switchgear*, OJ of 10 January 2008, C 5/7.

21 Commission of 21 February 2007 - Case 38.823 - *Elevators and Escalators*, no public version available.

22 Cf. White Paper on Damages Actions for Breach of the EC antitrust rules of 2 April 2008, COM(2008) 165 and Green Paper on Damages Actions for Breach of the EC antitrust rules of 19 December 2005, COM(2005), 672.

Figure 1 – The ten highest cartel fines²³

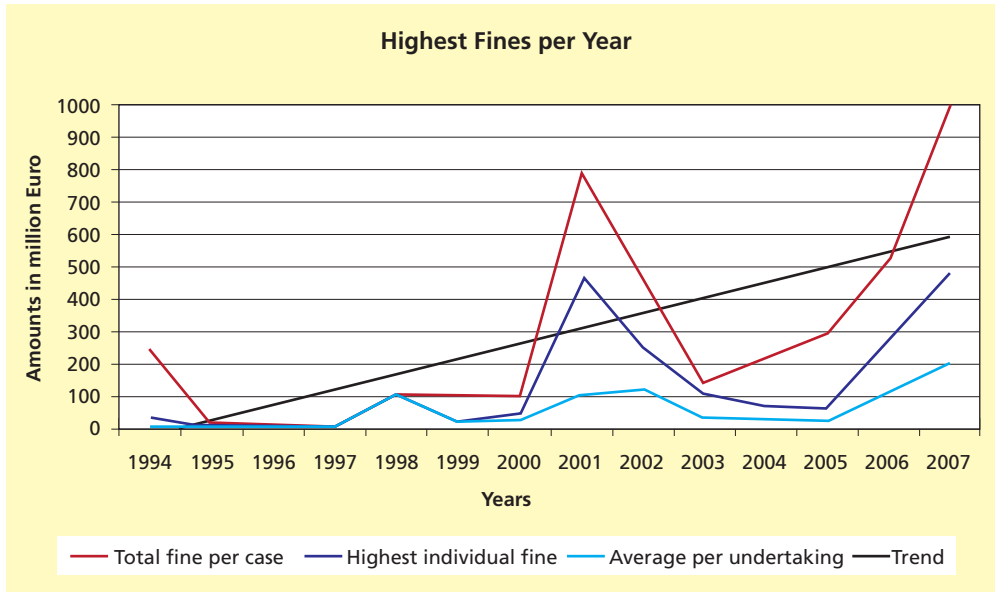
Ten highest cartel fines per case			Ten highest cartel fines per undertaking		
	Year	Total amount in million EUR		Year	Total amount in million EUR
Elevators and Escalators	2007	992.3	ThyssenKrupp Elevators and Escalators	2007	479.7
Vitamins	2001	790.5	Hoffmann – La Roche Vitamins	2001	462.0
Gas Insulated Switchgear	2007	750.7	Siemens Gas Insulated Switchgear	2007	396.6
Synthetic Rubber	2006	519.1	Eni SpA Synthetic Rubber	2006	272.3
Flat Glass	2007	486.9	Lafarge SA Plasterboard	2002	249.6
Plasterboard	2002	478.3	BASF AG Vitamins	2001	236.9
Bleaching Chemicals	2006	388.1	Otis Elevators and Escalators	2007	224.9
Acrylic Glass	2006	344.6	Heineken NV Dutch beer market	2007	219.3
Hard Haberdashery: Fasteners	2007	328.6	Arkema SA Methacrylates	2007	219.1
Fittings	2006	314.8	Solvay SA / NV Bleaching chemicals	2006	167.1

The trend becomes even more obvious when looking at Figure 2. On the basis of the cartel cases for which the highest fines were imposed in every year for the last fourteen years²⁴, it becomes clear that the Commission is steadily increasing the fines it imposes on cartel infringers.

23 Cf. the Commission's case statistics, available under http://ec.europa.eu/comm/competition/index_en.html.

24 Cases: 1994 – Cement; 1995: Crane-hiring; 1996 – Adalat; 1997 – Irish Sugar; 1998 – Volkswagen; 1999 – Seamless steel tubes; 2000 – Lysine; 2001 – Vitamins; 2002 – Plasterboard; 2003 – Sorbates; 2004 – Copper plumbing tubes; 2005 – Industrial bags; 2006 – Synthetic Rubber; 2007 – Elevators and Escalators.

Figure 2 – The highest fines in the last fourteen years (per year)



Figures 3 and 4 illustrate that the decisive increase began in 2006, before which the fines imposed over a year remained consistently below EUR 1 billion and the average fine per undertaking did not exceed EUR 20 million. Two years later, in 2007, the respective amounts had already increased threefold and more.

Figure 3 – Total amount of fines imposed per year

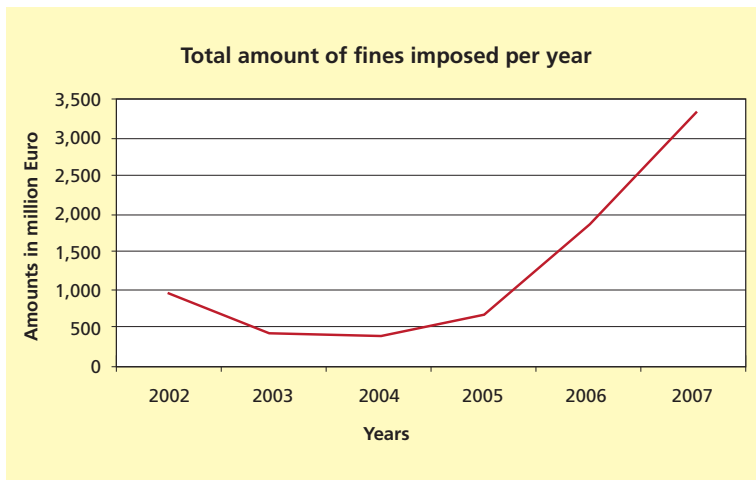
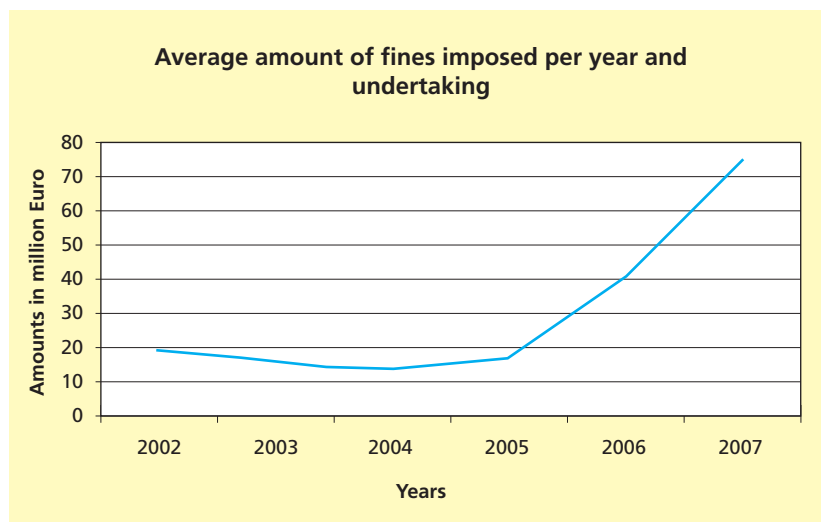


Figure 4 – Average amount of fines imposed per year and undertaking



This clear shift towards a more aggressive fining practice highlights the fact that the Commission based all its fining decisions on the same legal basis: Art. 23 (2) of Regulation 1/2003 (“**Reg. 1/2003**”)²⁵ and, as the case may be, its predecessor provision Art. 15 (2) of Regulation 17/1962 (“**Reg. 17**”)²⁶ which contains similar wording. The enormous explosion of the fine range (EUR 3 million in 1996 to EUR 479.9 million in 2007) on the basis of the same legal provisions²⁷ and procedure raises severe concerns about whether the set of rules regarding the imposition of fines as well as the procedure of competition law infringement investigation is adequate and compliant with overriding legal principles and standards.

This study undertakes to review this adequacy. Its findings show that there is an urgent need to restore the balance between the set of rules on imposition of fines and procedure, on the one hand, and the current fining practice on the other.

25 OJ of 4 January 2003, L 1/1. Art. 23 (2) Reg. 1/2003 reads:
“The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

- (a) they infringe Article 81 or Article 82 of the Treaty; or
- (b) they contravene a decision ordering interim measures under Article 8; or
- (c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10% of the sum of the total turnover of each member active on the market affected by the infringement of the association.”

26 OJ of 21 February 1962, 13, p. 204/62.

27 Supplementary, the Commission applies two Commission notices in order to determine the exact fine: (i) the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ of 1 September 2006, C 210/2 (“**Fining Guidelines 2006**”) and (ii) the Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ of 8 December 2006, C 298/17 (“**Leniency Notice**”).

C. The European Fining Practice in the Light of Superior Principles of the EU/EC Treaty, of Constitutional and of International Law

I. Introduction

The monetary fines imposed on cartels under European competition law have reached spectacular levels.

The practice presented in detail in Parts B. and D. of this study gives reason to scrutinise the fining procedure currently practised in European competition law and to examine it with regard to potential deficiencies.

As will be substantiated in detail below, the current fining practice is subject to considerable criticism from a rule-of-law perspective. The doubts regarding the rule of law arise against the backdrop of the EU/EC Treaty, internationally recognised general principles of law, the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), and the Charter of Fundamental Rights of the European Union (“**Charter of Fundamental Rights**”)²⁸.

The rules and principles which can be derived therefrom call for an overhaul of the system of imposing fines by modifying or clarifying the applicable regulations of secondary legislation, however at least through a manner of interpretation and application which deviates from the current practice of the Commission and the courts of the European Community (“**Community courts**”).

Although there may have initially been no real reason to find fault with the European fining procedure as a mechanism for combating infringements of competition law, this procedure now no longer satisfies the rule-of-law requirements due to the change in existing practice, i.e. a tendency towards imposing “record fines” for cartel agreements the levels of which were previously unheard of.

As a result, a reasonable new balance must be struck between the Commission’s justified interest in pursuing infringements of fair competition and the likewise justified interests of the undertakings concerned in an effective remedy.

28 OJ of 14 December 2007, C 303/1.

II. The EU/EC Treaty, general legal principles, the ECHR and the Charter of Fundamental Rights as superior standards of control

1. The law of the EU/EC Treaty

Due to the hierarchy of norms that also apply under Community law, the legal provisions of Reg. 1/2003 must, as secondary legislation, be judged by the standards of the superior law of the EU/EC Treaty.

2. General legal principles

The same applies to general legal principles, in particular those of a constitutional nature, compliance with which is stipulated in Art. 6 (1) EU.

These rules of law will retain their importance as a yardstick, even after the planned amendment to the Treaty.

According to the (Reform) Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007²⁹ ("**Treaty of Lisbon**"), the obligation of the European Union to observe the rule of law will in future also be contained in Art. 2 EU.

3. The ECHR

In addition, pursuant to Art. 6 (2) EU, the European Union respects the fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States of the European Community ("**Member States**").

Apart from the fact that the European Union is already currently bound by the principles of the ECHR in terms of their substance, the Treaty of Lisbon will, in future, expressly provide for the accession of the European Union to the ECHR, which will be enshrined in a new paragraph 2 of Art. 6 EU.

4. The Charter of Fundamental Rights of the European Union

As regards the application of its secondary competition legislation laid down in Reg. 1/2003, the European Community is already obliged by applicable law to respect the regulations of the Charter of Fundamental Rights, which was solemnly proclaimed by the European Parliament ("**Parliament**"), the Council and the Commission in Nice on 7 December 2000, even though this is not yet deemed to be applicable law.³⁰

29 OJ of 17 December 2007, C 306/1; consolidated versions of the EU Treaty and the Treaty on the Functioning of the European Union, OJ of 9 May 2008, C 115/1.

30 In this regard, cf. Schwarze, *Europäisches Wirtschaftsrecht* [European Economic Law], 2007, p. 232 et seq. with further reference.

In the *max.mobil* case, the European Court of First Instance (“CFI”) held the Charter of Fundamental Rights to be of legal relevance to the extent that its regulations may serve to safeguard (“confirm”) a conclusion already arrived at by other means as regards the recognition of general European rule of law and constitutional principles.³¹

In a judgment of 27 June 2006, the European Court of Justice (“ECJ”) even went a step further.³² In that judgment, the ECJ stated:

“The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter.”

That ECJ judgment enhances the importance of the Charter of Fundamental Rights insofar as it already applies the Charter of Fundamental Rights as a standard of control, where secondary Community legislation refers to the Charter of Fundamental Rights in its recitals. This new practice of the ECJ has profound consequences for European competition law, because recital no. 37 in the preamble to Reg. 1/2003 reads as follows:

“This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.”

Consequently, this means that pursuant to the ECJ’s case law all rules and principles of the Charter of Fundamental Rights become binding for the interpretation of Reg. 1/2003.

If one regards the sanctioning decisions issued under competition law to be decisions at least similar to those under criminal law, then the judicial rights set out in the Charter of Fundamental Rights (Art. 47 et seq. of the Charter of Fundamental Rights), in particular, are applicable without exception in favour of the undertakings.

Beyond this case law of the ECJ, the Treaty of Lisbon makes it expressly clear for the future, by way of an amendment to Art. 6 (1) EU, that the European Union recognises the rights, freedoms and principles laid down in the Charter of Fundamental Rights of 7 December 2000 in the version amended on 12 December 2007 in Strasbourg. According to that provision of the Treaty of Lisbon, the Charter of Fundamental Rights shall share the same legal status as the Treaties.

31 CFI of 30 January 2002 - Case T-54/99 - *max.mobil v Commission*, ECR 2002, II-313, para. 48.

32 ECJ of 27 June 2006 - Case C-540/03 - *Parliament v Council (“Family Reunion”)*, ECR 2006, I-5769, para. 38.

III. Control by applying the standards of legal certainty and foreseeability and the principle of non-retroactivity

When applying superior legal and constitutional standards – as is necessary in line with the hierarchy of legislation in European Community law –, the European fining practice does not comply with the requirements of legal certainty and foreseeability. It violates the principle of *nulla poena sine lege certa* and also, as will be presented below, the principle of non-retroactivity.

1. Violation of the requirement of legal certainty also in the case of fines being classified as sanctions of a non-criminal nature

At first, this applies irrespective of whether the fines imposed under competition law are classified – in line with consistent court practice – as purely administrative measures or as acts of state of a criminal nature. For according to the ECJ's case law, the general rule that “a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis” applies in Community law.³³

1.1 Art. 23 of Reg. 1/2003 lacks sufficient substantive character

There are considerable doubts about the existence of such a “clear and unambiguous legal basis”³⁴, because the nature of Art. 23 of Reg. 1/2003 as a substantive rule is insufficient with regard to the imposition of fines. For example, the provision merely requires an intentional or negligent infringement by an undertaking or association of undertakings of the essential competition provisions of Art. 81 or 82 EC, which are broadly worded giving them a general-clause-like character (Art. 23 (2) of Reg. 1/2003).

The Regulation cites the gravity and duration of the infringement as the sole criteria for fixing the amount of the fine (Art. 23 (3) of Reg. 1/2003).

Furthermore, Reg. 1/2003 in Art. 23 (2) merely determines the maximum limit of the fine, namely that it shall not exceed 10% of the total turnover generated by the undertaking in the preceding business year. In this regard, it remains unclear whether the term “total turnover” relates to the turnover of the group or that of the individual undertaking and whether the preceding business year refers to the year prior to the infringement or the year prior to the sanction.

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

34 Likewise e.g. Rittner/Dreher, *Europäisches und deutsches Wirtschaftsrecht* [European and German Economic Law], 3rd ed., 2008, p. 650; likewise Rittner/Kulka, *Wettbewerbs- und Kartellrecht* [Competition and Antitrust Law], 7th ed., 2008, p. 470.

The fact that the Commission's administrative guidelines actually contain more detailed provisions on determining the amount of fines and on immunity from or the reduction of fines will be presented in detail in Part D. below.³⁵ However, these defining provisions are neither contained in the relevant secondary legislative provision of Art. 23 of Reg. 1/2003 itself, nor does the Regulation expressly authorise the issuing of such provisions.

1.2 Virtually unlimited discretion of the Commission in imposing fines

From the aspect of the required certainty of the penalty provisions in accordance with the rule of law, this is all the more serious, as the Commission has virtually unlimited discretion in fixing the amount of fines.

Since its leading decision in the *Musique diffusion française (Pioneer)* case, the ECJ has allowed the Commission to raise the level of fines for reasons of deterrence, without placing any specific restrictions on it.³⁶ This has been accepted even during ongoing competition proceedings.³⁷

In addition to the last-mentioned case above, with its lack of protection even against retroactive application by the Commission of more stringent fining guidelines, further examples from the recent past demonstrate how unlimited the discretion granted by the ECJ to the Commission is.

In the *SGL Carbon* case, for example, the ECJ was quite generous in interpreting the requirements for compliance with the 10% limit for fixing the amount of the fine. According to that ruling, "it is only the final amount of the fine imposed which must comply with that 10% limit". Consequently – according to the ECJ – the Commission is not prohibited "from arriving, during the various stages of calculation, at an intermediate amount higher than that limit, provided that the final amount of the fine imposed does not exceed it."³⁸

Furthermore, the ECJ has granted the Commission unlimited discretion in the finding and appraisal of the specific characteristics of a repeated infringement (which results in a more severe penalty) and, in this regard, released the Commission from the obligation to observe any limitation period.³⁹

35 The Fining Guidelines 2006 and the Leniency Notice. Cf. footnote 27.

36 ECJ of 7 June 1983 - Joined Cases 100 to 103/80 - *Musique Diffusion française v Commission*, ECR 1983, 1825, para. 109.

37 ECJ of 28 June 2005 - Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to 208/02 P and C-213/02 P - *Dansk Rorindustri and others v Commission*, ECR 2005, I-5571, para. 228-230; likewise ECJ of 18 May 2006 - Case C-397/03 P - *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, ECR 2006, I-4475, para. 25.

38 ECJ of 29 June 2006 - Case C-308/04 P - *SGL Carbon v Commission*, ECR 2006, I-5977, para. 82.

39 ECJ of 8 February 2007 - Case C-3/06 P - *Groupe Danone v Commission*, ECR 2007, I-1331, para. 38. Critically seen from rule of law aspects, even by authors who are members of cartel authorities (specifically: the German Federal Cartel Office). Cf. Engelsing, *Die Bußgeldleitlinien der Europäischen Kommission von 2006* [The Fining Guidelines of the European Commission of 2006], WuW 2007, 470, 477.

And finally, recent case law of the ECJ specifically emphasises the deterrent function of the fines, without drawing the necessary conclusions from this evaluation and at least providing compensation which guarantees an effective remedy on the part of the undertakings concerned.

According to the judgment in the *Showa Denko* case, “the fine imposed on an undertaking may be calculated by including a deterrence factor which is assessed by taking into account a large number of factors and not merely the particular situation of the undertaking concerned.”⁴⁰

1.3 Incompatibility of discretion which is not subject to any specific restrictions with the requirement of a “clear and unambiguous legal basis”

Such wide discretion of the Commission in fixing the amount of fines, which discretion is not subject to any specific restrictions imposed by the case law of the ECJ, does not comply with the requirement of “a clear and unambiguous legal basis” for sanctions under European Community law, a requirement which is principally acknowledged by the ECJ itself. At the same time, raising the level of fines during ongoing competition proceedings constitutes inadmissible retroactivity.

It is true that the application of general clauses and unclear legal terms in Community law does not in itself constitute a violation of the principles of legal clarity and sufficient certainty of legal norms. This applies, in particular, if such unspecific and general-clause-like legal terms can be more precisely defined by case law as already have been in interpretative practice for quite some time.

Furthermore, the reservation of legislative authority does not apply in Community law in the same manner as in national constitutional and administrative law,⁴¹ all the more so as the Treaty of Lisbon intends to retain the traditional terms of “Regulation” and “Directive” for the normative acts of law in European law and does not intend to adopt the change of terms provided for in the European Treaty on a Constitution for Europe, namely into “European law” and “European framework law” (cf. Art. I-33 of the Treaty on a Constitution for Europe).

1.4 Application of the reservation of legislative authority in Community law

However, with regard to applicable European Community law it is also certain that material regulations affecting citizens and undertakings cannot be issued by the administration itself, but must be based on a decision by the legislature, in particular, if the executive power – as is the case in the imposition of fines – carries out interventions which have a burdensome effect.

If the ECJ, in its leading decision in the *Farbwerke Hoechst* case, holds it to be a general principle of law recognised in all legal systems of the Member States that “any intervention by the public authorities in the sphere of private activities of any person,

40 ECJ of 29 June 2006 - Case C-289/04 P - *Showa Denko v Commission*, ECR 2006, I-5859, para. 23.

41 Cf. only Hilf/Classen, *Der Vorbehalt des Gesetzes im Recht der Europäischen Union* [The Reservation of Statutory Powers in the Law of the European Union], in: *Festschrift for Selmer*, 2004, p. 71 et seq.

whether natural or legal, must have a legal basis and be justified on the grounds laid down by law [...]”⁴², that principle must of course apply to the acts of the Community bodies as well.

In the aforementioned judgment, the ECJ also stated the reason for recognising the fundamental rule-of-law principle that the acts of the administration must have a legislative basis: The aim is to provide to the sphere of private activities “protection against arbitrary or disproportionate intervention” by the public authorities⁴³ with the help of this principle.

1.5 No sufficient realisation of the reservation of legislative authority in respect of fines

The Community legislature has failed to create the relating requisite “clear and unambiguous legal basis” in the extensive form required. Although Reg. 1/2003 specifies some general points of reference for setting fines in cases of infringement of fair competition, by referring to the gravity and duration of the infringement (Art. 23 (3) of Reg. 1/2003) and the 10% limit of the undertaking’s turnover for fixing the amount of the fine (Art. 23 (2) of Reg. 1/2003), the Community legislature itself does not set out all criteria which are material in this respect, but has left them – without stating any further requirements – to the sole discretion of the administrative authority, i.e. the Commission.

1.6 Essential decisions reserved for the legislator as a principle of existing Community law

Although the institutional system of the European Union has certain special features and, as is generally known, differs from the separation of powers in a national constitutional state,⁴⁴ the ECJ has, in various contexts, recognised with regard to applicable Community law that the Community legislature itself must determine the basic elements of the matter to be dealt with.⁴⁵

In this respect, the reservation of legislative authority not only requires a formal legal basis in legislation, but also postulates a sufficient density of regulation. As a result, the reservation of legislative authority is not satisfied merely by the Community legislature creating a simply regulation; rather, this must be done with sufficient certainty, regulating all basic issues together with the required detail of regulation.⁴⁶

42 ECJ of 21 September 1989 - Joined Cases 46/87 and 227/88 - *Hoechst v Commission*, ECR 1989, 2859, para. 19.

43 Ibid.

44 Cf. only Everling, in: von Bogdandy (ed.), *Europäisches Verfassungsrecht [European Constitutional Law]*, 2003, p. 860 et seq.; Oppermann, *Europarecht [European Law]*, 3rd ed., 2005, p. 81.

45 Cf. e.g. ECJ of 17 December 1970 - Case 25/70 - *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster*, ECR 1970, 1161, para. 6; ECJ of 16 June 1987 - Case 46/86 - *Romkes v Officier van Justitie*, ECR 1987, 2671, para. 16; ECJ of 13 July 1995 - Case C-156/93 - *Parliament v Commission*, ECR 1995, I-2019, para. 18. In this regard Scheuing, in: Schulze/Zuleeg (ed.), *Europarecht [European Law]*, 2006, p. 234 with further reference.

46 Cf. Kingreen, in: Calliess/Ruffert, *EUV/EGV [EU Treaty/EC Treaty]*, 3rd ed., 2007, Art. 52 of the Charter of Fundamental Rights, para. 62.

The ECJ particularly emphasised the latter in connection with harmonisation measures in the Single Market pursuant to Art. 95 EC. In this context, the ECJ stated in a judgment of 6 December 2005:⁴⁷

“First, the Community legislature must determine in the basic act the essential elements of the harmonising measure in question.

Second, the mechanism for implementing those elements must be designed in such a way that it leads to a harmonisation within the meaning of Article 95 EC (para. 48).

That is the case where the Community legislature establishes the detailed rules for making decisions at each stage of such an authorisation procedure, and determines and circumscribes precisely the powers of the Commission as the body which has to take the final decision (para. 49).”

It would be difficult to understand if the “essential decision” doctrine,⁴⁸ which the ECJ has recognised in principle, were not to apply to the law of fine sanctions in European competition law. In view of the enormous increase in the level of fines, such an opinion is not least supported by the argument that the requirements of certainty to be satisfied by the legislature increase along with the degree of intervention.⁴⁹

1.7 Essential decisions reserved for the legislator under the Treaty of Lisbon

The principle according to which the Community legislature itself must regulate the essential elements of a specific matter – i.e., in the present case, the imposition of fines and the fixing of fine amounts in European competition law – is adopted and even more expressly confirmed by the Treaty of Lisbon.

For example, the principle according to which essential decisions are reserved for the legislator is expressly laid down in Art. 249b (1) of the Treaty of Lisbon, which in future – as Art. 290 (1) s. 3 of the Treaty on the Functioning of the European Union – shall provide for the European Union’s method of operation. That article reads as follows:

“The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.”

The principle that essential decisions must be taken by the Community legislature and may not be delegated is confirmed in the same article of the Treaty of Lisbon by the provision stipulating that the Community legislature, in the event that powers of implementation are delegated to the Commission, shall be obliged – in general compliance with German constitutional law (Art. 80 (1) s. 2 of the German Constitution)

47 ECJ of 6 December 2005 - Case C-66/04 - *United Kingdom v Parliament and Council*, ECR 2005, I-10574, para. 47-49; in this regard, cf. reference to this judgment in Kingreen, loc. cit.

48 Scheuing, loc. cit.

49 In that sense, expressly Kingreen, loc.cit.

– “to explicitly define in the legislative acts the objectives, content, scope and duration of the delegation of power”.

The Community legislature’s own responsibility is further underpinned by the fact that the Parliament and the Council shall both be able to revoke any delegation of power granted and to make entry into force of the delegated act subject to the condition that no objection has been made by the Parliament or the Council within a period set by the legislative act.⁵⁰

1.8 Conclusions following from the “essential decisions” principle in respect of fines

It can be assumed that the principle applicable to the delegation of powers from the legislature to the Commission – which is even expressly confirmed by the Treaty of Lisbon, according to which the legislature is obliged to regulate the essential elements of a matter itself – must apply not only with regard to implementing regulations with a genuine rule-of-law character, but all the more so with regard to administrative guidelines of the Commission.

As presented below in detail, the Commission decides on the amount and imposition of fines by means of such administrative guidelines on the basis of a detailed regime which it itself established.

Likewise, one can hardly deny that the Community legislature, with its points of reference of “gravity and duration of the infringement” and the limit of 10% of the turnover in Reg. 1/2003, has not itself determined all essential elements concerning the imposition of fines in European competition law and thus, as such, has not created a “clear and unambiguous legal basis”.

The Commission has used the leniency programme, in particular, which is decisive for the issue of reduction of fines (which have reached astronomical levels), to set essential rules which – according to the “essential decision” principle also applicable in European constitutional law – should have been set by the Community legislature itself.⁵¹

These reservations as regards the rule of law were also shared by the Parliament in a resolution concerning the XXVI. Report of the Commission about Competition Policy (1996).⁵² The resolution “states that it [the Parliament] can accept neither the contents nor the form of the Commission’s notice on the non-imposition or reduction of fines in cartel cases; calls upon the Commission to take measures aimed at introducing a legally binding instrument with an appropriate legal basis; expresses the wish that this legally binding instrument duly take account of the legal traditions of the majority of the Member States.”

50 With regard to the same rules in the Treaty on a Constitution for Europe, cf. Schwarze, *Der Verfassungsentwurf des Europäischen Konvents* [The Draft Constitution of the European Convention] (ed.: Schwarze), 2004, p. 541/2 of the summary.

51 Cf. Weitbrecht, *Das Vorgehen der Kommission gegen internationale Kartelle: Bußgeldpolitik und Kronzeugenregelung*, in: *Europäisches Wettbewerbsrecht im Wandel* [The Commission’s Course of Action Against International Cartels: Fining Policy and Leniency Rules, in: *Changes in European Competition Law*] (ed.: Schwarze), 2001, p. 151, 158.

52 OJ of 24 November 1997, C 358/55 under K. 8.

A resolution of the Parliament of 19 June 2007 concerning the Report on Competition Policy 2005 takes the same line. It stresses – with all respect for the Commission’s efforts to strengthen the instruments for tackling cartels also by means of a leniency programme – “that further refinement of that instrument is required in order to avoid its possible misuse, in particular by unfairly disadvantaging the weaker parts in the collusion.”⁵³

1.9 Requirement of a legislative basis also due to the intervention’s relevance to fundamental rights (Art. 52 (1) s. 1 of the Charter of Fundamental Rights)

Art. 52 (1) s. 1 of the Charter of Fundamental Rights, which is already recognised by case law and which, by way of the Treaty of Lisbon, is expressly integrated into the law of the European Union further favours the necessity of legislature itself having to regulate all material issues regarding the imposition of fines. Pursuant thereto, any limitation on the exercise of rights and freedoms recognised by the Charter of Fundamental Rights must be provided for by law.

On the part of the undertaking, the imposition of fines affects, in particular, the freedom to choose an occupation, the freedom to conduct a business, the right to property, the principle of equality before the law, and the guarantees of fair administrative proceedings and a fair trial (cf. Art. 15, 16, 17, 20, 41 and 47 of the Charter of Fundamental Rights). It is also from this perspective, i.e. that the interventions by the Commission are of relevance to fundamental rights, that the essential elements regarding the imposition of fines must be determined by the Community legislature itself.⁵⁴ As illustrated above, this is not the case at present.

2. Definite violation of the principle of legal certainty and the principle of non-retroactivity if fines are classified as quasi-criminal measures

The undertakings concerned deserve to enjoy the protection granted on a legislative basis against arbitrary or disproportionate interventions, all the more so as the fining decisions in competition law – unlike what is predominantly assumed in the case law of the Community courts and by the Commission – are not mere administrative measures, but measures of a quasi-criminal nature.

2.1 Decisions ordering the payment of fines are at least quasi-criminal in nature

The reference in Art. 23 (5) of Reg. 1/2003, according to which decisions ordering the payment of a fine “shall not be of a criminal law nature” does not confer on the

53 European Parliament Resolution of 19 June 2007 on the Report on Competition Policy 2005, OJ of 12 June 2008, C 146 E/105, para. 6.

54 Cf. Rittner/Dreher, *Europäisches und deutsches Wirtschaftsrecht* [European and German Economic Law], 3rd ed., 2008, p. 651, who point out that not only individual orders to pay fines, but also the wide range of the fine amount provided for in Art. 23, may conflict with recital 37 of Reg. 1/2003, which obliges the Regulation to respect the fundamental rights and to observe the principles recognised by the Charter. Cf. in the same sense Rittner/Kulka, *Wettbewerbs- und Kartellrecht* [Competition and Antitrust Law], 7th ed., 2008, p. 471. Specifically with regard to the requirement of equal treatment in the imposition of fines, cf. Wils, *Optimal Antitrust Fining: Theory and Practice*, *World Competition* 29 (2), 2006, p. 183, 205 et seq.

Community bodies an arbitrary right to qualify their sovereign acts themselves.⁵⁵ This means that not only the formal originator of the measure – in this case the Commission – is of relevance for the differentiation between an administrative decision and a criminal measure. Rather, as is also otherwise the case in Community law, what is decisive is how a measure must be objectively assessed according to its substantive content. For example, the question of whether a “decision” in the sense of Community law exists should not be assessed on the basis of the chosen term, but on the legal nature of the act concerned.⁵⁶

2.2 Significance and blocking effect of Art. 23 (5) of Reg. 1/2003

The exclusion of the “criminal law nature” of the fines can be explained primarily by considerations of competence. At the time, the intention was to make it clear that the European Community, with the preceding provision in Art. 15 (4) of Reg. 17 which has identical wording in this respect, does not unduly claim for itself a criminal law competence which it does not have.⁵⁷

Until recently, the general rule according to which neither criminal law nor the rules of criminal procedure generally fall within the Community’s competence has been stressed in the case law of the ECJ.⁵⁸ In that sense, Art. 23 (5) of Reg. 1/2003 (previously Art. 15 (4) of Reg. 17) may also be understood as a legal boundary with respect to the imposition of fines in competition law.⁵⁹ The fining decisions must not cross the line into criminal law. Where this is the case – as is today – they do not conform with applicable law.

2.3 Fining decisions must comply with the principles of criminal law and criminal procedure

When examined from a substantive law perspective, fining decisions in competition law are presently at least quasi-criminal in nature. To be valid, they must therefore comply with the principles of criminal law and criminal procedure – regardless of whether or not they exceed the boundary drawn in Art. 23 (5) of Reg. 1/2003.

According to ECJ case law, the object of the penalties is just as much “to suppress illegal activities and to prevent any reference”.⁶⁰

55 Cf. Schwarze, *Rechtsstaatliche Grenzen der gesetzlichen und richterlichen Qualifikation von Verwaltungsfunktionen im europäischen Gemeinschaftsrecht* [Rule of Law Limitations of the Legislative and Judicial Qualification of Administrative Functions in European Community Law], *EuZW* 2003, 261.

56 Cf. only Ruffert, in: Calliess/Ruffert, *EUV/EGV* [EU Treaty/EC Treaty], 3rd ed., 2007, Art. 249, para. 123.

57 In this regard, in more detail Schwarze/Weitbrecht, *Grundzüge des europäischen Kartellverfahrensrechts* [Essential Features of the European Law of Cartel Procedure], 2004, p. 148; Heine, *Quasi-Strafrecht und Verantwortlichkeit von Unternehmen im Kartellrecht der Europäischen Gemeinschaften und der Schweiz* [Quasi-Criminal Law and Liability of Undertakings in the Cartel Law of the European Communities and Switzerland], *Schweizerische Zeitschrift für Strafrecht*, Vol. 125 – 2007, Issue 2, p. 105, 112 et seq.

58 Most recently, ECJ of 23 October 2007 - Case C-440/05 - *Commission v Council*, not yet published in ECR, para. 66.

59 The CFI does not seem to consider Art. 23 (5) Reg. 1/2003 as a limit to the Commission’s fining power, cf. CFI of 6 October 1994 - Case T-83/91 - *Tetra Pak v Commission*, ECR 1994, II-755, para. 235.

60 ECJ of 15 July 1970 - Case 41/69 - *Chemiefarma v Commission*, ECR 1970, 661, para. 172-176.

With their intended function as a deterrent and punishment for a wrong committed, the fines fulfil “punitive” purposes under criminal law. If the Commission and the ECJ, in contrast, predominantly emphasise the administrative nature of the penalties and do not – such as, for example, Advocate General *Colomer* – classify the fine proceedings clearly and without restriction (at least in the German version of his conclusions) as measures of criminal law,⁶¹ it is apparent that such classification is predominantly characterised by the ensuing legal consequences.

In the opinion of the ECJ, the fining procedure is a special administrative procedure compliant with flexible administrative concepts of the efficiency and effectiveness of penalties and shall not be deprived of its effect by consistently applying standards of criminal law and criminal procedure, which are more stringent in formal terms. The intention is apparently not to interfere with the efforts of the “Kartellknacker” [“cartel busters”] – to whom the former Competition Commissioner *Karel van Miert* referred in his book “Markt, Macht, Wettbewerb”⁶² – by imposing excessively strict requirements.

However, that approach is no longer appropriate for the current fining practice with its exorbitant fines.

This is not to say that the cartel law system does not require effective instruments to enforce its material rules. Nor can it be denied that the threatened fines must have a deterrent effect in order to prevent infringements of fair competition. However, from the aspect of rule-of-law-principles, there is no adequate balance at present between the demand for effective enforcement of cartel law and the safeguarding of justified claims of the undertakings concerned to an effective remedy.

That balance, lost in the wake of the increase in fines to levels previously unheard of, needs to be restored.

This can be accomplished first by consistently – and not only in individual cases, as has been the case so far – applying the principles of criminal law and criminal procedure to the fining procedure, which are stricter than the more flexible principles of administrative law. It is above all the rules of the ECHR and the Charter of Fundamental Rights, by which – as illustrated above – the bodies of the European Community are bound, which give grounds to do so. For measures which in substantive terms qualify as criminal law measures – such as fines under competition law – these rules require mandatory compliance with key rule-of-law principles, such as legality and foreseeability of the penalties and the principle of non-retroactivity.

61 Cf. his opinion in Case C-217/00 P, *Buzzi Unicem v Commission*, ECR 2004, I-123, para. 29. The English version reads: “The procedure for finding infringements of Articles 81 EC and 82 EC is sanctionative by nature.”

62 Van Miert, *Markt, Macht; Wettbewerb* [Market, Power, Competition], 2000, p. 216 et seq.

2.4 No justification of measures on account of their being “useful” to the European tax payer

In particular, the classification of fines as quasi-criminal measures makes it impossible for the Commission to invoke their “usefulness” to the European tax payer, as has meanwhile become consistent practice. In this regard see, *inter alia*, the Commission’s statement in the *vitamin* cartel of 21 November 2001.⁶³

“Fines imposed by the Commission as a result of infringements of EU competition law are accounted into the general budget of the European Union once they have become definitive. The overall EU budget is pre-defined and therefore any unscheduled revenues [...] [are to] be deducted from the contributions made by Member States to the EU budget, ultimately to the benefit of the European tax payer.”

A penalty which is adequate pursuant to the rule of law can hardly be justified by the following statement: “The amount of the fines is paid into the Community budget. The fines therefore help to finance the European Union and reduce the tax burden on individuals.”⁶⁴

Völcker⁶⁵ comments on that development with the words: “It is debatable whether still higher fines will be more effective in preventing cartels or whether they will simply lead to a wealth transfer from shareholders to the Community budget.”

With regard to the recent fining practice, it is therefore not surprising that lately even former members of the ECJ, such as *Everling*, have expressed their doubts as to whether that practice is compliant with the rule of law. For example, *Everling* considers such “classification” as a mere administrative and not a criminal offence “to be questionable”, “even with regard to penalties under cartel law, which in some cases amounted to several hundred millions in the practice of recent years”.⁶⁶

2.5 Requirements of the ECHR (in particular, Art. 6 and 7) also apply to undertakings in fine proceedings

If the standards of the ECHR are applied, the principles of criminal law and criminal procedure, in particular Art. 6 and 7 of the ECHR, which provide for the right to a fair trial and the principle of “no punishment without law”, also unquestionably apply to fine proceedings under competition law.

63 Commission Press Release IP/01/1625.

64 Commission Memo/06/337 of 20 September 2000 in the *copper fittings* case; with equivalent wording in the *road bitumen* cartel, Commission Memo/06/326 of 13 September 2006; most recently in the Commission Memo 07/544 of 5 December 2007 with regard to the *chloroprene rubber* cartel.

65 Rough Justice? An Analysis of the European Commission’s New Fining Guidelines, CML Rev. 2007, p. 1285, 1317.

66 Cf. *Everling*, Die Mitgliedstaaten der Europäischen Union unter der Aufsicht von Kommission und Gerichtshof [The Member States of the European Union under Supervision of the Commission and the Court of Justice], in: Festschrift for Isensee, 2007, p. 773, 789; *Everling*, Zur Gerichtsbarkeit der Europäischen Union [The Jurisdiction of the European Union], in: Festschrift for Rengeling, 2008, p. 527, 531.

Firstly, these fundamental guarantees of criminal law and criminal procedure are not inapplicable for the reason that the fines are not strictly criminal law sanctions, but rather measures comparable to penalties for administrative offences under German law. The aforementioned principles of the ECHR also apply to such penalties.⁶⁷

It is likewise recognised that legal persons may also invoke Art. 6 (1) of the ECHR.⁶⁸

And finally, according to the case law of the European Court of Human Rights (“ECtHR”), the requirement of *nulla poena sine lege certa* not only applies to the legislative fixing of the elements of an offence, but also to the amount of the expected penalty.⁶⁹ Art. 7 (1) s. 2 of the ECHR expresses that prohibition of a subsequent increase in the penalty just as explicitly as Art. 49 (1) s. 2 of the Charter of Fundamental Rights.

2.6 Fining regime lacks required legal certainty

It is true that, according to the rules of the ECHR, both the field of law and the addressed audience are relevant for assessing whether or not an act is sufficiently specified and clear. For example, technical terms or relatively unspecific clauses, which are not clear enough in general, may still satisfy the requirements of certainty – for instance as elements of criminal offences in disciplinary law for certain professional groups or in criminal business law –, because a more extensive expertise may be expected from the relevant professional groups themselves or because they may be advised to obtain expert advice.⁷⁰

However, even when applying these standards, the relevant rule of Art. 23 of Reg. 1/2003 lacks the required legal certainty. Even an advisor with experience in cartel law is no longer able to clearly predict the expected fine for an infringement of cartel law purely on the basis of Art. 23 of Reg. 1/2003, apart from making the general prediction that the fines imposed by the Commission have so far exhibited an unbroken upward trend.

The Commission’s unlimited competence to raise the level of fines at its own administrative discretion, as well as its likewise unlimited power to decide according to its own leniency rules on the conditions of immunity from a fine which would have been imposed or on the reduction of such fine, do not meet the requirements of a clear and foreseeable legal basis which the legislature itself created.

It may be disputable whether and to what extent the completion of a set of legal rules should be left to administrative practice, which assumes the role of specifying and defining such rules, and to subsequent judicial interpretation. However, if the exemption

67 ECtHR of 21 February 1984 - Case 58544/79 - *Öztürk v Germany*, NJW 1985, 1273, para. 56. In this regard Frowein/Peukert, EMRK-Kommentar [Commentary on the ECHR], 2nd ed., 1996, Art. 6, para. 39; Meyer-Ladewig, EMRK-Handkommentar [ECHR Commentary], 2nd ed., 2006, Art. 6, para. 15, 15a.

68 Cf. Report of the EComHR of 30 May 1991 – 11598/85, para. 66 – *Société Stannit*. In this regard Schwarze, Der Schutz der Grundrechte durch den EuGH [The Protection of Fundamental Rights by the ECJ], NJW 2005, 3459, 3461.

69 ECtHR of 22 March 2001 - Cases 34044/96, 35532/97, 44801/98 - *Streletz, Kessler, Krentz v Germany*, NJW 2001, 3035, 3037.

70 Cf. Grabenwarter, Europäische Menschenrechtskonvention [European Convention for the Protection of Human Rights and Fundamental Freedoms], 2nd ed., 2005, p. 342 with reference to rulings of the ECtHR.

from a penalty, or its reduction, and the level of the expected penalties are left to the sole discretion of the administration – as is the case at present –, the rule-of-law guarantees of the kind which are indispensable in particular in criminal law and under the rules of criminal procedure are not complied with.

2.7 Violation of the prohibition of an increase in penalty in the case of retroactive application of more stringent fining guidelines

Raising the level of fines during ongoing competition proceedings violates the prohibition of an increase in penalty, which is specifically laid down in the ECHR and the Charter of Fundamental Rights, as well in national constitutional law.

The case law of the ECJ is evidently inconsistent in this respect. On the one hand, it expressly includes the Commission's Fining Guidelines in the scope of protection against a retroactive change of the law. According to the ECJ, such rules of conduct also constitute "law" within the meaning of Art. 7 (1) ECHR, which provides protection against a penalty which is not covered by law or which is increased subsequently.⁷¹

On the other hand, however, the case law of the ECJ cancels the protection of legitimate expectations, as established therein, by granting the Commission unlimited discretion to raise the level of fines.⁷²

According to the ECJ, the undertakings concerned must expect the fines to be raised at any time, either by way of individual decisions or by amendment of the Fining Guidelines.⁷³ Thus, not only the principle of legality is violated, but also that of the protection of legitimate expectations.

3. No substantive objections against a violation of the principle of legality and the principle of protection of legitimate expectations

Several objections can be raised against these conclusions, all of which are, however, ultimately not substantive.

3.1 Unlimited jurisdiction of the Community courts to review decisions (Art. 229 EC) is not a remedy

For example, one might point out that the unlimited jurisdiction of the Community courts to review decisions, which is provided for in competition law in respect of fines (Art. 229 EC in conjunction with Art. 31 of Reg. 1/2003), acts as an adequate rule-of-law counterbalance to the unclear elements of a fineable offence, which is, however, sufficiently complemented by administrative guidelines.

Firstly, this can be met by the counterargument that each Community body is obliged to satisfy the requirements of the rule-of-law principle itself and that remedying of a

71 ECJ of 28 June 2005 - Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P - *Dansk Rorindustri and others v Commission*, ECR 2005, I-5571, para. 222/223.

72 ECJ, *ibid.*, para. 228-230.

73 ECJ, *loc. cit.*; likewise ECJ of 18 May 2006 - Case C-397/03 P - *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, ECR 2006, I-4475, para. 25.

lack in the precision of rule of law on the part of the Community legislature by the Community judicature therefore does not seem acceptable.

Furthermore, judicial practice would have to be in line with that reasoning. For, a true remedy in accordance with the rule of law would require that the Community courts themselves fully review the raised accusation of an infringement of fair competition and the adequacy of the fine, instead of restricting themselves – as is customary now – to a cursory review of the Commission’s competition procedure and the findings thereof.

Looking at the competition proceedings conducted so far as a whole, one cannot help but think that, particularly in the early stages of cartel control, the ECJ strived for a kind of “deal” to complete time-consuming and complex commercial law proceedings within a certain time frame by more or less systematically reducing fines.

However, in view of the enormous levels of fines, a remedy in accordance with the rule of law would only be conceivable today if the Community courts refrained from the practice of a more or less cursory review and performed a full examination of the Commission’s actions and findings.

3.2 Completion of the fining regime would not place excessive demands on the Community legislature

Furthermore, one may raise the objection that even criminal law or rules of criminal procedure which are compliant with the rule of law cannot do without a certain degree of ambiguity in the form of general clauses, either as regards the formulation of the elements of a criminal offence or as regards its consequences. However, this does not release the Community legislature from its obligation to make all conceivable efforts to create more transparency in fixing the amounts of fines. The legal provisions are extremely sparse in this respect. Apart from the points of reference of gravity and duration of the infringement of fair competition and the limit of 10% of turnover, the entire completion of the fining regime, including regulations regarding the immunity from fines or their reduction, is left to the Commission’s administrative discretion. It would not place an excessive burden on the legislature to take an independent decision in this regard.

3.3 The fining regime has not become more predictable through practical application

Furthermore, the objection may be raised that the fining proceedings in European Community competition law have been conducted for almost fifty years now basically without objection, and that the broad legal rules have attained a sufficient rule-of-law character in the course of decades of practice, so that doubts about the required certainty and unambiguity of the sanctioning system are not (or no longer) reasonable.

Firstly, this argument can definitely be reversed. The greater the changes in practical application allowed over the decades by that normative system – which applies in

principle unchanged – , the more the required legal clarity and certainty of the penalty system can be questioned.⁷⁴

It is probably not an exaggeration to state that at the time Art. 15 of Reg. 17 was adopted, it was by no means conceivable that the fines would reach such (exorbitant) levels under one and the same regime.

3.4 The shift from quantity to quality

Secondly, if considered in realistic terms, one cannot deny – despite all conceivable theoretical objections – that even the field of law experiences shifts from quantity to quality. This is the case where initially moderate fines have meanwhile reached the amount of half a billion euros.

Although it may not be easy to specify a precise limit where a fine for a mere administrative offence becomes a criminal law penalty, this does not mean that no such limit exists. There are good arguments for classifying all fines imposed at their current level as quasi-criminal measures.

3.5 Consequence of an obligation under the rule of law of the Community legislature to remedy deficiencies

Under these circumstances, the Community legislature has an obligation under the rule of law to rectify the situation in order to restore an appropriate balance between the Commission's justified claims to pursue infringements and likewise justified claims of the undertakings concerned to an effective remedy. In this regard, the guiding standard must be that the Community legislature itself – as required by the ECHR and the Charter of Fundamental Rights – brings about (or restores) the legality of the fining system and ensures the required certainty and foreseeability of the fines. In complying with the principle of *nulla poena sine lege certa*, the Community legislature may not leave completion of the fining system to the Commission's (virtually) unrestricted administrative discretion by way of administrative guidelines. Moreover, the adoption of an increase in the level of fines resolved during ongoing competition proceedings also violates the principle of non-retroactivity.

Furthermore, the consistent linking of the fining procedure to the legal standards of criminal law and criminal procedure, which are stricter than the general principles of administrative law, would not ultimately weaken the effectiveness of the European cartel authorities unreasonably. After all, the rules of criminal procedure, despite their strict formality, by no means bar the authorities from taking necessary "surprise measures" in the prosecution of criminal acts.

74 With regard to the change from initially low fines to continuously increasing fines, cf. only Faull & Nikpay, *The EC Law of Competition*, 2nd ed., 2007, p. 1011 et seq.

3.6 Necessary corrections by the Commission and the Community courts by consistently linking the fining procedure to the rule-of-law principles of criminal law and criminal procedure

Under the existing system, it is mainly the Community courts – apart from the Commission itself – that are called upon to restore the rule-of-law balance between ensuring fair competition law on the one hand and the undertakings’ rights of defence on the other hand, by strictly enforcing the fundamental principles of criminal law and criminal procedure in the competition-related fining procedure and by conducting a closer examination of the content of cartel accusations and amounts of fines.

Despite all endeavours by the ECJ to adapt to the practice of the ECtHR when formulating its judgments, substantive differences in assessment remain between the case laws of the two jurisdictions. On the part of the ECJ, these differences are primarily due to its basic understanding of the fine procedure under European cartel law.

In the ECJ’s opinion, such procedure primarily remains an administrative procedure which must satisfy the requirements of administrative efficiency and effectiveness. This applies despite the fact that in its case law, the ECJ – apart from applying the general principles of European administrative law – occasionally also applied the stricter criminal and criminal procedural guarantees as laid down by the ECHR to the procedure for the imposition of penalties in competition law, albeit taking the ECtHR’s case law into account.⁷⁵ Only when the ECJ changes its general policy, which appears to be inevitable in view of the current level of fines imposed, and consistently applies the fundamental principles of criminal law and criminal procedure, as stipulated in Art. 6 and 7 of the ECHR and Art. 47 – 49 of the Charter of Fundamental Rights, to the fining procedure under competition law will conformity with the ECtHR’s case law be restored and the superior requirements of the ECHR and the Charter of Fundamental Rights respected.

4. Conclusion

Under the present conditions, the fining procedure violates the principle of legal certainty and – in increasing the level of fines during ongoing proceedings – also the principle of non-retroactivity applicable under criminal law and the rules of criminal procedure.

⁷⁵ Cf. ECJ of 8 July 1999 - Case C-199/92 P - *Hüls v Commission*, ECR 1999, I-4287, para. 150; ECJ of 8 July 1999 - Case C-235/92 P - *Montecatini v Commission*, ECR 1999, II-4539, para. 176. In this regard, Schwarze/Weitbrecht, *Grundzüge des europäischen Kartellverfahrensrechts* [Essential Features of the European Law of Cartel Procedure], 2004, p. 145.

IV. Control by applying the standards of the presumption of innocence and the privilege against self-incrimination

1. The particular problem of the fining procedure in terms of the rule of law from the aspect of the presumption of innocence and the privilege against self-incrimination

In the light of the fundamental criminal and criminal procedural guarantees of the presumption of innocence (*in dubio pro reo*) and the privilege against self-incrimination (*nemo tenetur*), the present fining procedure under competition law raises problems from a rule-of-law perspective. These problems stem, in particular, from the immunity rule issued by the Commission by way of an (administrative) notice (“Notice on Immunity from fines and reduction of fines in cartel cases” – “**Leniency Notice**”).

The leniency policy, with its promise of immunity from or reduction of a fine, triggers a factual coercion of an undertaking to incriminate itself and to disclose incriminating information. In particular, accusations by principal witnesses that are too extensive or too general, which the Leniency Notice provides an incentive for, will – contrary to the fundamental guarantee of the presumption of innocence – in substantive terms result in the burden of proof being reversed to the effect that it is not the authorities which must provide evidence of an infringement, but rather the accused undertaking itself which must exonerate itself from the accusation.

So far, the Community courts have in principle not objected to the Commission’s leniency rules. However, despite positive effects they may have had in connection with the breaking up of cartels, the leniency rules have rightly met with reservations as to whether they comply with the rule of law.⁷⁶

2. Recognition by the Community courts of the presumption of innocence for undertakings in fine proceedings

As regards the legal situation concerning the two rule-of-law guarantees under examination here in terms of Community law, there is no doubt that the presumption of innocence, whereby every person accused is presumed to be innocent until his guilt has been established according to law, principally applies. The CFI recently confirmed this once again in a judgment of 12 October 2007.⁷⁷

In that judgment the CFI also confirmed, by way of reference to previous judgments of the ECJ⁷⁸, that the principle of the presumption of innocence applies to the procedure relating to infringements of the competition rules applicable to undertakings that may

76 Cf. Hetzel, *Kronzeugenregelungen im Kartellrecht* [Leniency Notices in Cartel Law], 2004, p. 157 et seq.; Dannecker/Biermann, in: Immenga/Mestmäcker, *Wettbewerbsrecht EG / Teil 2* [EC Competition Law / Part 2], 4th ed., 2007, Reg. 1/2003, para. 221.

77 CFI of 12 October 2007 - Case T-474/04 - *Pergan Hilfsstoffe für industrielle Prozesse v Commission*, not yet published in ECR, para. 76.

78 *Inter alia*, ECJ of 8 July 1999 - Case C-199/92 P - *Hüls v Commission*, ECR 1999, I-4287, para. 150.

result in the imposition of fines or periodic penalty payments.⁷⁹ In this regard, the CFI also made express reference to Art. 48 of the Charter of Fundamental Rights.⁸⁰

3. Comparison of the practice of Community courts with that of the ECtHR

The practice of the ECJ regarding the guarantee of the privilege against self-incrimination is more lenient than the practice of the ECtHR and (previously) of the European Commission on Human Rights (“**EComHR**”).

3.1 The guarantee of the privilege against self-incrimination in the practice of the ECtHR

The ECtHR derives from Art. 6 (1) of the ECHR the right not to be obliged to incriminate oneself and understands this to be a comprehensive right to refuse to furnish information.⁸¹

“Although not specifically mentioned in Article 6 of the Convention, the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (1).” This is the literal wording of a judgment of the ECtHR of 3 May 2001.⁸²

By way of a summary of its previous case law, the ECtHR recently pointed out in a judgment of 11 July 2006 concerning a fair trial protected by Art. 6 of the ECHR, that “[t]he right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused”.⁸³

3.2 Lesser protection granted by the practice of the Community courts

Based on these standards, the privilege against self-incrimination and the right to remain silent are recognised to a much lesser extent by the ECJ for undertakings in cartel proceedings. The case law of the ECJ is apparently based on the consideration to ensure, if possible, the effectiveness of the authority’s investigations in the discovery and combating of cartels. For example, the ECJ case law grants undertakings at most a “right to refuse to make an admission”.⁸⁴

In the leading decision in the *Orkem* case which is still authoritative and which was confirmed in 2006⁸⁵, the ECJ – in respect of the facts which are of relevance to the competition procedure – did not recognise a right of the undertakings concerned to

79 Ibid., para. 75.

80 Loc. cit.

81 ECtHR of 25 February 1993 - Case 10828/84 - *Funke v France*; in this regard Schwarze, *Der Grundrechtsschutz durch den EuGH [The Protection of Fundamental Rights Granted by the ECJ]*, NJW 2005, 3461.

82 ECtHR of 3 May 2001 - Case 31827/96 - *J.B. v Switzerland*, NJW 2002, 499, para. 64.

83 ECtHR of 11 July 2006 - Case 54810/00 - *Abu Bakah Jalloh v Germany*, EuGRZ 2007, 150, 161, para. 100.

84 In that sense Burrichter, in: Immenga/Mestmäcker, *Wettbewerbsrecht EG / Teil 2 [EC Competition Law / Part 2]*, 4th ed., 2007, preliminary notes in relation to Art. 17-22 of Reg. 1/2003, para. 36 with further reference.

85 ECJ of 29 June 2006 - Case C-301/04 P - *Commission v SGL Carbon AG*, ECR 2006, I-5915, para. 39 et seq.

refuse to furnish information, even where there was a risk of self-incrimination. Rather, the ECJ expressly held the Commission to be entitled “to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct”.⁸⁶

The ECJ considers a limit for the Commission’s request for information to be reached only where information is requested which “undermines the rights of defence of the undertaking”⁸⁷. In particular, “the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove”.⁸⁸

The application of the principles of the *Orkem* case in the case law of the CFI demonstrates how the privilege against self-incrimination is undermined by the restriction on the right to remain silent and to refuse to furnish information. The CFI does not consider the obligation to answer purely factual questions and to present existing documents to be a violation of rights of defence or of the entitlement to a fair trial. The CFI attempts to justify that opinion with the unrealistic and contradictory argument that “[t]here is nothing to prevent the addressee of such questions or requests from showing, whether later during the administrative procedure or in proceedings before the Community courts, when exercising his rights of defence, that the facts set out in his replies or the documents produced by him have a different meaning from that ascribed to them by the Commission”.⁸⁹

4. Reasons for a violation of the principles of the right to remain silent and the presumption of innocence in accordance with the ECHR and the Charter of Fundamental Rights

Due to these restrictions on the right to remain silent, the practice of the Community courts does not meet the standards of the ECHR and the Charter of Fundamental Rights.

86 ECJ of 18 October 1989 - Case 374/87 - *Orkem v Commission*, ECR 1989, 3283, para. 34. In respect of subsequent court rulings, cf. documentation at Burrichter, *ibid.*, para. 33 et seq.

87 ECJ, *loc. cit.*

88 ECJ, *ibid.*, para. 35.

89 ECJ of 20 February 2001 - Case T-112/98 - *Mannesmannröhren-Werke v Commission*, ECR 2001, II-729, para. 78. Likewise ECJ of 29 April 2004 - Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon v Commission.*, ECR 2004, II-1181, para. 406.

4.1 Presumption of innocence and right to remain silent pursuant to the ECHR and the Charter of Fundamental Rights as protection against illegal coercion or oppression

As mentioned above, the ECtHR considers the principle of *nemo tenetur* to be an essential element of a fair trial and to be closely related to the presumption of innocence.⁹⁰

The provisions of Art. 47 (2) and 48 (1) of the Charter of Fundamental Rights are also interpreted to the effect that they require, in a combination between a fair trial and the presumption of innocence, that the prosecution shall not seek to establish guilt under criminal law with the help of evidence obtained by the coerced cooperation of the accused.⁹¹

If the standards of the ECHR and the Charter of Fundamental Rights are applied, it is therefore of relevance, in order to answer the question of whether the privilege against self-incrimination was violated in conjunction with the presumption of innocence under criminal law, whether the described restrictions in European cartel procedures regarding the right to remain silent, and in particular the leniency rules applied therein, trigger an illegal coercion or oppression – within the meaning of the ECtHR's practice – vis-à-vis the undertakings concerned.

4.2 Leniency rules create factual coercion and results in the impairment of a fair trial

No judgments of the ECtHR exist in respect of that particular issue. However, taking into account the practice of the (former) EComHR, there are compelling reasons for assuming that the fining procedure in European competition law is not in line with the principles of the ECHR, and consequently the Charter of Fundamental Rights, also from the aspect of the privilege against self-incrimination and the presumption of innocence.

In any event, the leniency rules put substantial factual pressure on the undertakings to incriminate themselves, if it appears possible to obtain immunity from or reduction of a fine in this way.⁹²

4.3 No justification from the aspect of a rule which (allegedly) only benefits undertakings

However, these rules have a beneficial effect – and not a detrimental effect – at least on those undertakings which ultimately benefit from them and obtain immunity from or reduction of a fine. This does not mean that leniency notices are unproblematic from a rule-of-law perspective on account of an (allegedly) purely beneficial effect. For, they

90 Cf. ECtHR of 17 December 1996 - Case 19187/91 - *Saunders v United Kingdom*, RJD 1996 – VI, para. 68; ECtHR of 21 December 2000 - Case 34720/97 - *Heaney and Mc Guinness v Ireland*, RJD 2000 – XII, para. 40. In this regard, Grabenwarter, *Europäische Menschenrechtskonvention* [European Convention for the Protection of Human Rights and Fundamental Freedoms], 2nd ed., 2005, p. 333.

91 Cf. Eser, in: Meyer (ed.), *Charta der Grundrechte der Europäischen Union* [Charter of Fundamental Rights of the European Union], 2nd ed., 2006, Art. 48, para. 10a.

92 Cf. Part D. II. 2.1.b.

do not have only a unilateral effect for the benefit of the applicant wishing to make use of them.

Rather, in connection with a leniency notice, an overall decision is made in relation to a complex matter in which the beneficial effect on the benefiting undertaking(s) has, at the same time, a detrimental effect on other undertakings involved, from which the advantage under the notice is withheld.

Due to this double or triple effect, the application of the Leniency Notice in fining decisions cannot be detached from the obligation to respect the reservation of legislative authority.

For example, it is recognised in national (German), constitutional and administrative law that the granting of a benefit which is *per se* beneficial and therefore not subject to the reservation of legislative authority, such as a subsidy, is bound to the requirement of a legislative basis in the event that the beneficial effect is, at the same time, accompanied by a detrimental effect on the recipient of the benefit⁹³ or on a third party.⁹⁴

The present case is similar, because the application of the Leniency Notice forces the undertakings concerned to enter into a race for immunity from a fine or a maximum possible reduction of a fine.⁹⁵

The first undertaking will obtain immunity from a fine; the others will merely obtain a reduction or will gain nothing at all. This involves the absolutely incalculable risk – for all undertakings taking part in the race – of being exposed to unfounded, undifferentiated or excessive accusations raised by a competitor. In such an unclear situation, from which the undertakings are virtually unable to escape, the traditional principles of evidence in criminal proceedings or administrative offence proceedings threaten to be reversed. Instead of the rule according to which the authority – in this case the Commission – is obliged to prove the infringement of competition rules, the undertaking is placed in a situation in which it has to defend itself against accusations presented by other undertakings, which at first can hardly be assessed, and bear the burden of proof in this respect. This constitutes a threat to the very essence of the rights of defence under the rule of law. From this perspective, such procedure only appears acceptable, if ever, if it is bound to a clear legislative basis and form.

93 Cf. Zippelius/Würtenberger, *Deutsches Staatsrecht* [German Constitutional Law], 31st ed., 2005, p. 105: “Wo Leistungsgewährungen mit einer rechtlichen Belastung verkoppelt sind, gilt schon der traditionelle Gesetzesvorbehalt.” [Where the granting of benefits is linked to a legal burden, the traditional reservation of legislative authority must apply.]

94 For example, the Federal Administrative Court, BVerwGE 90, 112, 126, holds the reservation of legislative authority in accordance with the rule of law to be necessary, if the granting of a subsidy affects the sphere of fundamental rights of a third party which is not part of the subsidy relationship. In an affirmative sense, e.g. Maurer, *Allgemeines Verwaltungsrecht* [General Administrative Law], 16th ed., 2006, p. 123; Zippelius/Würtenberger, loc. cit.

95 With regard to such race, which is of priority to the undertakings, cf. Schwarze, *Les sanctions imposées pour les infractions au droit européen de la concurrence selon l’article 23 du règlement no. 1/2003 CE à la lumière des principes généraux de droit européen*, *Rev. Trim. de droit européen*, 2007, p. 1, 7. Cf. also Resolution of the Parliament, footnote 53.

In the opinion of the ECtHR, the following elements, in particular, are of relevance to the question of whether a certain procedure has extinguished the very essence of the privilege against self-incrimination: “the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put”.⁹⁶

4.4 Reasons why the privilege against self-incrimination is undermined, taking into particular account the practice of the EComHR

The following aspects speak in favour of the privilege against self-incrimination being undermined.

The risk of having to defend oneself actively against unfounded or, in any event, excessive accusations made by a competitor taking advantage of the Leniency Notice is considerable. Even on its own, the level of the fines now imposed provides a considerable incentive to undertakings to enter into the race for immunity from or reduction of a fine and also to use unfair means in order to eliminate competitors. The ensuing situation is practically incalculable for the undertakings concerned, as compared to a situation in which the authority itself raises the accusation of a cartel-related infringement, so that the calculated use of legitimate rights of defence is excluded or is at least rendered substantially more difficult. Such an incalculable situation not only puts considerable pressure on the undertakings to enter into the race for immunity from or reduction of a fine; it also compels the undertakings, at the same time, to disclose information, the secrecy of which is one of the fundamental rights in procedures which – as is the case here – result in extremely severe penalties.

Due to these circumstances, it seems reasonable to assume that the Leniency Notice on the whole exerts improper pressure and poses a threat to the fairness of the trial, which fairness is demanded by Art. 6 of the ECHR as an essential rule-of-law guarantee.

Such an appraisal is also implied in statements made by the EComHR in connection with the assessment of incriminating statements of an accomplice as principal witness who was promised immunity from prosecution or a reduction of his sentence in return.

In respect of both situations – immunity from prosecution and reduction of the sentence – the EComHR ruled as follows:

“The Commission points out that the use at the trial of evidence obtained from an accomplice by granting him immunity from prosecution (or “a reduction of sentence”) may put in question the fairness of the hearing granted to an accused person, and thus raise an issue under Art. 6 (1) of the Convention.”⁹⁷

96 Most recently ECtHR of 11 July 2006 - Case 54840/00 - *Abu Bakah Jalloh v Germany*, EuGRZ 2007, 150, 161, para. 101.

97 Cf. EComHR of 6 October 1976 - Case 7306/75 - *X. v the United Kingdom*; and of 30 November 1994 - Case 18666/91 - *René Salmon Meneses v Italy*. In this regard, Peukert, in: Frowein/Peukert, EMRK-Kommentar [Commentary on the ECHR], 2nd ed., 1996, Art. 6, para. 111.

In both cases, however, the EComHR, in light of the particular circumstances of the case, ultimately denied any violation of Art. 6 (1) of the ECHR on account of the full transparency of the chosen procedure and the fact that the relevant rights of defence had been granted.

In the first case of 6 October 1976, the EComHR cited the following grounds in its judgment:

“In the present case, however, the manner in which the evidence given by S. was obtained was openly discussed with counsel for the defence and before the jury. Furthermore the Court of Appeal examined carefully whether due account was taken of these circumstances in the assessment of the evidence and whether there was corroboration.”

In the second case of 30 November 1994, the EComHR denied any violation of Art. 6 (1) of the ECHR with the following rationale:

“However, the Commission notes that in the present case there are numerous elements in the proceedings as a whole, and concerning C. M.’s evidence in particular, that indicate that the applicant had a fair hearing. In the first place the agreement between the accomplice and the prosecution was fully disclosed and openly discussed with the applicant and his counsel. The applicant had every opportunity, through his lawyer, to put questions directly to C. M. and to challenge his statements, thus providing the judges with all information which was casting doubt on the witness’ credibility. Moreover, the Italian courts had examined the evidence before them thoroughly, and had come to the conclusion that the statements made by C. M. were corroborated by other evidence, such as the statements of the applicant’s accomplices as well as documents found in the defendant’s possession.”

Of course, the factual circumstances underlying the two decisions cannot be compared in all respects with the situation in the competition-related fining procedure where the Leniency Notice is applied. However, essential elements of the decisions of the EComHR indicate that the fining procedure currently practised does not satisfy the requirements of a fair trial within the meaning of Art. 6 (1) of the ECHR. Irrespective of the described coercion to incriminate oneself which ensues from the Leniency Notice, it is primarily the lack of transparency of the procedure for the accused undertaking and the lack of rights to directly question the principal witness which cast doubts on the fairness of the procedure.⁹⁸

When making an overall assessment of the circumstances, there are therefore compelling reasons for assuming that the fining procedure also does not satisfy the requirements of a fair trial within the meaning of the ECHR and the Charter of Fundamental Rights

⁹⁸ With regard to the necessity to produce all the evidence in the presence of the accused at a public hearing with a view to adversarial argument, cf. ECtHR of 15 June 1992 - Case 12433/86 - *Lüdi v Switzerland*, EuGRZ 1992, 300, para. 47.

– which follows the ECHR in this respect – from the aspects of the privilege against self-incrimination and the presumption of innocence. It is in any event necessary to make application of leniency rules in European competition law subject to the reservation of legislative authority, in order to thus grant the undertakings concerned “protection against arbitrary or disproportionate interventions” of the administration within the meaning of the *Hoechst* judgment.

4.5 No substantive objections against the assumption of a violation of the right to remain silent and the presumption of innocence

This conclusion cannot be refuted, either, by several conceivable objections. Firstly, it cannot be successfully asserted that Art. 6 and 7 of the ECHR stipulate mandatory rule-of-law principles of procedure only for a real criminal law trial, but not for the fining procedure under European competition law.

As presented above, the practice of the ECHR bodies regarding the interpretation of the ECHR follows a substantive approach and applies the basic rules of Art. 6 and 7 ECHR also to fine proceedings for acts that qualify as an administrative offence.

By making reference to the leading decision of the ECtHR in the *Öztürk* case⁹⁹, in which the imposition of fines for administrative offences was also made subject to the guarantees granted for a criminal trial, the EComHR expressly included the European antitrust proceedings in that protection:

“For the purpose of the examination of this question it can be assumed that the anti-trust proceedings in question would fall under Article 6 had they been conducted by German and not by European judicial authorities.”¹⁰⁰

At the same time, it follows from that decision of the EComHR that the granting of the aforementioned rule-of-law guarantees in a procedure with a punitive sanctioning nature is also not excluded due to the fact that an undertaking, and not an individual, invokes such guarantees. In the relevant case, the applicant was a limited partnership, and the Commission did not object in any manner to its authorisation to file the complaint.

It is the prevailing opinion that the term “everyone” who is entitled to the procedural rights provided under Art. 6 (1) of the ECHR comprises, apart from individuals, legal persons and equivalent entities (of persons).¹⁰¹

99 ECtHR of 21 February 1984 - Case 8544/79 - *Öztürk v Germany*, Series A No. 73, para. 46-56.

100 EComHR of 9 February 1990 - Case 13258/87 - *M u. Co. v Germany*, Yearbook of the European Convention on Human Rights, 1990, p. 46, 52.

101 Cf. EComHR of 11 July 1989 - Case 11598/85 - *S.A. Stenuit v France*. In this regard, cf. Peukert, in: Frowein/Peukert, EMRK-Kommentar [Commentary on the ECHR], 2nd ed. 1996, Art. 6, para. 4; Grabenwarter, Europäische Menschenrechtskonvention [European Convention for the Protection of Human Rights and Fundamental Freedoms], 2nd ed., 2005, p. 102; Meyer-Ladewig, EMRK [ECHR], 2nd ed., 2006, Art. 6, para. 4.

5. Extension of the protection granted by the right to remain silent to legal persons

Justified doubts about the entitlement to invoke, in particular, the protection granted by the right to remain silent and the presumption of innocence, as stipulated by the ECHR, also do not arise from the fact that it is undertakings as legal persons which invoke rights to remain silent for the purpose of protecting themselves against self-incrimination.

It is true that the Federal Constitutional Court – in connection with the provision of Art. 19 (3) of the Constitution of the Federal Republic of Germany, according to which fundamental rights also apply to German legal persons, to the extent that such rights are essentially applicable to legal persons as well – has limited the protection against the coercion to incriminate oneself to individuals.

The Federal Constitutional Court rejected such extension to legal persons on the grounds that the situation of the latter was not comparable to that of an individual who, on account of his human dignity, must be protected against coercion regarding the forming of his will. In contrast – according to the Court – “a legal person forms its will only through corporate bodies” which “with regard to criminal or administrative offences are only subject to a limited liability”. “If an individual acting as a corporate body” – so the Court – “commits such offence by violating the duties of the legal person, only the individual is deemed to be the offender. It is merely possible to impose a monetary fine on the legal person pursuant to Sec. 30 of the German Act Governing Administrative Offences (“OWiG”) which, however, neither contains an accusation of fault nor an ethical disapproval, but is aimed at compensation for the advantages obtained by the act”.¹⁰²

However, the situation in the European fining procedure based on an infringement of fair competition materially deviates from the above. Pursuant to Art. 23 of Reg. 1/2003, the undertakings, and not a corporate body acting on their behalf, are held liable for the infringement of competition rules.¹⁰³ An accusation of fault by way of an intentional or negligent infringement of competition rules is raised against the undertakings (Art. 23 (2) of Reg. 1/2003). Apart from this, there is no personal liability of a member of a corporate body or an employee of the undertaking.

If the penalties affect the undertaking itself – as is the case in European competition law –, there is no reason to deprive it of the full protection granted under the privilege against self-incrimination and – as is advocated by some legal commentators – to limit such protection to situations in which an individual who, on account of the functional term of “undertaking”, is at the same time the undertaking, is obliged to provide information incriminating to itself.¹⁰⁴

102 German Federal Constitutional Court of 26 February 1997, NJW 1999, 1841, 1843 et seq.

103 With regard to the liability of undertakings for the infringement of competition rules, cf. most recently ECJ of 11 December 2007 - Case C-280/06 - *Autorità Garante della Concorrenza e del Mercato (Ente Tabacchi Italiani)*, not yet published in ECR, para. 38/39.

104 Cf. Burcher, in: Immenga/Mestmäcker, Wettbewerbsrecht EG / Teil 2 [Competition Law EC / Part 2], 4th ed., 2007, preliminary note relating to Art. 17-22 of Reg. 1/2003, para. 44 with further reference.

As the undertakings themselves are the sole addressees of the accusation of fault and the threat of a penalty in the form of a fine, there is no apparent reason why they should be deprived of the full protection of the procedural guarantees of the ECHR, including the privilege against self-incrimination.¹⁰⁵ As regards the related presumption of innocence, the case law of the Community courts has at any rate recognised without limitation that undertakings, too, are entitled to the protection granted by that latter guarantee.

If the Community courts, in contrast, only grant protection against self-incrimination to a much lesser extent, it is apparent that this expresses, *inter alia*, the repeatedly mentioned concern that the effective combating of cartels by the authorities could otherwise not be ensured. If, however, the fining procedure is clearly of a punitive nature and provides for fines the level of which was previously unheard of, there is no reason to significantly reduce procedural guarantees under the rule of law – which the ECtHR also grants to legal persons without limitation – in European Community law and specifically in the competition-related fining procedure.

6. Conclusions

In view of the significance the principle of the privilege against self-incrimination has for a fair trial, the rules developed in respect of Art. 6 of the ECHR, as superior constitutional requirements, may also claim to be applicable without limitation for the benefit of undertakings in the European fining procedure.

This leads to the overall conclusion that the current fining practice is not in line with the rules regarding the presumption of innocence and the privilege against self-incrimination, as guaranteed by the ECHR and the Charter of Fundamental Rights.

¹⁰⁵ Cf. Weiß, Der Schutz des Rechts auf Aussagefreiheit durch die EMRK [The Protection of the Right to Remain Silent Granted by the ECHR], NJW 1999, 2236, 2237 with further reference; cf. also Grabenwarter, in: Korinek/Holoubek (ed.), Österreichisches Bundesverfassungsrecht [Austrian Federal Constitutional Law], 2007, Art. 6 ECHR, para. 225.

D. Specific Deficiencies of the Current System of Competition Law Enforcement of the European Community

I. Substantive law

Part C. explains the principles to be generally observed in Community legislation, and especially with respect to Reg. 1/2003. In the following, it will be analysed to what extent Art. 23 of Reg. 1/2003 and the entire system of fining of competition law infringements as established by the Commission and the Community courts comply with these principles.¹⁰⁶

1. The system on fines established by Art. 23 (2) of Reg. 1/2003 and the Fining Guidelines are illegal

1.1 Insufficient certainty of legal basis

Art. 23 (2) of Reg. 1/2003 does not meet the required standards to serve as a “clear and unambiguous legal basis” for the imposition of fines. Art. 23 (2) of Reg. 1/2003 grants the Commission virtually unlimited discretion in allowing the Commission to impose fines of up to 10% of the turnover of the undertaking concerned. Ultimately, this means that the Commission’s discretion ranges between some EUR 10,000 and, potentially, many billions of euros, depending on the turnover of the undertaking concerned. In view of this range it is clear that the fines are not pre-determined by the legal provision (Art. 23 (2) of Reg. 1/2003) but exclusively determined by the Commission.

As already explained in detail in Part C., the principle of a “clear and unambiguous basis” has its origin in the rule of law and can also be derived from various sources of law, e.g. Art. 6 of the ECHR and the Charter of Fundamental Rights. According to these sources, the imposition of a criminal sanction requires a “clear and unambiguous legal basis”.¹⁰⁷

¹⁰⁶ In order to provide an in-depth analysis of the current practice of European law enforcement, some repetition in presenting the relevant legal standards and principles is unavoidable in this part.

¹⁰⁷ ECJ of 25 September 1984 - Case 117/83 - *Könecke v Balm*, ECR 1984, 3291, para. 11.

In the *Degussa* judgment, the CFI held that according to the case law of the Community courts,

*“the principle that penalties must have a proper legal basis is a corollary of the principle of legal certainty, which constitutes a general principle of Community law and requires, inter alia, that any Community legislation, in particular when it imposes or permits the imposition of sanctions, must be clear and precise so that the persons concerned may know without ambiguity what rights and obligations flow from it and may take steps accordingly”.*¹⁰⁸

Since the principle of a clear and unambiguous legal basis applies to any sanction – including both administrative and criminal sanctions – the question as to the nature of the fines imposed by the Commission can remain unanswered. Thus, the legal basis for the imposition of fines – Art. 23 (2) of Reg. 1/2003 – has to be “clear and unambiguous”. This requirement of clarity and unambiguity not only relates to the legal basis of the sanction but also to the extent of the sanction itself, i.e. the provisions which define the consequences¹⁰⁹.

Even though the infringement of the principle of a clear and unambiguous legal basis seems very obvious, the CFI held in its most recent decision that the Commission’s discretion is not unlimited and that Art. 15 (2) of Reg. 17 itself, as the predecessor of Art. 23 (2) of Reg. 1/2003, limits the scope of discretion. According to the CFI, the limiting factors are:

*“Firstly, by specifying that ‘the Commission may by decision impose on undertakings or associations of undertakings fines of from [EUR] 1 000 to 1 000 000 ..., or a sum in excess thereof but not exceeding 10% of the turnover [...] it provides for a ceiling on fines, based on the turnover of the undertakings concerned, that is to say, based on an objective criterion. Thus, although, [...], there is no absolute ceiling applicable to all infringements of the competition rules, the fine which may be imposed is nevertheless subject to a quantifiable and absolute ceiling calculated by reference to each undertaking in respect of each infringement, so that the maximum amount of the fine which may be imposed on a given undertaking is determinable in advance. Secondly, that provision requires the Commission to fix fines in each individual case having regard [...] both to the gravity and to the duration of the infringement’.”*¹¹⁰

This decision, including the limiting factors, was confirmed by the ECJ on 22 May 2008.¹¹¹

These limiting factors, however, are irrelevant: the CFI disregards the fact that the sanctions need to be pre-determined in a reasonably precise manner protecting

108 CFI of 5 April 2006 - Case T-279/02 - *Degussa v Commission*, ECR 2006, II-897, para. 66.

109 CFI, loc.cit., para. 67.

110 CFI, loc. cit., para. 75 et seq.

111 ECJ of 22 May 2008 - Case C-266/06 P - *Evonik Degussa v Commission*, para. 36 et seq.

the individual from arbitrary decisions by way of legislation. It is not sufficient that the administrative body will safeguard the necessary degree of transparency and predictability. Therefore, Reg. 1/2003 itself must meet the standards, and it is of no relevance whether the Commission's fining principles are sufficiently clear and unambiguous or not.

The two limiting criteria in Art. 23 (2) of Reg. 1/2003 which may serve as parameters for setting the fine – duration and gravity – cannot mitigate the lack of clarity since these parameters are not sufficiently determined either. According to the case law of the Community courts, there is no list of criteria which must be taken into consideration regarding the gravity of the case.¹¹² Therefore, contrary to the current decision practice of the CFI, Art. 23 (2) of Reg. 1/2003 infringes the principle of a clear and unambiguous legal basis.¹¹³

This infringement of the principle of a clear and unambiguous legal basis can only be remedied by limiting the scope of discretion of the Commission regarding the determination of the amount of fines. This would require an amendment of Art. 23 of Reg. 1/2003.

1.2 The Fining Guidelines and the Commission's recent fining policy infringe the principle of non-retroactivity¹¹⁴

Over the last ten years the Commission has twice changed the legal grounds and provisions on which the determination of fines is based. Guidelines on setting the fines were first introduced by the Commission in 1998 ("**Fining Guidelines 1998**")¹¹⁵ and then amended in 2006 ("**Fining Guidelines 2006**")¹¹⁶. These changes are of special relevance for cases where the cartel infringements were committed prior to the introduction or amendment of the Fining Guidelines. This raises the question of whether the legal provisions existing at the time of the infringement or the provisions in force at the time of the fining decision have to be applied by the Commission.

The ECJ stated in its leading *Dansk Rorindustri*¹¹⁷ judgment that the Fining Guidelines have to be applied with due consideration of the principle of non-retroactivity. Having taken into account the respective case law of the ECtHR on Art. 7 of the ECHR, the ECJ held that "in order to ensure that the principle of non-retroactivity was observed, it is necessary to ascertain whether the change in question was reasonably foreseeable at the time when the infringements concerned were committed."¹¹⁸ In this case the ECJ decided that the application of the Fining Guidelines 1998 was foreseeable, because the essential

112 Cf. CFI of 20 March 2002 - Case T-9/99 - *HFB v Commission*, ECR 2002, II-1487, para. 443.

113 Cf. also Part C. III.

114 Cf. also Part C. III. 2.

115 Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, OJ of 14 January 1998, C 9/3.

116 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ of 1 September 2006, C 210/2.

117 ECJ of 28 June 2005 - Joined Cases C-189/02 P, C-202/02 P, C-205 to C-208/02 P and C-213/02 P - *Dansk Rorindustri and others v Commission*, ECR 2005, I-5425, para. 214 et seq.

118 ECJ, loc. cit., para. 224.

new factor introduced by the Fining Guidelines 1998 was the basic amount serving as the basis for the determination of the fines. This basic amount had to be determined within parameters that were set without any relation to the relevant turnover of the undertakings concerned. More generally, the ECJ ruled that

“the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising the level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy. On the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy.”¹¹⁹

Even though the Commission – seemingly – understands the cited Court statements as “carte blanche” for all subsequent (and future) adjustments to the level of fines, it has to be noted that the Commission overlooks the circumstances and details of the judgment.

Firstly, the ECJ decided on compliance with the principle of non-retroactivity in a case where the level of fines was far from what it is today. The Commission’s decision in this case¹²⁰ was issued at a time when the level of the fines was still significantly lower (total amount of EUR 92.21 million imposed on ten undertakings, highest fine EUR 8.9 million). Against this background, the ruling of the ECJ that these fines were foreseeable seems comprehensible. However, the subsequent steady rise in the level of fines, especially the drastic rise beginning in 2006, was not foreseeable. Nor is it currently possible to foresee what level the fines may reach in the future.

Secondly, pursuant to the principles established in the *Dansk Rorindustri* judgment, the level of fines may be adjusted only on condition that the proper application of the competition rules requires such adjustment. However, the Commission and the Community courts have – so far – failed to substantiate such requirement for the significant rise in the level of fines over the last five years. Moreover, even the former President of the CFI, *Vesterdorf*, said that he has “doubts as to whether the rise in fines still has the intended effect”.¹²¹ According to him, there is a risk that these fines are “counterproductive”¹²², as the sanctioned undertakings might pass the consequences on to consumers. During the XVth St Gallen International Competition Law Forum ICF on 22-23 May 2008 he stated that “the level of fines has become very, very, very high” and asked whether “this really makes sense” and “makes for more deterrence”.¹²³ Thus, since there are good arguments that the necessary “requiring situation” as justification for an adjustment of the levels of the fines cannot be reasonably explained – and the

119 ECJ, loc. cit., para. 227.

120 Commission of 21 October 1998 - Case IV/35.691 - *Pre-Insulated Pipes*, OJ of 31 January 1999, L 24/1.

121 *Vesterdorf*, in: *Handelsblatt* of 19 June 2007 and *handelsblatt.com* of 19 June 2007.

122 *Vesterdorf*, *ibid.*

123 *Vesterdorf* on the XVth St Gallen International Competition Law Forum ICF on 22-23 May 2008, published by MLex on 22 May 2008.

Commission has so far failed to do so – the Commission cannot base the rise in the level of fines on the cited *Dansk Rorindustri* judgment.

Therefore, we conclude that the rise in the level of fines over the last few years is not in compliance with the requirements established by the CFI's case law and is in violation of the principle of non-retroactivity.

2. Insufficient correlation between the severity of fines and the infringement of competition law in the current fining system

The Commission imposes fines on undertakings for specific infringements of cartel law. As already indicated, the system of setting fines has changed twice over the past decade. As a result, the system of how to link the fine to the specific infringement has also changed. Until 1998, the Commission decided on fines without having a transparent structure in its procedure. In 1998, the Commission adopted – for the first time – guidelines on the method of setting fines in order to enhance the transparency of its fining policy. Eight years after implementation, the Commission deemed it necessary to revise its guidelines in order to further develop and refine its policy on fines in the light of experience (Fining Guidelines 2006).

2.1 Situation prior to the introduction of the Fining Guidelines 1998

Prior to the introduction of the Fining Guidelines 1998, the Commission generally determined fines by reference to the Community turnover in the product market concerned, or, where only a smaller market was affected, by reference to the turnover in the product and the geographical market concerned. For the most serious infringements, such as hard-core cartels, the fine generally accounted for 5 to 10% of the undertaking's turnover in the relevant market. The amount of 10% of the turnover generated with the products and/or services in the market concerned was considered an unofficial cap.¹²⁴

However, the Commission's fining practice was criticised for its lack of transparency. For example, older Commission decisions almost always contained only a list of the factors which the Commission had taken into account in determining the amount of the fine.

2.2 Situation under the Fining Guidelines 1998

In 1998, the Commission adopted the Fining Guidelines 1998 with the aim of ensuring "the transparency and impartiality of the Commission's decisions, in the eye of the undertakings, and of the ECJ alike while upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalizing infringements of the competition rules."¹²⁵

124 Sura, in: Langen/Bunte, Kartellrecht [Cartel Law], 10th ed. 2006, Vol. 2, Art. 23 Reg 1/2003; cf. also Commission of 7 June 2000 - *Amino Acids* - OJ of 7 June 2001, L 152/24, para. 318.

125 Introductory remark, Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, OJ of 14 January 1998, C 9/3.

The Fining Guidelines 1998 set out in detail the criteria and the calculation method used by the Commission in setting the fines. The general methodology established by the Fining Guidelines 1998 and subsequently applied by the Commission can be summarised as follows:

In a first step, the Commission determined a basic amount according to the gravity and duration of the infringement as the only criteria referred to in Art. 15 of Reg. 17 and now Art. 23 of Reg. 1/2003. As regards assessing the gravity of the infringement, the Commission had to take into account the nature of the infringement, its actual impact on the market and the size of the relevant geographic market. In a second step, aggravating and/or attenuating circumstances specific to each undertaking were applied to adjust the fine. In a next step, the Commission considered the degree of cooperation which could lead to immunity from fines according to the Notice of 18 July 1996 on the non-imposition or reduction of fines ("**Leniency Notice 1996**").¹²⁶ Finally, the Commission verified that the final amount of the fine calculated according to this method did not exceed the 10% total turnover threshold.

Despite the improvements in transparency, the Fining Guidelines 1998 and their implementation by the Commission were also consistently criticised for their unpredictability and opacity with regard to determining the basic amount of the fine, which served as the starting point for the subsequent steps of the calculation.

While there seemed to remain some form of complex correlation between the turnover on the market for the product concerned and the basic amount, this was a matter for conjecture, and in reading the decisions, one could equally suspect that "the starting amount was to a considerable extent chosen arbitrarily and at random."¹²⁷

2.3 Situation under the Fining Guidelines 2006

On 28 June 2006, the Commission released the Fining Guidelines 2006 which replaced the Fining Guidelines 1998.

The Fining Guidelines 2006 maintained the general four-step methodology described for the Fining Guidelines 1998, but also introduced significant innovations regarding calculation of the fines.

The Commission explicitly stated in its introductory remarks that the fines to be imposed under the new Fining Guidelines must have the necessary deterrent effect, not only to sanction the undertakings concerned (specific deterrence) but also to deter other undertakings from engaging in, or continuing, cartel infringements (general deterrence). In order to achieve these objectives the Commission deemed it "appropriate to refer to the value of the sale of goods or services to which the infringement relates as a basis for setting the fine".¹²⁸

126 OJ of 18 July 1996, C 207/4.

127 Siragusa/Rizza, EU Competition Law, 2007, Vol. III, para 4.118.

128 Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003, OJ of 1 September 2006, C 210/2, para. 5.

As a consequence, in determining the basic amount of the fine to be imposed, the Commission currently takes into consideration the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic market within the European Economic Area ("EEA") for the last business year of its participation in the infringement.¹²⁹ Thus, an accurate definition of the relevant product and geographic market currently assumes a greater relevance than in the past, since it serves as the basis for the calculation of the fine.

2.4 Assessment and conclusion

Even though under the Fining Guidelines 2006 the specific infringement and its consequences for the relevant market play a certain role in the determination of the fines, a more genuine link between the infringement and the amount of the fines would make the fine more transparent and represent a fairer and more reasonable fine.

For example, in its 2005 Annual Conference Report, the International Competition Network ("ICN") also considered as "an effective penalty [...] one that takes, [*inter alia*,] into account the financial gains perpetrated by the offence [...]"¹³⁰

On the basis of this approach, it is our conclusion that the fine which has a genuine link to the committed infringement is a fine that skims off the gains the infringer generated with the infringement. It might be reasonable to add a certain amount as a sanction for the infringement, but the fine should be based principally on the gains of the infringer from the infringement.

3. Insufficient standards in current Community legislation regarding intent and negligence as well as unclear rules regarding responsibility of undertakings for their employees

The standards set by the Commission and the Community courts regarding intent and negligence as well as the responsibility of undertakings for actions of individuals are insufficient.

3.1 Current standard in the decision practice of the Commission and the Community courts

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

As to the first criterion, according to the case law, the actions of any person who is authorised to act on behalf of the undertaking are sufficient to trigger the liability of the undertaking, i.e. the actions of such a person are deemed to be actions of the undertaking. In this respect, it is not necessary for there to have been an action or even knowledge on the part of principal managers; the action of any person authorised to

129 Loc cit., para. 13.

130 ICN, Defining Hard Core Cartel Conduct – Effective Institutions – Effective Penalties, available at www.internationalcompetitionnetwork.org.

act is sufficient.¹³¹ Even if the acting person was not entitled to conclude the agreement which violates Art. 81 EC, his conduct can be attributed to the undertaking. Only if the acting person clearly exceeded the limits of his function is there a possibility that his conduct might not be attributed to the undertaking.¹³² In practice, it is virtually impossible to successfully argue that the actions of an employee are not attributable to the undertaking.

As to the second criterion, the ECJ held that an undertaking acts intentionally or negligently where it cannot be unaware of the anti-competitive nature of its conduct.¹³³ Thus, the ECJ refers to the undertaking (and not to the individual acting for it) when establishing whether the infringement was committed intentionally or negligently. The nature of this criterion is demonstrated in the *Volkswagen* judgment in which the ECJ held that it is not necessary for the Commission to identify the persons whose actions reveal the intentional or negligent nature of the infringement. In this case, the Commission and the CFI derived the intentional nature of the infringement from statements made by persons, at least some of whom were not directly involved, without having established whether those persons had themselves also committed any objective infringements. The ECJ argued that an identification is not necessary because the fines are not of a criminal nature and that such a requirement would impinge seriously on the effectiveness of Community competition law.¹³⁴

In addition, the Commission and the Community courts do not clearly distinguish between intentional and negligent conduct of the undertaking. It is well-established that, in order to show that an infringement has been committed “intentionally”, it is not necessary for the Commission to show that the undertaking was actually aware that it was infringing competition rules. It is sufficient that the undertaking could not have been unaware that the conduct in question had as its object the restriction of competition.¹³⁵ Findings that an infringement has been committed negligently are rare and none of them relates to hard-core cartel cases.¹³⁶ In its decision practice, the Commission has not restricted itself to finding intention or negligence but has on occasion found that infringements have been committed “intentionally or negligently”¹³⁷ or “intentionally, or at least negligently”.¹³⁸ More recently, the Commission has even stopped using either of these terms in its assessments of the fines. In recent cases, the Commission

131 ECJ of 7 June 1983 - Joined Cases 100 to 103/80 - *Musique Diffusion française v Commission*, ECR 1983, 1825, para. 96.

132 Dannecker/Biermann, in: Immenga/Mestmäcker Wettbewerbsrecht EG/Teil 2 [Competition Law/Part 2], 4th ed., 2007, preliminary remarks to Art. 23 et seq. of Reg. 1/2003, para. 116.

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

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

135 ECJ of 11 July 1989 - Case 246/86 - *Belasco and others v Commission*, ECR 1989, 2117, para. 41; CFI of 28 February 2002 - Case T-86/95 - *Compagnie générale maritime and others v Commission*, ECR 2002 II-1011, para. 19, 234; Kerse/Khan, EC Antitrust Procedure, 5th ed., 2005, para. 7.021.

136 Siragusa/Rizza, loc. cit., para. 4.77.

137 E.g. Commission of 23 November 1972 - Case IV/26.894 - *Pittsburgh Corning Europe*, OJ of 5 December 1972, L 272/35.

138 E.g. Commission of 14 May 1997, Case IV/34.621, 35.059/F-3 - *Irish Sugar plc*, OJ of 22 September 1997, L 258/1.

has tended to describe the parties' actions simply as "deliberate" infringements when dealing with hard-core infringements, and referred to its description of the facts found rather than embarking on any case-related legal analysis of the criteria of intention or negligence.¹³⁹

3.2 Assessment and conclusion

This approach of the Commission and the Community courts regarding the intentional and negligent conduct of undertakings is not acceptable in several respects and violates the principle of proportionality.

Firstly, the Commission and the Community courts need to distinguish clearly between intention and negligence, since the severity of the infringement is greater in the event of intent than in the event of negligence. Negligent conduct must have different consequences than intentional conduct, i.e. it has to be sanctioned with lower fines. In the decision practice of the Commission and the courts, the standards for negligence and intent are neither clearly defined nor assessed in detail.

Secondly, the standards regarding the responsibility of an undertaking for actions of its employees are poorly defined. Intention and negligence are subjective in nature, since they refer to what a person does and what the person is aware of. The responsibility of an undertaking can only be established by attributing to it the intention or negligence of individuals acting for the undertaking.¹⁴⁰ As a consequence, the individuals whose intention or negligence is to be attributed to an undertaking must be identified. In addition, the actions of such persons and the subjective background of such actions need to be scrutinised. Furthermore, an undertaking must not be held liable for the culpable actions of each employee. Only intentional or negligent actions of persons who are entitled to represent the undertaking under the respective corporate legislation, i.e. members of the management, should be attributable to the undertaking.

4. Insufficient rules on liability of "undertakings"

4.1 Current situation

Art. 81 and 82 EC are directed against undertakings and Art. 23 (2) of Reg. 1/2003 provides for the Commission's legal capacity to impose fines on undertakings participating in cartel infringements of up to 10% of the undertaking's turnover generated in the preceding business year.

139 Commission of 20 December 2001 - Case COMP/E-1/36.212 - *Carbonless Paper*, OJ of 21 April 2004, L 115/1; of 2 July 2002 - Case C.37.519 - *Methionine*, OJ of 8 October 2003, L 255/1, para. 265; of 30 October 2002, COMP/35.587 *PO Video Games*, COMP/35.706 *PO Nintendo Distribution* and COMP/36.321 *Omega - Nintendo*, OJ of 8 October 2003, L 255/33, para. 371; Kerse/Khan, *EC Antitrust Procedure*, 5th ed., 2005, para. 7-021.

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

In practice and in the majority of cases, it is undertakings that are part of groups of undertakings that directly commit such infringements, which raises the question of whether other undertakings of the respective groups – especially the parent companies – may also be held (jointly and severally) liable and sanctioned. Bearing in mind that the “legal maximum”¹⁴¹ of the fines is set as a percentage of the concerned undertaking’s turnover, this question is of particular relevance if the direct infringer’s turnover is much less than that of the parent undertaking.

a. The notion of “undertaking” in Community competition law

Today, the principles which govern the liability of a legal entity for infringements of Community competition law are closely linked to the notion of “undertaking”. The CFI has defined undertakings as “economic units which consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision”.¹⁴² The ECJ, however, summarises its understanding of an undertaking as any entity engaged in an economic activity, which may comprise several distinct natural or legal persons having identical interests.¹⁴³ Thus, the term “undertaking” reflects a broad “functional and economic concept”¹⁴⁴ which, for competition law purposes, is not necessarily identical to the concept of a legal entity under company law.

b. Liability of the parent company

In keeping with the general trend of higher fines in recent years, the Commission is “generally keen to hold parent companies liable for the conduct of their subsidiaries.”¹⁴⁵ According to the case law of the Community courts, however, the Commission may impose fines on a parent company under certain conditions only.

In the *Hoek Loos* case, the CFI summarised its legal view as follows:

*“The applicant’s argument concerning the need to take into account the total turnover of the group of which the subsidiary, to which the decision imposing fines for infringement of the cartel competition rules is addressed, is part, is incompatible with, and renders completely meaningless, the settled case-law according to which the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them [...]”*¹⁴⁶

141 Cf. Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003, OJ of 1 September 2006, C 210/2, D.

142 CFI of 14 May 1998 - Case T-352/94 - *Mo och Domsjö v Commission*, ECR 1998, II-1989, para. 87.

143 Cf. ECJ of 12 July 1984 - Case 170/83 - *Hydrotherm v Commission*, ECR 1984, 2999, para. 10 et seq.

144 Kerse/Khan, EC antitrust procedure, 5th ed. 2005, para. 7-003.

145 Siragusa/Rizza, EU Competition Law, 2007, Vol. III, para. 4.46.

146 CFI of 4 July 2006 - Case T-304/02 - *Hoek Loos v Commission*, ECR 2006, II-3245, para. 117.

A parent company may in particular be held liable in two instances: (i) if the parent company was directly involved in the infringement (e.g. where representatives of the subsidiary participating in cartel meetings also belonged to the management of the parent company¹⁴⁷ or where the parent company approved and/or directed the infringing conduct¹⁴⁸), and (ii) in the absence of any direct involvement, if the parent company had a “decisive influence” over the actions of its subsidiary. The question whether such a decisive influence in fact exists depends – at least partly – on applicable company law. According to the CFI, the Commission “can assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power”.¹⁴⁹ However, this assumption may be rebutted. In the *Stora* decision, the ECJ found that

*“the Court of First Instance did not hold that a 100% shareholding in itself sufficed for a finding that the parent company was responsible. It also relied on the fact that the appellant had not disputed that it was in a position to exert a decisive influence on its subsidiary’s commercial policy, or produced evidence to support its claim that the subsidiary was autonomous.”*¹⁵⁰

The Commission has, *inter alia*, previously deemed the following to be indications that influence has been exercised: (i) the existence of a common market strategy,¹⁵¹ (ii) the parent company provided the subsidiary with a sales team,¹⁵² (iii) permanent cooperation including the exchange of information, innovation, patents, know-how,¹⁵³ or (iv) the fact that not even the companies concerned had any doubts that the subsidiary was not autonomous.¹⁵⁴

4.2 Assessment and conclusion

The broad understanding of the notion “undertaking” that results in almost any group of companies being viewed as one undertaking, means that more or less any part of a group of undertakings may be held jointly and severally liable, irrespective of its actual role in the infringement. This concept of parent company liability that is currently applied is not governed by clear-cut legal provisions: on the contrary, such provisions are non-existent, with even the principles applied being inconsistent.

Given the general applicability of the rule of law in connection with the imposition of fines for violations of Community competition law, and given the impact of the

147 ECJ of 16 November 2000 - Case C-286/98 - *Stora Kopparbergs Bergslags v Commission, Cartonboard*, ECR 2000, I-9915, para. 24 et seq.

148 CFI of 20 March 2003 - Case T-1/99 - *ABB Asea Brown Boveri v Commission*, ECR 2002, II-1881.

149 CFI of 10 June 2005 - Joined Cases T-71, T-74, T-87 and T-91/03 - *Tokai Carbon v Commission*, ECR 2005, II-10, para. 60.

150 ECJ of 16 November 2000 - Case C-286/98 - *Stora Kopparbergs Bergslags v Commission, Cartonboard*, ECR 2000, I-9915, para. 27 et seq.

151 ECJ of 4 June 1988 - Case 30/87 - *Bodson v Pompes funèbres des régions libérées*, ECR 1988, 2479.

152 ECJ of 24 October 1996 - Case C-73/95 P - *Viho v Commission*, ECR I-5482, para. 17.

153 Commission of 15 May 1991 - Case IV/22548 - *Christiani & Nielsen*, OJ of 5 July 1969, L 165/12, para. 23.

154 Commission of 15 May 1991 - Case IV/32.186 - *Gosme/Martell-DMP*, OJ 1991, L 185/23, para. 23.

imposition of joint and several liability on a parent company for competition law infringements committed by a subsidiary, it can be concluded that company liability must be regulated by Community legislation, and that it cannot be determined on the basis of the Community courts' case law when a parent company can be held liable for competition law infringements of a subsidiary.

Community competition law must respect the principles developed under the laws – and in particular under the national corporate laws – of the Member States regarding liability of parent companies for actions and/or obligations of subsidiaries, e.g. developed practice on piercing the corporate veil.

In the absence of such rules, the imposition of fines on parent companies can only be justified if the parent company itself participated in the infringement. There is only a legal basis for direct liability of the company that participated in the infringement. In addition, the current rules on parent companies established by the Community courts are inadequate because they do not take compliance programmes into account. For details please see Part E. I. above.

II. Procedural law

1. The decision-making process of the Commission fails to meet due process requirements and lacks transparency

The Community cartel fining procedure suffers from two deficiencies: it fails to meet the requirements of due process and lacks transparency. The procedure lacks transparency with regard who takes the final decision. This non-transparency is reflected in the fact that the whole investigation procedure is dealt with by Commission officials who, later on, do not decide on the fine.

1.1 The Commission's procedure

Reg. 1/2003 constitutes the legal basis for the Commission's enforcement procedure and provides the Commission with its investigation and sanction rights. The procedure is essentially an administrative one that can be split in two stages.¹⁵⁵ During the first stage, the Commission investigates the facts and during the second stage, it informs the undertakings concerned about its objections and makes a final decision. The entire administrative procedure can last for several years.

The investigation or fact-finding stage is dealt with by a case team. Following this stage, the same case team opens a formal procedure on behalf of the Commission by issuing a so-called statement of objections if it believes the evidence proves a relevant infringement.¹⁵⁶ According to Art. 12 of Reg. 773/2004, the Commission shall give the

¹⁵⁵ ECJ of 15 October 2002 - Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P - *Limburgse Vinyl Maatschappij and others v Commission*, ECR 2002, I-8375.

¹⁵⁶ Cf. Art. 10 of Reg. 773/2004.

parties to whom it has addressed a statement of objections the opportunity to develop their arguments at an oral hearing if they so request. This oral hearing is usually held a couple of weeks after the Commission has received the written response to the statement of objections in order to give the Commission enough time to prepare. The hearing is presided over by a Hearing Officer who is to ensure that the hearing is properly conducted and who contributes to the objectivity of the hearing.¹⁵⁷ Such hearings usually begin with the case handler giving a summary of the facts of the case and the arguments of the Commission. The addressees of the statement of objections then deliver their oral arguments before they are questioned by the representatives of the Member States, the Hearing Officer and other Commission officials present. After the hearing, the Hearing Officer prepares a report on the hearing and the conclusions drawn from it with regard to the right to be heard. The addressee of the report is the Competition Commissioner. Copies are given to the Director-General for Competition and the director responsible.¹⁵⁸

At no point during this long procedure (the written procedure and the hearing) are the undertakings concerned allowed to interrogate representatives of the other undertakings under investigation in order to challenge their respective declarations and testimonies.

Before making a decision – regardless of what it is – the Commission has to consult the Advisory Committee on Restrictive Practices and Monopolies pursuant to Art. 14 of Reg. 1/2003 (“**Advisory Committee**”). Members of the Advisory Committee are representatives of the national competition authorities of the Member States. This consultation either takes place in the form of a meeting or by written procedure. The Advisory Committee delivers a written opinion on the Commission’s preliminary draft decision. This written opinion of the Advisory Committee is attached, together with the Hearing Officer’s final report, to the draft Commission’s decision which is then sent to the college of Commissioners.¹⁵⁹

Because the decision-making process of the Commission is governed by the principle of collegiality¹⁶⁰, the college of the currently 27 Commissioners makes the decisions in cartel cases.

1.2 Assessment and conclusion

As has already been mentioned above, the fines imposed by the Commission are of a criminal or at least quasi-criminal nature. Thus, the general principles which govern the decision-finding process in criminal law should also be applied in this context. One of the central principles in the law of criminal procedure, that is also based on the rule of law, is the so-called principle of immediacy¹⁶¹ according to which a court judging a criminal offence is obligated to obtain a direct and immediate picture of the criminal

157 Art. 5 of the Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition procedures, OJ of 19 June 2001, L 162/21.

158 Ibid., Art. 13.

159 Ibid., Art. 15 and 16; Art. 14 Reg. 1/2003.

160 Cf. Art. 7 and 8 of the Commission’s internal rules of procedure; ECJ of 23 September 1986 - Case 5/85 - *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission*, ECR 1986, 2585, para. 28 et seq.

161 E.g. in Germany, according to sec. 226, 250, 261 Strafprozessordnung [Code of Criminal Procedure].

offence and the offender. Specifically, the principle of immediacy comprises the judge's obligation to be present at every step of the main proceedings.

The description of the Commission's procedure, however, illustrates that the final decision in cartel cases is made by up to 27 officials, i.e. the Commissioners, who – in most cases – never participated in the investigation, read the files or listened to the oral presentations of the undertakings concerned. Although the neutrality of the Hearing Officer is not questioned, the decision is based exclusively on reports listing other people's impressions and opinions. At no time do the undertakings to be fined have the chance to explain their point of view in person to the officials who will make the decision at the end of the day.

In addition, there are deficiencies with regard to evidence. The undertakings are not granted the right to interrogate any "witnesses", i.e. employees of the other undertakings under investigation, on whose declaration the Commission bases its decision. This clearly infringes Art. 6 (3) of the ECHR, according to which everyone charged with a criminal offence has minimum rights such as (lit. d) the right to examine, or to have examined, witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The applicability of Art. 6 of the ECHR to cartel cases has already been explained.

The ECtHR's ruling in its *Haas* judgment clearly shows this infringement:

*"Where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6."*¹⁶²

In order to improve the transparency of the cartel fining procedure, make it compliant with due process requirements and abolish other deficiencies as to the requirements of the rule of law, the Commission procedure should be amended accordingly. In particular, the same Commission representatives should deal with a case for the entire duration of the procedure and, ultimately, be directly and immediately involved in the decision-making process.

2. The Leniency Notice is illegal

The Leniency Notice is the most celebrated instrument of the Commission for finding and sanctioning cartels. However, it infringes fundamental principles of law and is therefore illegal.

162 ECtHR of 17 November 2005 - Case 73047/01 - *Haas v Germany*, NStZ 2007, 103.

2.1 The Leniency Notice infringes the *nemo tenetur* principle

a. The *nemo tenetur* principle in Community competition law

According to the principles of *nemo tenetur se ipsum accusare* and *nemo tenetur se ipsum prodere* (*nemo tenetur* principle), no one may be forced to incriminate himself. The right against self-incrimination includes the right not to respond to questions if there is a risk of self-incrimination. However, neither the EC Treaty nor Reg. 1/2003 establishes the right for undertakings – accused by the Commission of having committed cartel infringements – to remain silent if they otherwise risk incriminating themselves. For details, see Part C. IV. 4 above.

In 1989, as already mentioned, the ECJ ruled in its fundamental judgment *Orkem v Commission* on the privilege against self-incrimination. It denied the existence of any privilege against self-incrimination for undertakings but accepted that the Community law principle of respect for the rights of the defence prevented the Commission from compelling an undertaking “to provide it with answers which might involve an admission on its part of the existence of an infringement which is incumbent upon the Commission to prove”.¹⁶³ The *Orkem* decision was confirmed in *Commission v SGL Carbon* in 2006.¹⁶⁴ The ECJ’s line of argument cannot be adopted. The ECtHR acknowledged that the fair trial guarantee in Art. 6 of the ECHR also includes the right not to incriminate oneself. This must apply to undertakings as well.¹⁶⁵ In addition, a couple of Member States provide for the right to remain silent to apply to legal persons too. Furthermore, pursuant to Art. 14 (3) lit. g of the International Covenant on Civil and Political Rights, everyone has the right not to be compelled to testify against himself or to confess guilt. For all these reasons, the right to remain silent where there is a risk of self-incrimination and, therefore, the *nemo tenetur* principle, have to be acknowledged in Community competition law.

b. The Leniency Notice infringes the *nemo tenetur* principle

The Leniency Notice infringes the *nemo tenetur* principle. It also infringes the principles established by the ECJ in *Orkem v Commission* and *Commission v SGL Carbon*, i.e. the right not to be compelled to confess to an infringement.

The Leniency Notice together with the excessively increased fines virtually compels the undertakings to cooperate with the Commission and therefore to confess to the infringement. According to the Leniency Notice, only the first undertaking which submits evidence that meets the conditions set out in para. 8 a) or 8 b) of the Leniency Notice has the chance of receiving full immunity from any fine. All other undertakings can only receive reductions of the fine of up to 50%. The race to be the first cooperating undertaking results in coercion to cooperate and, thus, to confess. Immunity and reductions are only granted if the undertaking confesses to an infringement of Art. 81 (1) EC. Since the undertakings do not (and are not supposed to) know

163 ECJ of 18 October 1989 - Case C-374/87 - *Orkem v Commission*, ECR 1989, 3283, para. 35.

164 ECJ of 29 June 2006 - Case C-301/04 P - *Commission v SGL Carbon AG*, ECR 2006, I-5915, para. 39 et seq.

165 Cf. Part C. III. 2.5, footnote 68.

whether another undertaking has already filed a leniency application, not only does the first undertaking submit all the available evidence and a full confession, but the undertakings that cooperate subsequently do so as well. Given their lack of knowledge, the undertakings cannot weigh up the benefits of cooperation, i.e. a reduction in the fine (where this is still available), against the disadvantages of cooperation. A cooperating undertaking may not contest the facts submitted by other undertakings. The Commission considers any denial of facts as insufficient cooperation pursuant to para. 11, 23 of the Leniency Notice, which means that the fine may no longer be reduced.

The situation created by the Leniency Notice has been significantly intensified by the constant increases in the fines imposed by the Commission. As already shown in detail in Part B. of this study, the level of fines has dramatically increased since the first Leniency Notice was published in 1996. In 2007, the Commission imposed total fines of EUR 3,334,002,700, EUR 992,312,200 of which was in the *elevators and escalators* case. *ThyssenKrupp* had to pay a fine of EUR 479,669,850 for its participation in this cartel – after deducting the reduction granted under the Leniency Notice.

In practice, no undertaking can afford not to make use of the Leniency Notice. In view of such extremely high fines, every undertaking has to seize the chance of a reduction of the fine. Each board or management member of an undertaking is forced to cooperate with the Commission, since he would infringe his obligations under corporate law vis-à-vis the company and the shareholders if he put the cooperation advantage at risk (“prisoner’s dilemma”). Therefore, the rights of defence and, in particular, the right not to be compelled to confess an infringement have become worthless under the Leniency Notice. The Leniency Notice not only provides an incentive to cooperate, it compels the undertaking to cooperate, and, furthermore, puts extensive (or even excessive) pressure on undertakings to confess. The coercion imposed by the Leniency Notice is even stronger when the Commission has already initiated proceedings, e.g. when inspections have been carried out. In such a situation, a concerned undertaking has virtually no other option than to cooperate under the Leniency Notice. The Leniency Notice infringes the *nemo tenetur* principle and also the right not to be compelled to confess to an infringement established by the *Orkem* judgment.

2.2 The Leniency Notice infringes the principle of *in dubio pro reo*

The Leniency Notice infringes the principle of *in dubio pro reo* according to which the innocence of the accused has to be presumed until his guilt has been proven.

a. The presumption of innocence in European Community legislation

The presumption of innocence belongs to the fundamental rights which are protected in the European Community pursuant to the established case law of the ECJ¹⁶⁶. It is based in particular on Art. 6 (2) of the ECHR and Art. 48 (1) of the Charter of Fundamental Rights. The Community courts have confirmed that this principle applies to the procedures

166 ECJ of 8 July 1999 - Case C-199/92 - *Hüls v Commission*, ECR 1999, I-4287 para. 149; ECJ of 6 July, 2000 - T-62/98 - *Volkswagen v Commission*, ECR 2000, II-2707, para. 281.

relating to infringements of the competition rules applicable to undertakings, which may result in the imposition of fines.¹⁶⁷

The presumption of innocence requires that the burden of proof in respect of the infringement of Art. 81 (1) EC rests with the Commission. This is also explicitly stated in Art. 2 of Reg. 1/2003. Therefore, the Commission bears the legal and evidentiary burden in respect of all elements of the infringement.

b. Assessment and conclusion

The Leniency Notice infringes the principle of *in dubio pro reo* because it results in a shift of the burden of proof from the Commission to the undertakings. Under the Leniency Notice an undertaking has to prove that itself and other undertakings infringed Art. 81 (1) EC if it wants to be eligible for immunity from or reduction of a fine. If the undertaking does not provide sufficient evidence, it risks not benefiting from the Leniency Notice at all, i.e. not receiving immunity from or a reduction in the fine. As already set out above, the Leniency Notice virtually compels undertakings to cooperate with the Commission and to fulfil its conditions. The thresholds for submitting sufficient evidence applicable to undertakings are high. According to para. 8 a) of the Leniency Notice, the submitted information and evidence must, in the Commission's view, enable it to carry out a targeted inspection or, pursuant to para. 8 b), to even find an infringement of Art. 81 EC. Only if these conditions are met will immunity from any fine be granted. In addition, in order to qualify for reduction of a fine, an undertaking must provide the Commission with evidence of the alleged infringement that represents significant added value with respect to the evidence already in the Commission's possession (cf. para. 24 of the Leniency Notice).

These rules show that the Commission shifted the burden of proof to the undertakings. In view of the very high fines, the undertakings are virtually forced to cooperate with the Commission and to apply for leniency. Therefore, they are forced to provide sufficient evidence to prove the infringement.

3. Limited review of the Commission's decisions by the Community courts

The limited review of the Commission's fine decisions by the ECJ and the CFI infringes Art. 6 of the ECHR and Art. 47 of the Charter of Fundamental Rights.

3.1 Limited judicial control of the Commission's decisions

An undertaking which is an addressee of a decision by the Commission can initiate proceedings against this decision pursuant to Art. 230 EC. According to Art. 230 (2) EC, the grounds of the action include lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule relating to its application, and misuse of powers. At first instance, the CFI reviews points of facts and

¹⁶⁷ ECJ of 8 July, 1999 - Case C-199/92 - *Hüls v Commission*, ECR 1999, I-4287 para. 149; CFI of 19 June 1995 - T-30/91 - *Solvay v Commission*, ECR 1995, II-1775, para. 73; CFI of 19 June 1995 - Case T-36/91 - *ICI v Commission*, ECR 1995, II-1847, para. 83.

points of law. The applicant can bring an appeal against a judgment by the CFI before the ECJ, which appeal, however, is limited to points of law.

a. Judicial review is limited to pleas raised by the parties

In the proceedings before the Community courts, the parties determine in principle the content and scope of the review and the judgment. The judges will not award more to the parties than they have applied for. In addition, they do not examine the entire decision of the Commission of their own motion, but instead only consider the pleas raised by the applicant.¹⁶⁸ Therefore, even if the Commission's decision is unlawful with regard to some aspects, the Community courts will not examine these aspects if the parties have not raised a plea in this respect.

Exceptions to this principle are rare. The ECJ traditionally distinguishes between procedural and substantive issues. It considers questions of infringement of an essential procedural requirement of its own motion¹⁶⁹, whereas the infringement of substantive law is only reviewed upon a plea raised by the party. Advocate General *Jacobs* applied another approach. In his opinion, the CFI and the ECJ must raise matters of public policy (*ordre public*) of their own motion.¹⁷⁰ However, he admits that it is difficult to define matters of public policy. In his opinion, which points a court may raise of its own motion ultimately depend on the fundamental values of the legal order concerned, on the respective roles of the parties and the court under the applicable rules of procedure, on the branch of the judiciary which is called upon to apply the concept, and on the level at which the proceedings take place.

These principles generally also apply to decisions of the Commission according to which a fine is imposed. Although, according to Art. 31 of Reg. 1/2003, the Community courts have unlimited jurisdiction to review decisions according to which the Commission has fixed a fine, and to cancel, reduce or increase the fine, in the decision practice, neither the ECJ nor the CFI fully reviews the Commission's fine decisions of their own motion. The examination of the Community courts is limited to the pleas raised by the respective applicant even in cases where high fines are imposed¹⁷¹.

There are very few cases where the Community courts reviewed aspects of the case which were not raised by the parties. In the *carton* cases, the CFI reviewed the insufficiency of the grounds of its own motion.¹⁷² However, this also concerns an essential procedural requirement and is thus in line with the general case law of the ECJ. In the *ALMA* decision, the ECJ examined whether the amount of the fine was excessive without the applicant having raised a plea in this regard. However, the ECJ argued that the reduction in the amount of the fine constitutes a partial acceptance of the application

168 Cf. Hackspiel, in: Rengeling/Middeke/Gellermann, Handbuch des Rechtsschutzes in der Europäischen Union, [Handbook of the legal protection in the European Union], 2nd ed., 2003, § 21, para. 4.

169 ECJ of 7 May 1991 - Case C-304/89 - *Oliveira v Commission*, ECR 1991, I-2283, para. 18.

170 Opinion of Advocate General in Case C-210/98 P, *Salzgitter AG v Commission*, ECR 2000, I-5843, para. 130 et seq.

171 Cf. CFI of 29 June 1995 - Case T-30/91 - *Solvay v Commission*, ECR 1995, II-1775, para. 98.

172 CFI of 14 May 1998 - Case T-295/94 - *Buchmann v Commission*, ECR 1998, II-813, para. 172.

to annul the decision and therefore does not have an effect *ultra petita*.¹⁷³ It therefore cannot be said that the Community courts apply a stricter standard in fine cases than in other cases. Also in fine cases, judicial review is generally limited to the pleas raised by the parties.

b. The CFI does not investigate the facts found by the Commission

The CFI does not carry out its own investigation into the facts on which the Commission's decision is based. However, it would have the means to do so. According to Art. 65 of the Rules of Procedure of the Court of First Instance ("**CFI Rules of Procedure**")¹⁷⁴, the CFI can adopt the following measures of inquiry: a personal appearance of the parties, a request for information and production of documents, oral testimony, the commissioning of an expert's report, and an inspection of the place or thing in question. In particular, pursuant to Art. 68 (1) of the CFI Rules of Procedure, the CFI may, either of its own motion or on application of a party, order that certain facts be proved by witnesses.

However, the CFI hesitates – also in cases involving a right to unlimited review pursuant to Art. 31 of Reg. 1/2003 – to make use of these measures and to carry out its own investigation into the facts. Instead, it bases its judgment on the facts found by the Commission.

The most frequent measure adopted by the CFI is requests for information and production of documents to clarify the facts and the role of the participants. Only in very rare cases does the CFI examine witnesses or commission an expert's report.¹⁷⁵ In most cases the CFI does not adopt any measure of inquiry at all. According to the ECJ, the CFI cannot be required to call witnesses of its own motion, since Art. 66 (1) of the CFI Rules of Procedure makes it clear that it is to prescribe such measures of inquiry as it considers appropriate by means of an order setting out the facts to be proved.¹⁷⁶ Even if the parties apply for the hearing of witnesses, the CFI is very hesitant. For instance, in one case it rejected an application because the applicant failed to state precisely with regard to what facts and for what reasons the witnesses were to be examined.¹⁷⁷

Given the fact that the CFI does not carry out its own investigation, it makes itself dependent on the facts presented by the parties. It normally only carries out a plausibility check and compares the facts found by the Commission in the decision with the files and the pleas raised by the applicants. For instance, in the *DSM v Commission* case, the CFI limited its review to whether the findings of fact contained intrinsic contradictions.¹⁷⁸ The CFI acknowledges that the judicial control cannot be a substitute for a thorough investigation of the case in the course of the administrative procedure.¹⁷⁹

173 ECJ of 10 December 1957 - Case 8/56 - *ALMA v ECSC High Authority*, ECR 1957, 179, 202.

174 OJ of 30 May 1991, L 136/1.

175 Witnesses were examined in ECJ of 7 June 1983 - Joined Cases 100 to 103/80 - *Musique Diffusion française v Commission*, ECR 1983, 1825.

176 ECJ of 17 December 1998 - Case C-185/95 P - *Baustahlgewebe v Commission*, ECR 1998, I-8417, para. 77.

177 CFI of 20 March 2002 - Case T-9/99 - *HFB and others v Commission*, ECR 2002, II-1487, para. 38.

178 CFI of 17 December 1991 - Case T-8/89 - *DSM v Commission*, ECR 1991, II-1833, para. 259.

179 CFI of 29 June 1995 - Case T-30/91 - *Solvay v Commission*, ECR 1995, II-1775, para. 98.

Furthermore, since the CFI does not hear witnesses, the undertakings concerned do not have the possibility of examining witnesses either. However, such a possibility could be important to the undertakings concerned, in particular with regard to statements made by witnesses in leniency applications. The Leniency Notice offers an incentive to undertakings and individuals to charge other undertakings and individuals to a great extent. In practice, individuals involved in cartel infringements tend to confess to more than they actually witnessed. Since the Leniency Notice demands that the submitted information must enable the Commission to find an infringement (for immunity), or that it must at least represent significant added value (for a reduction), an undertaking must try to provide as much incriminating information and as many documents as possible. It is therefore crucial for the defending undertaking to examine the witnesses of other undertakings. This is neither possible in the proceedings before the Commission nor before the Community courts.

c. Community courts have not established an independent fining policy

The ECJ and the CFI have not established their own fining policy, i.e. they have not developed their own methods for calculating the fine or determining which criteria have to be taken into account. In fact, they grant a wide margin of discretion to the Commission and limit their review of the Commission's decisions to obvious mistakes and the general adequacy of the fine. Even the former president of the CFI, *Bo Vesterdorf*, suggests that the CFI may wish to play a more active role in the setting and verification of fines. According to *Vesterdorf*, setting antitrust penalties is

*“one area in which the full jurisdiction could and, in my opinion, might and perhaps should be used by the CFI so that the court undertakes, in all cases of fines, its own appreciation of all the relevant circumstances of the case and if it disagrees with the level of the fine set by the Commission sets its own fine, albeit of course duly motivating why it finds another fine more appropriate.”*¹⁸⁰

Although the Community courts are not bound by the Commission's Fining Guidelines regarding the amount of the fine, in practice, they follow the rules set out therein. The CFI held that “as fines constitute an instrument of the Commission's competition policy, it must be allowed a margin of discretion when fixing their amount [...]”.¹⁸¹ The same applies to the examination of decisions regarding the immunity from and reduction of the fine by the Community courts. Although the Courts are not bound by the Commission's Leniency Notice, they often only review whether it was correctly applied but do not develop their own leniency standard. It is therefore the Commission that determines the fining policy and the leniency policy and not the CFI or the ECJ.

180 Vesterdorf on the XVth St Gallen International Competition Law Forum ICF on 22-23 May 2008, published by MLex on 22 May 2008.

181 CFI of 7 October 1999 - Case T-228/97 - *Irish Sugar v Commission*, ECR 1999, II-2969, para. 246; CFI of 9 July 2003 - Case T-230/00 - *Daesang Corporation and Sewon Europe v Commission*, ECR 2003, II-2733, para. 37.

d. Conclusion

The judicial control of fines imposed by the Commission is restricted. It is limited to the pleas raised by the parties. Furthermore, the Community courts do not fully examine the facts found by the Commission, and there is no fining policy established by the courts.

3.2 Infringement of Art. 6 of the ECHR

The imposition of fines by the Commission and the limited review of the Commission's decisions by the Community courts infringe Art. 6 of the ECHR. Pursuant to Art. 6 (1) of the ECHR, in the determination of his civil rights and obligations and of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In addition, according to Art. 6 (3) of the ECHR, everyone charged with a criminal offence has minimum rights such as (lit. d) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Art. 6 of the ECHR applies to fines imposed by the Commission pursuant to Art. 23 of Reg. 1/2003. The fines imposed by the Commission are criminal in nature within the meaning of Art. 6 of the ECHR. This was confirmed by the ECtHR with respect to the German administrative fines in the *Öztürk* case¹⁸² and with respect to the Slovak Minor Offences Act in *Lauko v Slovakia*.¹⁸³ The principles established in these decisions also apply in the present case. According to the ECtHR, how an offence is classified by the legislator is not important; its nature, however, is crucial for determining whether it is a criminal offence.¹⁸⁴ Thus, the fact that, pursuant to Art. 23 (5) of Reg. 1/2003, the decisions whereby fines are imposed shall not be of a criminal law nature, is not relevant. As to the nature of the offence, the ECtHR notes that generally falling within the ambit of the criminal law are offences that make their perpetrator liable to penalties intended, *inter alia*, to be deterrent and to punish. There can be no doubt that the fines imposed by the Commission intend to punish and to be deterrent. This has been stressed by the Commission on many occasions. According to para. 4 of the Fining Guidelines, "fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence)".

Furthermore, Competition Commissioner *Neelie Kroes* herself states the following regarding punishment:

*"I will ensure that cartels will continue to be tracked down, and punished."*¹⁸⁵

182 ECtHR of 21 February 1984 - Case 8544/79 - *Öztürk v Germany*, EuGRZ 1985, 62.

183 ECtHR of 2 September 1998 - Case 4/1998/907/1119 - *Lauko v Slovakia*, Report 1998-VI.

184 ECtHR of 21 February 1984 - Case 8544/79 - *Öztürk v Germany*, EuGRZ 1985, 62 para. 49 et seq., 52 et seq.

185 Commission Press Release IP/06/698.

The ECtHR held that the minor offence committed by Mr. Öztürk, i.e. driving a car into another parked car which led to a fine of DM 60 (approx. EUR 30), is of a criminal law nature. Thus, cartel offences whereby fines of up to 10% of the group turnover of the undertakings can be imposed must indeed be considered to be of a criminal law nature. Therefore, Art. 6 of the ECHR applies to fines imposed according to Art. 23 of Reg. 1/2003.¹⁸⁶ Art. 6 of the ECHR not only applies to individuals but likewise to legal persons.¹⁸⁷

The proceedings before the Commission and the Community courts do not meet the requirements of Art. 6 of the ECHR. An undertaking which is subject to a fine imposed by the Commission is not heard by a tribunal within the meaning of Art. 6 (1) of the ECHR. In the *Öztürk* decision, the ECtHR established certain standards regarding prosecution and punishment of offences by administrative authorities. According to the ECtHR, conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the ECHR, provided that the person concerned is able to have any decision thus made against him reviewed by a tribunal that offers the guarantees of Art. 6 of the ECHR.¹⁸⁸

In this decision the ECtHR only refers to minor offences as regards the admissibility of conferring the prosecution and punishment of such offences on administrative authorities. However, it is doubtful whether the ECtHR would also agree that cartels which involve fines of up to 10% of the annual group turnover can be prosecuted and sanctioned by administrative authorities. In addition, the ECtHR held that, in any event, the person concerned must be able to have any decision thus made against him reviewed by a tribunal that offers the guarantees of Art. 6 of the ECHR. The Community courts do not satisfy this criteria. As demonstrated above, the CFI only considers the pleas raised by the applicant but does not of its own motion examine the legality of the entire decision of the Commission. Furthermore, the CFI does not carry out its own investigation into the facts but only carries out a plausibility check of the facts found by the Commission. Finally, the Court has not established its own fining policy but grants the Commission a wide margin of discretion regarding the amount of the fine to be imposed. Therefore, the CFI only controls the decision of the Commission to a limited extent but does not make its own decision on the case. This does not satisfy the standards set out in Art. 6 (1) of the ECHR whereby the criminal charge must be determined by a tribunal. In cartel proceedings the charge is determined by the Commission and not by the Community courts. The Commission, however, is not a tribunal.¹⁸⁹

Furthermore, the proceedings infringe Art. 6 (3) lit. d of the ECHR, according to which everyone charged with a criminal offence has the right to examine or have examined

186 Please see also Part C.

187 Report of the EComHR of 30 May 1991 - Case 11598/85 - *Société Stanuit*, EuGRZ 1991, 505, para. 66; Peukert, in Frowein/Peukert, Europäische Menschenrechtskonvention [European Convention on Human Rights], 2nd ed., 1996, Art. 6, para. 4.

188 ECtHR of 21 February 1984 - Case 8544/79 - *Öztürk v Germany*, EuGRZ 1985, 62 para. 56; ECtHR of 2 September 1998 - Case 5/1998/908/1120 - *Kadubec v Slovakia*, RJD 1998-VI, para. 57.

189 ECJ of 7 June 1983 - Joined Cases 100 to 103/80 - *Musique Diffusion française v Commission*, ECR 1983, 1825 para. 6. However, the ECJ rejected the argument that the combined functions of prosecutor and judge of the Commission contravene Art. 6 (1) of the ECHR.

witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. Neither in the proceedings before the Commission nor before the Community courts do the undertakings have the possibility of examining witnesses. This is particularly significant with regard to statements made in leniency applications. The undertakings charged in such statements do not have the possibility of examining the witnesses who made the statements. In addition, neither the Commission nor the Community courts hear the witness. So, whether the statements are true or false is not examined at all. As already mentioned above, the Leniency Notice creates an incentive to confess as much as possible and also to charge other undertakings. This therefore constitutes a serious infringement of Art. 6 (3) lit. d of the ECHR.

The proceedings before the Commission and the Community courts also infringe Art. 47 (2) of the Charter of Fundamental Rights. Pursuant to this provision, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. For the reasons explained above, such a hearing by a tribunal is not granted in cartel proceedings before the Commission and the Community courts.

The limited review of the Commission's decisions by the Community courts infringes Art. 6 (1) of the ECHR and Art. 47 (2) of the Charter of Fundamental Rights. In addition, Art. 6 (3) lit. d of the ECHR is infringed since the undertakings concerned do not have the possibility of examining witnesses.

E. Corrections and Political Amendments in Community Law

I. Compliance programmes and measures intended to avoid cartel infringements should be taken into consideration

As explained above, according to the Commission and the Community courts' understanding, the key function of fines imposed for cartel infringement is deterrence.¹⁹⁰ However, using this approach the Commission and the Community courts disregard the fact that positive and constructive incentives for the prevention of cartels are also a feasible and successful approach to fighting cartels. This approach is – for example – supported by the Organisation for Economic Co-operation and Development (“OECD”) in its “3rd report on the implementation of the 1998 Recommendation”¹⁹¹, where it explicitly calls attention to such positive incentives as complements or alternatives to fines with mere punitive character.

These incentives could include rewarding the existence of corporate compliance programmes. A compliance programme is a programme implemented by an undertaking with the aim of preventing statutory or regulatory infringements and potential subsequent sanctions by public authorities.

In various jurisdictions, authorities reward the existence of such programmes by classifying them as mitigating circumstances when setting the fines. For example, according to the United States Sentencing Guidelines, “the existence of an effective compliance and ethics program” is explicitly named as a mitigating factor.¹⁹² However, the Commission and the Community courts currently do not take the existence of compliance programmes into account when setting the fines, and are even considering regarding this as an aggravating circumstance.

190 Cf. Parts C. and D.

191 OECD, 3rd report on the implementation of the 1998 Recommendation of 15 December 2005, p. 27; available at www.oecd.org/competition.

192 United States Sentencing Commission, Guidelines Manual, chapter 8.

1. Practice of the Commission and the Community courts

Neither the Fining Guidelines 1998 nor the Fining Guidelines 2006 contain provisions regarding compliance programmes.

The Commission did however take the existence of compliance programmes into consideration prior to that. This concerned both programmes which were implemented before and programmes which were implemented after the infringement had occurred. None of these cases concerned hard-core cartels, though.

In the *VIHO v Parker Penn* decision, for example, the Commission states:

“As regards the amount of the fine imposed on Parker, the Commission took the following points in particular into account:

[...]

6. Parker attempted in 1987 to place its relationship with its subsidiaries and its exclusive dealers on a legally unobjectionable basis by instructing a legal adviser to draw up a wide-ranging programme on compliance with community competition law, which was completed in 1989.”¹⁹³

Also, in a case regarding the abuse of a market-dominant position in 1988, the Commission explained that in setting the fine it took account of the “Community compliance programme.”¹⁹⁴

By contrast, in 1986 the Commission refused to consider a compliance programme to be a mitigating circumstance in a case concerning a hard-core cartel. In the subsequent appeal decision, the CFI supported this view holding that

“[...] whilst it is indeed important that the applicant took steps to prevent fresh infringements of Community competition law from being committed by members of its staff in the future, that circumstance does not alter the fact that an infringement has been found to have been committed in the present case. Faced with that fact, the Court would point out that it has already held that the criteria [...] justify the general level of the fines imposed [...]. It must be added in this regard that, here again, the fact that in a previous case the Commission considered that, having regard to the factual circumstances, account should be taken of the steps taken by the undertaking in question to prevent fresh infringements of Community competition law from occurring in the future cannot oblige it to take account in the same way of similar measures in the present case, since the Commission emphasized in the Decision (point 108) that the infringement of Article 85(1) of the EEC Treaty was particularly serious and had been committed intentionally and in conditions of great secrecy.”¹⁹⁵

193 Commission of 15 July 1992 - Case IV/32.725 - *VIHO/Parker Penn*, OJ of 15 August 1992, L 233/27, para. 24.

194 Commission of 18 July 1988 - Case IV/30.178 - *Napier Brown – British Sugar*, OJ of 19 October 1988, L 284/41, para. 86.

195 CFI of 17 December 1991 - Case T 7/89 - *Hercules Chemicals v Commission*, ECR 1991, II-1711, para. 357.

The Commission apparently does not intend to take account of existing compliance programmes in the future. In recent cases, the Commission repeated its view, stating that

“[w]hile the Commission welcomes such measures to avoid cartel infringements in the future, such measures cannot change the reality and significance of the infringement and the need to sanction it in this decision [...].

In this regard the Commission rejects the parties’ claim that the introduction of a compliance programme should be a mitigating circumstance.”¹⁹⁶

The CFI does not question the Commission’s approach. In *Degussa’s* appeal against the above Commission decision, it held:

“[...] it is settled case-law that, whilst it is indeed important that the applicant took steps to prevent fresh infringements of Community competition law from being committed by members of its staff in the future, that circumstance does not alter the fact that an infringement was found to have been committed. It follows that the mere fact that in certain cases the Commission took the implementation of a compliance programme into consideration as a mitigating factor does not mean that it is obliged to act in the same manner in any given case [...]

According to that case-law, the Commission is therefore not required to take a circumstance such as that into account as a mitigating factor, provided that it adheres to the principle of equality of treatment, which requires that it should not assess the matter differently for any undertaking addressed by the same decision [...].”¹⁹⁷

2. Discrimination against undertakings with (effective) compliance programmes under the Leniency Notice

The Commission not only refuses to take compliance programmes into account as mitigating circumstances but it also discriminates against them in its leniency policy. Undertakings that have adopted a compliance programme have a significant disadvantage in leniency cases. Most corporate compliance programmes sanction employees found to have infringed competition laws, in particular by participating in a cartel. The employees are threatened by the employer with, *inter alia*, dismissal, damages claims, etc. Therefore, in undertakings in which compliance programmes have been implemented, it is much more difficult to convince the employees involved in the cartel infringement to cooperate with the undertaking and to disclose the circumstances of the cartel, since this would involve confessing to having participated in it. In such undertakings, not only is the amount of information which can be submitted to the Commission generally smaller, the undertakings also need more time to gather it. This places undertakings with compliance programmes at a significant disadvantage

196 Commission of 31 May 2006 – Case COMP/F/38.645 - *Methacrylates*, para. 386.

197 CFI of 5 April 2006 - Case T-279/02 - *Degussa v Commission*, ECR 2006, II-897, para. 350 et seq.

compared to those without compliance programmes. Such policy does not encourage undertakings to adopt compliance programmes and to engage in the prevention of cartel infringements.

3. Assessment and conclusion

Contrary to the Commission's current approach to fighting cartels with its focus on deterrence but in line with the practice in the United States of America and the recommendations of the OECD, the Community cartel infringement procedure should reward the existence of compliance programmes. In order to create its "own, right mix of sanctions"¹⁹⁸ – recommended by the OECD – the European Community cartel infringement procedure might benefit from a change to and extension of the current "one-way" exclusive fining approach as well as from the introduction of sanctions against individuals.¹⁹⁹

II. Sanctions against individuals

Art. 23 (2) of Reg. 1/2003 provides that the Commission may impose fines "on undertakings and associations of undertakings" for negligent or intentional violations of Art. 81 EC, but says nothing about imposing fines on individuals. This illustrates that, contrary to various Member States' jurisdictions,²⁰⁰ the Community competition regime does not recognise the liability of individuals, only of undertakings. Since the unlawful conduct of the acting individuals must be attributed to the undertaking on behalf of which they acted, it seems reasonable that any fine must require that it first be determined which individual acted and whether his actions were negligent or intentional and, secondly, whether the undertaking can be held responsible for these actions. In order to allow for such a clear-cut two step process, it may be necessary to consider the liability of individuals under Community competition law.

Under current Community competition law, individuals are not personally liable for infringements of competition laws. Within this framework, the undertaking bears the risk for the individual's conduct – regardless of whether this is unlawful under cartel legislation. As explained above, the attribution of responsibility to the undertaking under the current system does not reflect whether an individual acted negligently or intentionally, and it does not consider whether the acting individual acted on behalf of the undertaking. In order to justify a policy which allows for the imposition of severe fines, it is necessary to have clear rules on the attribution of responsibility; first it must be determined which individual violated the competition rules, then whether the violation was committed negligently or intentionally and finally whether the infringement committed by the individual can be attributed to the undertaking.

198 OECD, 3rd report on the implementation of the 1998 Recommendation of 15 December 2005, p. 27; available at www.oecd.org/competition.

199 Cf. below, Part E. II.

200 Cf. Reg. 1/2003, recital 8.

For this to work, rules on individual liability are required to provide a sound legal basis for the subsequent liability of undertakings. Therefore, it is necessary to incorporate a system of liability of the acting individuals into competition law enforcement.

1. Competence of the European Community to issue criminal sanctions against individuals?

Whether the European Community has the competence to adopt legal instruments which give the Commission the power to issue criminal sanctions is a highly disputed issue. There is broad agreement in the legal literature that – under the current framework of the EC Treaty – the European Community does not have the competence to create supranational criminal law by adopting respective European Community Regulations. This refusal is based on the fact that, on the one hand, criminal law is still deemed to be the “paragon of national sovereignty”²⁰¹ and that an explicit provision in the EC Treaty would therefore be required to bestow such powers on the European Community. On the other hand, there are systematic arguments against the bestowal of such powers. With the Treaty of Amsterdam²⁰², a major part of the EU Treaty regarding Police and Judicial Cooperation was transferred into the EC Treaty, leaving behind the provisions on criminal matters. Had the legislators wanted to integrate criminal matters into the Community Law, they would have transferred them as well.

In addition to the general “legislation” competence, the European Community might also dispose of the so-called “directive competence”.²⁰³ Via European Community directives, the European Community can control the harmonisation of certain legal areas between the Member States. In the past, the Commission has tried to indirectly issue criminal law provisions in order to protect certain Community interests, e.g. the so-called “Money Laundering Directive”.²⁰⁴ These measures have always been disputed among the representatives of the Member States.

In 2005, the ECJ decided – for the first time – on the existence of this “directive competence” of the European Community in criminal matters.²⁰⁵ In a case that primarily concerned environmental law, the ECJ held that the European Community has the power to require the Member States to lay down criminal penalties for the purpose of protecting the environment, since this protection constitutes one of the essential objectives of the European Community. The ECJ pointed out that

“[a]s a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence. [...]”

201 Perron, in: Dörr/Dreher (ed.), *Europa als Rechtsgemeinschaft [Europe as a Law Community]*, 1997, p. 267.

202 Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and related acts, OJ of 10 November 1997, C 340.

203 Satzger, *Internationales und Europäisches Strafrecht [International and European Criminal Law]*, 2005, § 8, para. 31 et seq.

204 Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ of 10 June 1991, L 166/77.

205 ECJ of 13 September 2005 - Case C-176/03 - *Commission v Council*, ECR 2005, I-7879.

However, [...] [this] does not prevent the Community legislature [...] from taking measures which relate to the criminal law of the Member States [...].”²⁰⁶

This ruling was recently confirmed by the ECJ in a different legal context.²⁰⁷

Sticking to the wording of these cited judgments of the ECJ and considering the fact that the protection of the free market and competition is likewise one of the essential objectives of the European Community, one might assume that the cited case law could also apply to competition law. Given this, it may not be impossible for the European Community to require that Member States introduce certain criminal sanctions for cartel infringements by way of an appropriate directive and after having amended Art. 23 of Reg. 1/2003.

2. Effects of the existence of sanctions against individuals for cartel infringements

Criminal sanctions for cartel infringements are not the only possibility for sanctioning individuals for cartel infringements, as it is also possible to impose administrative fines on them. All the options in this context are to be found among the Member States. Among others, the United Kingdom²⁰⁸ and, to a limited extent, France²⁰⁹ have chosen to introduce cartel infringements as criminal offences. There are also Member States, e.g. Germany²¹⁰, Spain²¹¹ and the Netherlands²¹², which have opted for the possibility of administrative fines against individuals, while others, such as Sweden, have followed the approach of the European Community and impose fines exclusively on undertakings and not on individuals.

According to the “3rd report on the implementation of the 1998 Recommendation” issued by the OECD there is no systematic empirical evidence available to prove the deterrent effects of criminal sanctions.²¹³ Under these circumstances “ultimately each country must determine its own “right” mix of sanctions that has the most effective deterrent effects against cartels”. Pursuant to the report “a strong case can be made that cartel enforcement will be more effective if sanctions against individuals are part of that mix”. The report concludes, however, that “[i]n each jurisdiction [...] this decision depends on a number of factors, including a jurisdiction’s cultural and legal environment, its enforcement history in cartel cases, the relationship between a competition authority

206 ECJ, loc. cit., para. 47 et seq.

207 ECJ of 23 October 2007 - Case C-440/05 - *Commission v Council*, para. 66, not yet published in ECR.

208 Cf. sec. 188 of the Enterprise Act 2002 according to which individuals are subject to criminal sanctions if they dishonestly agree with one or more persons to make or implement, or cause to be made or implemented, certain cartel-type arrangements relating to at least two undertakings.

209 Cf. Art. L. 420-6 of the French Commercial Code according to which individuals are subject to criminal sanctions if they have fraudulently taken a personal and decisive part in the conception, organisation or implementation of the cartel. Art. L. 420-6 is, however, rarely applied.

210 Cf. sec. 81 German Act Against Restraints on Competition, sec. 1 OWiG.

211 Cf. Art. 63 (2) of the Spanish Act on Defence of Competition of 3 July 2007, allowing a fine of up to EUR 60,000.

212 Cf. Art. 56 (1) of the Dutch Competition Act, allowing a fine of up to EUR 400,000.

213 OECD, 3rd report on the implementation of the 1998 Recommendation of 15 December 2005, p. 27; available at www.oecd.org/competition.

and courts and prosecutors, as well as resources of a competition authority". Although these arguments have to be carefully considered, we believe that the threat of sanctions on individuals can be an important complement to corporate sanctions. Individual sanctions may strengthen the incentive of directors and employees to resist corporate pressure to engage in unlawful activities, and thus enhance the level of deterrence.

Also, the imposition of fines on individuals who personally and directly committed the infringements might lessen the need of the respective authority, at the European level the Commission, to impose all deterrent measures – the enormous fines – on the undertakings only and should lead in the long term to a decrease in the fines.

III. New leniency programme

The legal concerns regarding the current leniency programme for rewarding undertakings' cooperation in competition law enforcement have been explained above. In order to allay these concerns, it would first of all be necessary to have a legal basis for such a leniency programme, e.g. by inserting such rules into Reg. 1/2003. Secondly, it would be necessary to deal with the *nemo tenetur* principle, i.e. it must be ensured that the decision to remain silent will not aggravate the fine and that there is no virtual coercion to cooperate. Furthermore, it would be necessary to make sure that the contributions of cooperating parties are carefully scrutinised for correctness, which can only be accomplished by means of a procedure in which any reduction is granted after judicial scrutiny of all the evidence yielded during the procedure. Finally, it would be necessary to review whether the concept of granting full immunity is at all appropriate, in particular when the Commission has already initiated proceedings, or whether it would be appropriate to grant certain reductions only.

IV. Amendments to the newly introduced direct settlement procedure

Until recently, the Community provisions provided for only one kind of cartel procedure. This "traditional" cartel procedure before the Commission and then either before the CFI or the ECJ is – in general – very long and costly. Only the normal Commission procedure comprises the evaluation of, *inter alia*, leniency applicants' statements, dawn raids, requests for information, witness statements, statements of objections, hearings, confidentiality reviews, evidentiary reviews and fining considerations resulting in detailed decisions which often contain hundreds of pages. The fact that there usually are various defendants from different countries requiring various versions in various languages additionally protracts the procedure. As a result, the Commission procedure usually takes years. Even though the Commission has – partly due to the success of the leniency programme – approximately 35-40 investigations underway, on average fewer than ten of them are decided per year. What is more, once the Commission has issued its decision, the majority of the undertakings concerned appeal the decisions before the Community courts, again burdening the resources of the Commission and

the courts. These aspects illustrate that, from the European institutions' point of view, the introduction of a faster and less burdensome procedure that reduces the risk of appeals was a very welcome step. However, in general, undertakings are also interested in having the huge fines imposed on them reduced. Following a discussion of these issues, Competition Commissioner *Kroes* said in a speech "we may need to look at how some form of plea bargaining procedure could bring advantages in the context of European competition law."²¹⁴ In order to suit the action to the word, the Commission elaborated a proposal for the implementation of such a direct settlement procedure. Following a Commission draft and a public consultation, the Commission adopted a Commission Notice ("**Settlement Notice**")²¹⁵ and a Commission Regulation amending Reg. 773/2004²¹⁶ on 30 June, 2008. These legal instruments set out the framework for rewarding cooperation in the conduct of proceedings commenced in view of the application of Art. 81 EC to cartel cases.²¹⁷

1. The settlement procedure

According to the Settlement Notice, the newly introduced settlement procedure will 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.²¹⁸

A prerequisite for the application of the direct settlement procedure is that the undertakings concerned must be prepared to acknowledge their participation in a cartel and their respective liability. The whole procedure is subject to the Commission's discretion in various respects: according to para. 5 of the Settlement Notice, the Commission retains a broad margin of discretion to determine which cases may be suitable to explore the parties' interest to engage in them or discontinue them or to definitely settle.

Should some of the undertakings concerned in a cartel investigation request settlement discussions, the Commission and the respective undertakings will – at the Commission's discretion – enter into bilateral and confidential²¹⁹ settlement discussions. In the course of these discussions, the Commission will disclose information allowing the undertakings concerned to be informed of the essential elements taken into consideration so far.²²⁰ When the parties to the proceedings reach a common understanding regarding the scope of the potential objections and the range of fines likely to be imposed, the undertaking concerned has to submit a final settlement submission – either in writing or orally²²¹. This

214 Kroes, Speech on April 7, 2005, "The First Hundred Days", available under http://ec.europa.eu/comm/competition/speeches/index_speeches_by_the_commissioner.html.

215 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases. OJ of 2 July 2008, C 167/1.

216 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, OJ of 1 July 2008, L 171/3.

217 Settlement Notice, para. 1.

218 Ibid.

219 Settlement Notice, para. 7.

220 Settlement Notice, para. 16 et seq.

221 Settlement Notice, para. 38. Oral submissions will be recorded and transcribed at the Commission's premises.

submission must, *inter alia*, contain an acknowledgement of the undertaking's liability for the infringement, an indication of the maximum amount of the fines the undertaking foresees and accepts as well as its confirmation that it has been sufficiently informed of the Commission's objections.²²² These acknowledgements and confirmations are conditional upon the Commission meeting the settlement request. Thus, the settlement request may not be revoked unilaterally by the undertaking concerned.²²³ Access to these settlement submissions may only be granted to those addressees of statement of objections who have not requested settlement and who commit not to make any copy of the submissions and to ensure that the information to be obtained therefrom will only be used for judicial and administrative proceedings for the application of the Community competition rules at issue in the related proceedings. Access will not be granted to other parties, such as complainants.²²⁴ Without the undertaking's consent the Commission will not transmit settlement submissions to national courts.

Subsequently, the Commission will issue a statement of objections. In the event that this statement of objections does not endorse the undertaking's settlement submission, the general provisions will apply and the undertaking's acknowledgements will be deemed to be withdrawn.²²⁵ If not, the Commission may – upon the undertaking's reply to the statement of objections – adopt the final decision without any other procedural step such as a hearing.²²⁶

If the Commission decides to reward an undertaking for settlement within the framework of this procedure, it will reduce the amount of the fine by 10% after the 10% cap has been applied.²²⁷ If the undertaking has also applied for leniency, the settlement reduction will be added to the leniency reduction.²²⁸

The undertaking's legal right to appeal against the Commission's decision before the CFI in accordance with Art. 229 and 230 EC will not be affected by the application of the settlement procedure.

2. Assessment and conclusions

In line with the majority of the submissions²²⁹ that were sent to the Commission as part of the public consultation on the draft instruments, we are of the opinion that the introduction of a settlement procedure is generally a positive innovation. For example, the European Competition Lawyers Forum (“ECLF”) welcomed “the prospect of companies being able to settle EU [European Union] Cartel Cases.”²³⁰

222 Settlement Notice, para. 20.

223 Settlement Notice, para. 22.

224 Settlement Notice, para. 35.

225 Settlement Notice, para. 27.

226 Settlement Notice, para. 28.

227 Settlement Notice, para. 32.

228 Settlement Notice, para. 33.

229 All submissions are available at the Commission's website at http://ec.europa.eu/comm/competition/cartels/legislation/cartels_settlements/index.html.

230 ECLF Submission of 21 December 2007, p. 1, available at the Commission's website, cf. footnote 229.

However, the settlement procedure has various weaknesses which raise certain concerns. After the introduction of amendments to the draft in response to the replies received during the public consultation phase, the following issues remain the most disputed parts of the new procedure: the amount of the reductions for settlement and the possibility of negotiations with the Commission.

While the Commission's draft did not stipulate limits for the reduction amount to be granted in a settlement under this procedure, the majority of the consultation submissions recommended that the "reward for settlement should be a discount of at least 20%."²³¹ Overall, there seems to be a strong opinion that the amount of a possible reduction of the fines due to a settlement "must be substantial to create sufficient incentive for companies to settle."²³² However, when adopting the Settlement Notice the Commission decided to grant a reduction of 10% only.

Finally, and this is also in line with the replies to the public consultation, the Commission's intention to abstain from real negotiations²³³ on the fine to be imposed, the settlement discount or the scope of infringement must be criticised. The ECLF, for example, expects that "in the absence of some scope for discussion on these issues the process will be largely unattractive to companies."²³⁴

Whilst individual provisions of the Commission's settlement procedure will not be assessed in too much detail in this legal opinion on the deficiencies of the current cartel procedure of the European Community, the newly introduced procedure may provide the opportunity to scrutinise the Commission's general attitude towards the cartel procedure and its role in it.

It can be said with certainty that the Commission is not able to mitigate the defects inherent in the "regular" cartel procedure which have been – and will still be – identified in this study. On the contrary, the Commission will retain these main defects by intending to implement them in the new settlement procedure as well. Attention was called above to the Commission's unlimited scope of discretion regarding the imposition of fines, especially when it comes to determining the amount of the fines.²³⁵ In the case of the settlement procedure the Commission also intends to reserve for itself an unlimited scope of discretion, e.g. regarding the decision to enter into settlement discussions or to endorse written settlement submissions. In its submission to the Commission, the Federal Association of the German Industry [Bundesverband der Deutschen Industrie] and the German Chamber of Industry and Commerce [Deutscher Industrie und Handelskammertag] held as follows:

231 Submission of Herbert Smith LLP, Gleiss Lutz and Stibbe of 27 December 2007, para. 2.8; likewise e.g. submission of International Bar Association Antitrust Committee of 19 December 2007, p. 1 and 3; ECLF Submission of 21 December 2007, p. 5; Submission of the Studienvereinigung Kartellrecht e.V. ("**Studienvereinigung**"), loc. cit.; all available at the Commission's website (cf. footnote 229).

232 Submission of the Studienvereinigung of 21 December 2007, p. 3, available at the Commission's website (cf. footnote 229).

233 Settlement Notice, para. 2.

234 ECLF Submission, loc. cit., p. 4.

235 Cf. above Parts C. and D.

“The introduction of an effective system of direct settlement requires the existence of clear-cut legal conditions which allow the parties to carry out a substantive estimation of the results and to conduct the proceedings effectively [...].

From the undertakings’ point of view, the main point of criticism is the Commission’s broad scope of discretion regarding not only the initiation of the proceedings, but also the amount of the reduction of the fine, the disclosure of evidence or the possibility of a unilateral termination of the proceedings. This scope of discretion makes the new instrument incalculable for the undertakings [...]

For reasons of fairness and foreseeability of Commission decisions, the scope of discretion of the Commission should be substantiated and limited.”²³⁶

The “seemingly absolute discretion”²³⁷ of the Commission which the Commission grants itself by way of the issuance of various legal provisions – such as the Fining Guidelines or now the Settlement Notice – clearly contradicts the rule of law. The Commission apparently understands its own role in cartel procedures as one of unlimited powers and unrestricted freedom of action. Thus, the Commission’s scope of discretion in the proposed settlement procedure and elsewhere should be clearly defined and limited as described above.

V. Reform of the judicial review of the Commission’s decisions in competition law infringement cases

There are grounds for correcting the current system whereby only a limited judicial review of the fining decisions is carried out: firstly, from the aspect of a remedy that is comprehensive and as effective as possible also in Community law and, secondly, from the aspect of the functional correlation between preceding administrative proceedings and subsequent judicial review.

In this regard, a distinction must be made between measures which are possible under existing law and measures which require an amendment of the applicable law.

1. Consequences of the requirement of a remedy that is comprehensive and as effective as possible

De lege lata, it is first of all the general concept of a remedy that is comprehensive and as effective as possible in Community law which provides grounds for reconsidering the actual practice of review. In view of the constantly rising level of fines, the ECJ should

236 Submission of Bundesverband der Deutschen Industrie and Deutscher Industrie- und Handelskammertag of 17 December 2007, p. 1 et seq., available at the Commission’s website, cf. footnote 229.

237 Submission of International Bar Association Antitrust Committee of 19 December 2007, p. 2, available at the Commission’s website, cf. footnote 229.

extend its control, which it can do at any time within the scope of the current system. According to their wording, Art. 229 EC in conjunction with Art. 31 of Reg. 1/2003 merely grant the Community courts the authority, i.e. “unlimited jurisdiction”, to review decisions. However, from a general rule-of-law perspective, the authority to conduct a review at their unlimited discretion may become an obligation to do so. This is in particular the case if administrative discretion is reduced to zero.

In that sense, the level of the current fines alone is a good argument for demanding that the Community courts react – according to the purpose of the authority granted to them – by conducting reviews that are more thorough than those currently conducted, as a consequence of the rule of law.

As a counterbalance to the Commission’s findings, it is in particular necessary for the Community courts to provide a more extensive clarification of the facts *ex officio* and to make considerations of their own regarding the amount of the penalty, which considerations must be independent from the Commission’s considerations.²³⁸

Such a change would definitely be in line with the policy otherwise represented in the case law of the ECJ. The ECJ case law has always recognised the principle that Community law is based on the concept that individuals are entitled to judicial protection that is comprehensive and as effective as possible.²³⁹

That principle, which is recognised in the jurisprudence of the Community courts, has meanwhile been enshrined in Art. 47 (1) of the Charter of Fundamental Rights, according to which “[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”.

That provision evidently follows Art. 6 and Art. 13 of the ECHR. However, by granting a remedy before a tribunal, Art. 47 (1) of the Charter of Fundamental Rights deliberately goes beyond the provision of the ECHR which, in Art. 13, is restricted to a remedy merely before an authority.²⁴⁰ The judicial scope of review is not expressly addressed in Art. 47 (1) of the Charter of Fundamental Rights; however, that provision must be interpreted to mean that the criterion of “an effective remedy” guarantees at the same time a judicial review which is as comprehensive as possible. Reducing the scope of the review calls into question the effectiveness of a remedy.

238 Cf. Schmidt, Die Befugnis des Gemeinschaftsrichters zu unbeschränkter Ermessensnachprüfung [The Community Judge’s Unlimited Jurisdiction to Review Decisions], 2004, p. 196.

239 In recent court practice, cf. primarily ECJ of 25 July 2002 - Case C-50/00 - *Unión de Pequeños Agricultores v Council*, ECR 2002, I-6677, para. 38 et seq. Further reference in Schwarze, *Europäisches Wirtschaftsrecht* [European Economic Law], 2007, p. 275, para. 42.

240 Cf. Eser, in: Meyer (ed.), *Charta der Grundrechte der Europäischen Union* [Charter of Fundamental Rights of the European Union], 2nd ed., 2006, Art. 47, para. 11.

2. Corrections from the aspect of the functional correlation between administrative proceedings and judicial review

Furthermore, a more intensive judicial review of fining decisions is required from the aspect of a reasonable functional correlation between the law of administrative procedure and judicial review.

The principle that the extent of the necessary judicial remedy in accordance with the rule of law depends on the priority of the objects of legal protection, or legally protected interests, which are at stake and on the extent to which they are under threat of being impaired is also recognised in comparative law.²⁴¹

In addition, a correlation must be recognised to the effect that the less protection provided by administrative proceedings to the parties concerned in terms of the rule of law, the more extensive the judicial remedy must be.²⁴²

These considerations are a further argument in favour of a more extensive judicial review of fining decisions. The current fining procedure grants the Commission virtually unlimited discretion, in particular regarding the amount of the fine to be imposed. As presented above, European case law has in principle approved the increase in the level of fines issued by the Commission. Taking into account the extensive discretion which the Commission has in the administrative procedure, there is a need, pursuant to the rule of law, to intensify the judicial control.

The ECJ, too, confirmed that principle with regard to its own control in a specific case. In the case *Technische Universität München*, the ECJ, by taking into account the aforementioned functional correlation between the form of the administrative procedure and the guarantee of an effective judicial remedy, found that where administrative institutions have a power of appraisal, the form and review of the administrative procedures must, by way of compensation, be all the more stringent.²⁴³

3. Conclusion: Obligation of the Community courts to conduct a review at their unlimited discretion

In conclusion, there are substantial grounds, even based on applicable law, for the authority of the Community courts provided for in Art. 229 EC, namely to conduct a review at their unlimited discretion, to be changed into an obligation in view of the current fining practice under European competition law.

241 In this regard, cf. – in Community law itself – e.g. ECJ of 15 October 1987 - Case 222/86 - *Unectef v Heylens*, ECR 1987, p. 4097. In the judgment the ECJ insisted on an effective protection by arguing that the free movement of workers is a “fundamental right”.

242 In this regard, also ECJ, loc. cit.; likewise ECJ of 15 May 1986 - Case 222/84 - *Johnston v Chief Constable of the Royal Ulster Constabulary*, ECR 1986, p. 1651.

243 Cf. ECJ of 21 November 1991 - Case C-269/90 - *Technische Universität München v Hauptzollamt München-Mitte*, ECR 1991, I-5469, para. 14. In this regard, Schwarze, *Europäisches Verwaltungsrecht* [European Administrative Law], 2nd ext. ed., 2005, p. LX and LXXXIV.

VI. Reform of the fining procedure – the Commission as an “accusatorial authority” over whose applications the Community courts decide

Also *de lege ferenda*, measures are conceivable for reaching a new balance, which is more appropriate in terms of the rule of law, between the Commission’s virtually unlimited competence to issue sanctions and the rights of defence of the undertakings concerned.

1. Proposals for reshaping the relationship between the Commission and the ECJ

An (extensive) proposal could be to shape the procedure conducted by the Commission as an accusatorial procedure. The Community courts would then decide on the accusations raised by the Commission and the setting of a fine.

If the decision regarding the fine is transferred from the Commission to the Community courts, the concentration of power in one body would be broken up.

Proposals to this effect have been made by various authors in the legal literature. A change of system assigning to the Commission the role of an investigator and reserving the actual decision-making power to the Community courts could raise concerns, above all, about the Commission’s double function as investigator and judge from the aspect of the principle of a separation of powers.²⁴⁴

Such new assignment of roles would also limit the risk of violating the procedural rights of the parties concerned²⁴⁵. And finally, it is conceivable to bring about an approximation, for example, to the German type of law governing administrative offences in this way, according to which the judge makes the final decision on the facts.²⁴⁶

2. Institutional and organisational consequences of reshaping the current system

However, it must be considered from the outset that such a new system would involve substantial institutional and organisational changes. It could not be realised without making use of substantial human resources on the part of the Community courts. Apart from the assignment of the new judicial task to the CFI, another way of realising that concept could be to set up special judicial panels which would be entrusted with the fining decisions.

244 Cf. Schmidt, *Die Befugnis des Gemeinschaftsrichters zu unbeschränkter Ermessensnachprüfung* [The Community Judge’s Unlimited Jurisdiction to Review Decisions], 2004, p. 196, with reference to Rittner, *Kartellpolitik und Gewaltenteilung in der EG* [Cartel Policy and Separation of Powers in the EC], *EuZW* 2000, 129; Schermers/Waelbroeck, *Judicial Protection in the European Communities*, 1992, § 644, who refer to the Commission as “law-maker, public prosecutor and judge in the first instance”. Cf. also Judge *Lenaerts* in his final report on “Procedures and sanctions in economic administrative law” as general reporter for the 17th F.I.D.E. Congress 1996 in Berlin. With reference to a great number of speakers in his working group he summarised their reaction as follows: “They feared the concentration of functions within a single case-handling authority and often, physically speaking, in the minds of the very same people, as they thought it difficult to separate mentally the different roles of investigator, prosecutor and decision-maker.”

245 Cf. Schmidt, *loc. cit.*

246 Cf. Schmidt, *loc. cit.*

Due to the changes brought about by the Treaty of Nice, the applicable Art. 220 (2) EC allows, pursuant to Art. 225a EC (unanimous Council resolution), for the attachment of judicial panels to the CFI “in order to exercise, in certain specific areas, the judicial competence laid down in this Treaty.”

This possibility is retained in the Treaty of Lisbon.²⁴⁷

The question as to what extent the setting up of judicial panels is generally reasonable in competition law is, however, still controversial.²⁴⁸

Setting up such new judicial panels might be a reasonable solution in the system described above of re-allocating tasks between the Commission and the Community courts. In this way it would be possible, in particular, to provide the additionally required human resources.

3. Practical implementation of the new system under applicable Treaty law

It has not yet been finally clarified, however, whether such a new system of separation between an accusatorial authority and the court could be implemented under applicable Treaty law.

There is agreement that a right of the Community courts to decide first on fining sanctions would require regulation in secondary legislation to this effect.

At present, such regulation does not exist in the applicable secondary legislation of the European Community. Art. 31 of Reg. 1/2003 merely provides for a power of the Community courts to examine decisions pursuant to which the Commission imposed a fine, by way of an unlimited review. However, it does not grant the Community courts the power to issue such a decision themselves.

In contrast, there are controversial opinions regarding the question of whether such a new allocation of tasks could be introduced under the provisions of applicable Treaty law on a secondary legislation basis. This depends, in particular, on how the provisions of Art. 229 and 83 (2) lit. d EC are to be interpreted, the content of which will remain unchanged by the Treaty of Lisbon.

According to its wording, Art. 229 EC provides that the Community Courts may be given “unlimited jurisdiction with regard to the penalties provided for”, i.e. not only the power to conduct an unlimited discretionary review, but also the power to impose the penalties provided for.

247 Cf. Art. 9f and Art. 225a of the Treaty of Lisbon. Under the new Treaty, Art. 225a will become Art. 257 of the Treaty on the Functioning of the European Union. In this new article the term “judicial panels” is replaced by “specialized courts”.

248 Cf. e.g. Everling, *Stand und Zukunftsperspektiven der Europäischen Gerichtsbarkeit* [Status and Prospects of European Jurisdiction], in: *Festschrift für Deringer*, 1993, p. 40, 58 on the one hand and Hirsch, *Die Kooperation von nationalen und europäischen Gerichten bei der Durchsetzung des Wettbewerbsrechts* [Cooperation of National and European Courts in the Enforcement of Competition Law], in: Schwarze (ed.), *Instrumente zur Durchsetzung des europäischen Wettbewerbsrechts* [Instruments for Enforcing European Competition Law], 2002, p. 135, 145 on the other hand. In this regard Schmidt, *loc. cit.*

Art. 83 (2) lit. d EC provides that, as part of the implementing regulations or directives in competition law, detailed rules will be laid down in order to “to define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph.”

In this regard, lit. a of Art. 83 (2) EC expressly provides that the implementing regulations or directives will be designed to ensure compliance with the prohibitions laid down in Art. 81 (1) and 82 EC by introducing fines and periodic penalty payments.

Although the wording of Art. 229 EC – at least in the German version – expressly also provides for the “imposition” of a coercive measure, one opinion held in the legal literature deems the system change discussed herein, i.e. providing for a right of (first) decision of the Court of Justice, to be impermissible.²⁴⁹

At first, that opinion presents the argument that the wording contained in the German version, namely “imposition” (*Verhängung*) of penalties, is an addition which is absent in the other language versions, so that this must be an editorial error. Furthermore, that opinion asserts that the imposition of a fine by the Court of Justice would not be in line with the system, because the Court of Justice is an instance competent to exercise judicial control, and not an executive or criminal law body. And finally – according to that opinion – implementing regulations in accordance with Art. 83 EC could not materially alter the description of the functions of the Commission and the ECJ in the Treaty itself, which corresponds to the principle of the separation of powers.²⁵⁰

However, the prevailing tendency in the legal literature is probably that the Treaty is open in respect of this issue and that it is consequently possible to also grant the Community courts a right, based on a regulation in secondary legislation, to decide (first) on a monetary fine.²⁵¹

Pernice makes the most explicit statements with regard to the subject matter of this problem.²⁵² In his opinion, “for example the final decision on the violation of the prohibitions of Art. 85 (now: Art. 81) and 86 (now: 82) and on the imposition of fines could be assigned to the Court of Justice; for example for the purpose of remedying the accumulation of functions at the Commission, which is occasionally criticised for being a party/investigator and judge at the same time in cartel matters”. However, *Pernice* also points out in this context that neither the ECJ nor the CFI has concluded from this

249 In that sense with further reference Schmidt, *Die Befugnis des Gemeinschaftsrichters zu unbeschränkter Ermessensnachprüfung*, *ibid.*, p. 194 et seq.

250 In that sense, in particular Schröter, in: von der Groeben/Schwarze, *Kommentar EUV und EGV* [Commentary on the EU Treaty and the EC Treaty], 6th ed., 2003, Art. 83 EC, para. 47.

251 In that sense, e.g. Cremer, in: Calliess/Ruffert, *EUV/EGV*, 3rd ed., 2007, Art. 229 para. 5; Gaitanides, in: von der Groeben/Schwarze, *EUV/EGV*, 6th ed., 2004, Art. 229, para. 14; Borchardt, in: Lenz/Borchardt, *EU- und EG-Vertrag* [EU and EC Treaty], 4th ed., 2006, Art. 229, para. 6; Schwarze, in: *EU-Kommentar* [EU Commentary], 2000, Art. 229, para. 8.

252 *Pernice*, in: Grabitz/Hilf, *Kommentar zur EU* [Commentary on the EU], status of October 1997, Art. 87 EC, para. 25.

– i.e. the accumulation of functions at the Commission – that it is necessary to reshape the system based on the existing Treaty law.²⁵³

However, it is not possible *de lege ferenda* to derive from these judgments of the ECJ and the CFI a decisive objection against the admissibility of a change of system regarding the fining procedure. Both judgments focus on the question of whether it is possible to raise fundamental objections against the current fining practice under applicable law. They do not address the problem which is at issue here, namely whether it would be possible on the basis of Art. 229 and 83 (2) EC to introduce such a new procedural system in the future by way of secondary law.

4. Conclusion: It is possible to implement a new system on a secondary law basis under applicable Treaty law

In our opinion, such remodelling of the fining procedure could be implemented, in accordance with the prevailing opinion in the legal literature, on the basis of applicable Treaty law by way of secondary legislation provisions. *De lege ferenda*, this would also help overcome the deficiencies of the current fining procedure in terms of the rule of law. In particular, the EC Treaty would then be interpreted in line with the ECHR. However, there would be no objection to additionally safeguarding the described reshaping of the fining procedure by means of primary law; in fact, this would be preferable from the aspect of legal policy.

²⁵³ In this regard, cf. ECJ of 29 October 1980 - Joined Cases 209 to 215 and 218/78 - *Van Landewyck v Commission*, ECR 1980, 3125, 3248; and CFI of 10 March 1992 - Joined Cases T-68/89, T-77/89 and T-78/89 - *SIV and others v Commission*, ECR 1992, II-1403, 1435, para. 70 et seq., which *de lege lata* do not assume a violation of the principles of the separation of powers.

F. Proposals

The deficiencies in substantive and procedural law with respect to the current system of competition law enforcement in the European Community call for changes. Below we have summarised proposals which could be implemented under the existing legal system and proposals which require amendments to the existing legal system.

These proposals would help to restore a reasonable balance between the Commission's justified interests in pursuing infringements of fair competition and the likewise justified interests of the undertakings concerned in an effective remedy.

I. Proposals which could be implemented under the existing legal system

1. Strict observation of defence rights as guaranteed in criminal proceedings

The proceedings before the Commission must meet the substantive and procedural standards applied in criminal proceedings which ensure that the defence rights are observed. This not only applies if the Commission's fines are considered to be strictly criminal sanctions. It also applies to administrative sanctions which have the same effect in substance. This means: Art. 23 (5) of Reg. 1/2003 does not exclude the fact that general legal principles which govern criminal proceedings, as a rule, have to be observed in the enforcement of European competition law due to its punitive character and following superior legal standards, in particular those of the ECHR and the Charter of Fundamental Rights.

2. Correction of the leniency programme

Firstly, it must be ensured that the decision on granting reductions is fully reviewed by the Community courts.

Secondly, it is also necessary to strengthen the *nemo tenetur* principle, i.e. it must be made clear that the decision to remain silent will not aggravate a potential fine.

Thirdly, it must be ensured that contributions of cooperating parties are carefully scrutinised as to their accuracy by the Community courts.

Finally, it has to be reviewed whether the concept of granting full immunity is at all appropriate, in particular when the Commission has already initiated proceedings, or whether it would be appropriate to grant certain reductions only.

3. **Changing the principles of judicial review of the Commission's decision in competition law infringement cases**

The Community courts should carry out a full judicial review of the Commission's fining decision. Art. 229 EC should not only be understood as providing unlimited discretion to review, but also as an obligation to fully review the decisions.

4. **Fines may not have the quality of criminal sanctions due to Art. 23 (5) of Reg. 1/2003**

According to Art. 23 (5) of Reg. 1/2003, the fines imposed under Art. 23 are not criminal in nature. Since the nature of legal acts is not only determined by the wording of the norm, but also by assessing its objective character, this provision implies that fines imposed by the Commission for cartel infringements may not reach the level of criminal sanctions, and concepts of deterrence or general prevention may not play a decisive role in the determination of the amount of the fine. Therefore, it could already be concluded under the existing rules that the Commission may not impose fines where deterrence or general prevention are the prevailing aspects. This means in particular that the level of fines has to be significantly reduced.

5. **Correlation between fines and advantages gained from the infringement**

The rules on the determination of the amount of the fine should safeguard a correlation to the advantages gained with the infringement. Therefore, the determination process should mainly consider the damage caused or the benefits obtained as a result of the competition law infringement.

6. **Reshaping the principles regarding allocation of responsibility for competition law infringements to undertakings**

Today, Art. 23 (2) of Reg. 1/2003 provides for the imposition of fines for negligent and intentional infringements of Art. 81 EC only. Therefore, it is the Commission's obligation to clearly determine such negligent and intentional infringement when imposing fines.

Contrary to its current practice, the Commission needs to identify the individuals who participated in the infringement with their actions. In the next step, the Commission needs to determine whether the actions of these individuals can be attributed to the undertaking. This may only be the case when the individuals in questions are the statutory representatives of the undertaking, or alternatively, because the acting individuals were not sufficiently supervised by the statutory representatives of the undertaking.

This approach would allow for the consideration of corporate compliance programmes, which are currently not considered. If an undertaking has done all that can be reasonably expected of it to avoid committing infringements, the necessity to impose sanctions may not be justified.

7. Reshaping the principles under which parent companies can be held liable for infringements of subsidiaries

The current system of parent company liability is based on the concept of an “economic unit” between the parent company and a subsidiary. The prerequisites for the assumption of an “economic unit” are mainly based on the size of the shareholding and potential influence. This concept needs to be reshaped taking into account aspects relating to “piercing the corporate veil” as developed in the Member States’ jurisdictions.

II. Proposals which require amendments to the existing legal system

In order to ensure that the proposals explained under Part F. I. above are observed, it would be advisable to incorporate these proposals into the applicable provisions.

1. Incorporation of fining principles into Reg. 1/2003

The fining principles should not merely be left to the Commission’s discretion, but should be incorporated into Reg. 1/2003. In order to comply with the requirements of the general legal principles, the fining principles would have to be further improved and specified, and allow the undertakings concerned to foresee what the potential fines would be.

2. Introduction of a new leniency programme

In addition to the proposed amendments to the existing leniency programme which are possible under the existing legal system, and in order to allay the concerns about the current system, it is necessary to create a legal basis issued by the Community legislator for such a system, i.e. by incorporating the relevant provisions into Reg. 1/2003.

These provisions should also include rules on the issues raised above in Part F. I. 2 regarding amendments to the leniency programme.

3. Introduction of fines against individuals

A concept allowing for the imposition of fines on individuals could be considered. The imposition of fines on individuals who personally and directly participate in cartel infringements would reduce the need of the Commission to impose the enormous fines on the undertakings only. In the long-term, the introduction of individual fines might also lead to a decrease in infringements. Preference should in any case be given to sanctions below the level of genuine criminal fines.

4. Amendments to the direct settlement procedure

The newly introduced settlement procedure is a welcome innovation as regards streamlining of the procedure. However, the settlement procedure suffers from the same deficiencies that have been identified for the “normal” procedure. The Commission’s discretion with respect to the question of whether to enter into settlement negotiations or not, and if so, with whom, is very broad. Again, the Commission’s discretion must be limited.

5. Introduction of a new bi-institutional fining procedure: Commission as an “accusatorial authority” and Community courts as the decision-making body

A far-reaching approach for guaranteeing unbiased decisions on fines (cf. also Part F. I. 3. above) would be to change the entire system so that the Commission would be acting as an accusatorial authority and the Community courts would impose the fine based on evidence taken and arguments heard. The Commission’s role would be to act as investigator and accusatory body, and the Community courts would impartially decide on the case.

List of abbreviations

A

Art.	Article
Advisory Committee	Advisory Committee on Restrictive Practices and Monopolies

B

BVerwGE	Entscheidungen des Bundesverwaltungsgerichtes [Collection of decisions of the German Federal Administrative Court]
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C

Charter of Fundamental Rights	Charter of the Fundamental Rights of the European Union
cf.	compare (confer)
CFI	European Court of First Instance
CFI Rules of Procedure	Rules of Procedure of the Court of First Instance
CML Rev.	Common Market Law Review
Commission	European Commission
Community courts	The European Court of Justice and the Court of First Instance

E

EC	Treaty establishing the European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECLF	European Competition Lawyers Forum
ECR	European Court Reports
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ECU	European Currency Unit
ed.	editor, edition
EEA	European Economic Area
e.g.	for example (exempli gratia)
et. seq.	and the following (et sequentes)
et al.	and others (et alii/aliae/alios)
EU	Treaty on European Union
EuGRZ	Europäische Grundrechte-Zeitschrift [European Journal on Human Rights]
EUR	euros
EuZW	Europäische Zeitschrift für Wettbewerbsrecht [European Journal of Business Law]
ext.	extended

F	
Fining Guidelines 1998	Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty
Fining Guidelines 2006	Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No. 1/2003
I	
ibid.	in the same place (ibidem)
ICN	International Competition Network
i.e.	that is (id est)
L	
lit.	letter (litera)
Leniency Notice	Commission Notice on Immunity from fines and reduction of fines in cartel cases of 2006
Leniency Notice 1996	Notice of 18 July 1996 on the non-imposition or reduction of fines
loc. cit.	in the place cited (loco citato)
M	
Member States	Member States of the European Community
N	
NJW	Neue Juristische Wochenschrift [New Legal Weekly]
no.	Number
O	
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
OWiG	Gesetz über Ordnungswidrigkeiten [German Act Governing Administrative Offences]
P	
p.	page
para.	paragraph
Parliament	European Parliament
R	
Reg.	Regulation
Reg. 1/2003	Council 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
Reg. 17	EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty

Rev. Trim. de droit européen	Revue trimestrielle de droit européen
RJD	Report of Judgments and Decisions of the ECtHR
S	
s.	sentence
sec.	section
Settlement Notice	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
Studienvereinigung	Studienvereinigung Kartellrecht e.V.
T	
Treaty of Amsterdam	Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and related acts
Treaty of Lisbon	Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007
V	
v	versus
Vol.	volume
W	
WuW	Wirtschaft und Wettbewerb [Economics and Competition]